OUTER HOUSE, COURT OF SESSION

[2025] CSOH 71

P585/25

OPINION OF LORD LAKE

in Petition of

NICHOLAS PARKIN

Petitioner

for

an order to wind up Ayres Wynd Developments Limited

Petitioner: Tosh; Dentons UK and Middle East LLP
Respondents: Upton (for the first, third and fourth respondents); DHM Law Limited

8 August 2025

[1] This came before me on the petitioner's opposed motion for orders for intimation and service. An initial issue arose as to whether the respondents had standing to address the court. It was accepted that the effect of the caveat is that the caveator - the company - may be heard at the hearing. It was submitted, however, because the company is in voluntary liquidation, the directors no longer have the power to instruct legal advisers on its behalf. My attention was drawn to the Insolvency Act 1986, section 103, in terms of which all powers of the directors of a company are to cease on appointment of a liquidator. It was submitted that the remaining respondents had not lodged caveats and they were not able

to address the court. I should add that counsel for the petitioner did not seek to press these arguments hard.

[2] That the company is in voluntary liquidation is not free from doubt. The petition narrates that the administrator of the company sent a notice to the Registrar of Companies under paragraph 83(3) of schedule B1 to the Insolvency Act 1986 Act. The notice was duly registered by the Registrar on 11 June 2025. In terms of paragraph 83(6) of schedule B1, on registration, the appointment of the administrator ceases to have effect and the company shall be wound up as if a resolution for voluntary winding up under section 84 of the Act had been passed on that day. However, the issue of whether the administrator was validly appointed has been contested for some time. It has been the subject of proceedings both in this court and the sheriff court. If the appointment was not valid, the administrator would not have had the power to submit a notice under paragraph 83 and the deemed voluntary winding up would not have occurred. I was advised that that one of the reasons for this petition is to provide some clarity as to the position of the company. In this situation, to assume that the company is in liquidation would, in effect, determine the outcome. That is not appropriate. I therefore consider that counsel was validly instructed on behalf of the company and had regard to the submissions made on its behalf. So far as the third and fourth respondents were concerned, I heard counsel on their behalf also. The caveat entitled the first respondent to be heard and this made it necessary to hold a hearing. The third and fourth respondents were aware of that hearing and instructed counsel to attend. Both the petition procedure and the hearing are public. That being the position, any person in attendance or represented at the hearing who has an interest has a right to be heard.

[3] Moving from the preliminary issues to the substance of the motion, the first issue was whether or not the court has any discretion in relation to making first orders when a

petition is presented. It was noted for the petitioner that Rule 14.5 of the Rules of the Court of Session states that when a petition is presented, a first order "shall" be made. While it is correct that this is expressed in mandatory terms, it must be read in the context of the Rule of the Court of Session as a whole. RCS 5.1(d) stipulates that a person may lodge a caveat against an order for intimation, service and advertisement of a petition to wind up a company. It is apparent from this that the intention is that the person lodging a caveat would be heard before such an order is granted and that in turn gives rise to the inevitable inference that the court, having heard the party, may decide not to grant the orders.

[4] The next question is what test should be applied in considering whether to grant or refuse first orders. For the petitioner it was submitted that the test to be applied is that they should be granted unless it was inevitable that they would not succeed. I was referred in this regard to *Foxhall & Gyle Nurseries Limited, Petitioners* (1978 SLT (N) 29) where it was said that a first order should be granted unless there were compelling reasons not to. In *PEC Barr (Holdings) Limited* v *Munro Holdings UK Limited* (unreported, Edinburgh Sheriff Court, 23 June 2009), Sheriff Holligan said whether to grant the first order would depend on the circumstances. In that case there was, as here, a dispute as to whether the company was able to pay its debts as they fell due. Sheriff Holligan noted that if he did not grant the first orders, he would in effect be determining the petition and he could do that only if he considered that the respondents were bound to succeed in their opposition.

[5] As to what the grounds of opposition might be, I was referred also to the decision of Lord Hodge in *Mac Plant Services* v *Contract Lifting Services* (2009 SC 125), where he noted that, for the petitioner to succeed in the liquidation petition, it would have to prove both that it was a creditor of the company and that the company was unable to pay its debts as they fall due. The debt said to be owing in that case was disputed. Lord Hodge said,

> "A winding up petition is not the process in which to establish the respondent company's liability to pay a disputed debt. The petitioner will not be creditor for the purposes of section 124, and thus will not have title and interest to seek the winding up, if the respondent company shows that the debt is disputed in good faith and on substantial grounds. The court will normally dismiss the petition if it is clear that there is such a dispute. But honest belief on the part of the respondent company is not enough to undermine the petitioner's title. The respondent company must also show that there are substantial grounds for disputing the debt." (Authorities omitted)

[6] In that case, Lord Hodge reached the decision on the basis of consideration of affidavits and productions. The petitioner here is a director and shareholder of the company so does not need to establish the debt to found his title to present the petition. However, as the petition seeks winding up on the basis that the company is unable to pay its debts, the existence of the debt remains a critical issue.

[7] I was referred also to the English case of *IPS Law LLP* v *Safe Harbour Equity Distressed Debt Fund 3 LP* ([2024] EWHC 2663). It, in essence, took the same approach as Lord Hodge. Judge Curl KC noted that a dispute in relation to a debt will not be "substantial" if it has no real prospect of success. A petition will not be struck out just because the company alleges the debt is disputed but the court will not allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on *bona fide* grounds.

[8] Here, the dispute as to whether or not the debt is outstanding appears to have been ongoing for some time. There have been various court proceedings in relation to it. Claims have been made in the administration for differing sums. The petitioners aver that they submitted a claim for £1,377,788.79 in the administration. They have lodged a spreadsheet and bank statements which are said to demonstrate that certain payments were made to the company. While these statements do bear to show payments to the company, there is little information in either the statements or the spreadsheet and there is no accompanying affidavit to explain the position. The respondents acknowledge that sums were advanced

to the company but submit that these were repaid over time. They have lodged an affidavit from Charles Fitzgibbon, a director of the company, narrating that the debt was extinguished by payments made to the petitioner and, with his agreement, to companies in which he had a substantial interest. I was referred to productions which were dated some time ago and which it was submitted vouched that the petitioner agreed with this approach.

[9] This situation seems to me a paradigm of where there is a substantial dispute and the matter ought not to be resolved in a petition for winding up. That being so, the petition cannot succeed because the existence of the debt is a critical element for it. That would not be the position had the petitioner sought to wind up the company on the basis that it was just and equitable to do so. In the circumstances, it is inevitable that the respondents will succeed in their opposition and it is therefore not appropriate to grant first orders.