COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMERCIAL SIDE
2017/COM/com/00040

IN THE MATTER OF SUNSET EQUITIES LTD.

AND IN THE MATTER OF the International Business Companies Act, 2000

AND IN THE MATTER OF the International Business Companies Winding Up Act, 2011

AND IN THE MATTER OF the Companies (Winding Up Amendment) Act, 2011

BETWEEN

STERLING ASSET MANAGEMENT LTD.

Petitioner

AND

SUNSET EQUITIES LTD.

Respondent

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Brian Simms QC with Ramonne Gardiner for the Petitioner**
Gail Lockhart QC with Charles MacKay for the Respondent

28 March 2022

RULING

WINDER, J

1. This is my brief decision on the Petitioner's (Sterling's) application dated 11 March 2022 seeking leave to withdraw the Petition filed on 6 April 2017.

2. The trial of the Petition is set for 31 March 2022 and 1 April 2022.

3. Whilst Sterling seeks to withdraw the Petition, the Respondent (Sunset) opposes the withdrawal application. Sunset asks that the Court, instead of permitting the withdrawal, hear its Summons (lately filed on 25 March 2022) seeking an order that

   > "The Winding Up Petition filed by the Petitioner in this matter be dismissed on the ground that the Petitioner is contractually bound not to present a petition against the company."

   Sunset relies on Section 191 (2) of the Companies (Winding Up Amendment) Act, 2011, which provides that

   > *"The court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company."*

4. Order 3, rule 7 of the Companies Liquidation Rules (CLR) provides as follows:

   > Leave for petition to be withdrawn (O.3, r.7)
   > 7. (1) An application for leave to withdraw a creditor's petition may be made ex parte by summons.
   > (2) The court shall grant leave for a creditor's petition to be withdrawn on such terms as have been agreed between the petitioner and the company if it is satisfied that
   >> (a) the petition has not been advertised;
   >> (b) no notice of intention to appear and be heard on the petition (whether in support or opposition) has been received from any creditor; and
   >> (c) the company consents to an order being made under this rule.
   >
   > (3) If a creditor's petition has been advertised, any application for leave to withdraw the petition must be made at the advertised hearing and in any such case the court will consider making an order for substitution in accordance with rule 10.

5. Sunset submits that:

   Bahamian law does not permit a Petitioner to withdraw a winding up petition "at will". Withdrawal of a Winding Up Petition requires the leave of the Court and the decision whether or not to grant such leave is based on fairness, as well as the wishes of the Company and (in cases where the petition has been advertised) the creditors.

6. I readily accept that a petitioner may not withdraw a Petition "at will". I am not however prepared to find that the law reposes the ultimate decision, on the question of withdrawal, in the hands of the Company and those creditors wishing to be substituted, as Sunset's submissions seems to suggest. In any event, this is not a creditor's petition which O3 r.7 of the CLR seems to relate. The decision to permit a withdrawal must be a matter for the Court after taking into account all of the relevant circumstances. It would also not be the usual case for the Court to compel a petitioner to proceed with a trial where it seeks to withdraw. In a case such as this, which is not a creditors' petition, the Court is more concerned that issues consequent upon any withdrawal are taken into account prior to permitting the action to be withdrawn.

7. In a recent decision, concerning an interlocutory appeal of this Court's decision to refuse disclosure to Sterling in this case, the Court of Appeal stated:

   21. In this case Sterling has not alleged that Sunset will have a surplus to pay it as a contributory. On the contrary it asserts that Sunset is insolvent. It has no surplus. Its liabilities exceed its assets. It seeks to prove that on the winding up. It is on that basis that the Petition has been presented and on that basis that the judge has exercised his discretion to refuse discovery.

   22. Sterling also relies upon the decision of the Irish Court in Re Connemara Mining Company [2013] 1 IR 661. There are two points that should be noted. In that case the Petitioner sought to have the company wound up on two grounds (1) that the company was unable to pay its debts and (2) that it is just and equitable that the company should be wound up. The Petitioner failed on both grounds and the case is unhelpful to our analysis. Moreover, although the Irish court held that a contributory could Petition on the ground of insolvency and did not have to demonstrate a tangible interest.

23. The applicant also relies upon the decision of the English Court in Re Newman and Howard Ltd [1962] Ch. 257. In particular it relies on the following statement by Pennycuick, J.:

> "There is no doubt that the general rule is as stated by the Court of Appeal in In re Rica Gold Washing Co. Ltd.; but it seems to me that from the very nature of the case there must be an implied qualification to that general rule. In the case where a petition is based on a failure to supply accounts and information, with the consequence that the petitioner is unable to tell whether or not there will be a surplus available for the contributories, it cannot really be the law that the petitioner is bound to allege and to verify on oath the statement that the company has surplus assets when, by reason of the company's own default, he is not in a position to tell whether or not that statement is true. Nor, I think, can it really be the law that the petitioner is bound in such a case to make some vague statement such as "the accounts may show that there will be surplus assets available for the contributories". I understand that, in practice, a qualification from the general rule is accepted in the case where a petition is based on the allegation that there are matters in connection with the company which require an investigation, and it seems to me that a comparable qualification must be implied here. The rule, as it seems to me, is simply inapplicable to a case such as the present. I conclude, therefore, that this petition is not demurrable and in the circumstances the result is that the petition will be dismissed, because that is what the petitioner asks for, but the company will pay the petitioner's costs of the petition." [Emphasis added]

24. This decision is of no assistance to the matter before this Court. In that case the contributory brought the Petition on the just and equitable ground and not on the basis of insolvency. What the court was saying is that where a Petition is brought by a member on the ground that it is just and equitable to do so, it cannot be a requirement that the Petitioner shows that he has a tangible interest, that is to say that there will be a surplus available, if he is unable to make that statement because he has been deprived of information.

25. In this case there can be no averment of a tangible interest as the Petition itself is based upon the fact that the company is insolvent and by definition there can be no surplus. This is so whether the insolvency is a cash flow insolvency or a balance sheet insolvency. Sterling's case is that Sunset is insolvent.

26. Sterling then relies upon the decision of the Hong Kong Court of First Instance in Haw Par Pharmaceutical Pte Ltd v Hua Han Health Industry Holdings Ltd. [2019] HKCU 3084. In that case a Petition for the winding up of a company listed on the securities exchange was presented by a creditor on the ground that the company was insolvent. That Petition was withdrawn after a majority shareholder of the company satisfied the

Petitioner's debt. Haw Par, who was a minority shareholder owning 10% of the shares, issued a summons to be substituted as the Petitioner. Haw Par sought to amend the Petition to wind up the company on just and equitable grounds and alternatively on the ground of insolvency. Leave to substitute and amend was granted and the company appealed. The material ground of appeal was described in the judgment of the court as follows:

> "[7]. The first ground of appeal took issue with the following parts of the Ruling:
>
> > '58. Being a contributory as a minority shareholder is no bar to an application to be substituted as petitioner. Nor is it an answer to an application for substitution that a contributory has no tangible interest in the company being wound up on just and equitable grounds. It is sufficient for the 28 contributory to demonstrate the need for an investigation into the affairs of the company, as that is itself a sufficient advantage to justify the making of a winding up order."
> >
> > "77. ... It is settled law that it is sufficient for the contributory to demonstrate the need for an investigation into the affairs of the company, as that is itself a sufficient advantage to justify the making of a winding up order."

27. In my judgment, Haw Par is of little assistance. The court was concerned with the ability of a Petitioner to show a tangible interest on a Petition to wind up a company on the just and equitable ground where the Petitioner is unable to do so because of the conduct of the company in depriving it of information. In the present case, Sterling does not seek discovery in order to show that it as a contributory has a tangible interest. On the contrary, it seeks discovery in this Petition to prove insolvency, that is to say that it does not have any tangible interest in any surplus, because its case is that Sunset has no surplus.

8. Sterling accepts that the Court of Appeal's decision creates a challenge for it, as a contributory contending that there is no surplus, to maintain the necessary locus standi to pursue the winding up of Sunset, on its pleaded claim for insolvency. In these circumstances, the decision to seek the withdrawal of the Petition is indeed appropriate. In light of this eventuality and the dicta of the Court of Appeal, any other finding that the Petition ought to be dismissed for any additional reason, as now being sought by Sunset, could likely be considered obiter dicta.

9. There is another outstanding action before the Supreme Court in the Common Law & Equity Division, 2020/CLE/gen/00329, which was brought by Sunset against Sterling and others. In that action, Sunset complains of conspiracy and specifically alleges that the Petition was filed in breach of the shareholders agreement, and that it was being prosecuted dishonestly as the named defendants knew that Sunset was not insolvent. This very issue, of the filing of the Petition in breach of the provisions of the shareholders agreement, will therefore need to be determined during the prosecution of that action. Whilst my determining of this issue (of whether the Petition was filed in breach of the shareholders agreement) in the present action may be useful in assisting the determination of that action, it will not obviate the need for that action to still proceed. In the circumstances I ought not to proceed to hear Sunset's Summons when it must again be fully ventilated in that action where there are additional parties, who are not in this action.

10. In all the circumstances therefore, I will grant leave for the withdrawal of the Petition. Having withdrawn the Petition, I am not satisfied that there is any real basis to depart from the usual order made for costs in these circumstances. The usual order is that the party seeking the withdrawal ought to pay the costs of the action. In the circumstances therefore, Sunset shall have its reasonable costs to be taxed if not agreed.

Dated this 30th day of March AD 2022

Ian R. Winder

Justice