OUTER HOUSE, COURT OF SESSION

[2024] CSOH 37

P1096/23

OPINION OF LORD BRAID

In the petition of

CHRISTOPHER TURNBULL

Petitioner

for

relief under s 122 of the Insolvency Act 1986 against the directors of Against the Head Limited

Petitioner: Party
Respondents: Anderson; Gilson Gray LLP

26 March 2024

Introduction

[1] The petitioner, Christopher Turnbull, is a minority shareholder in (and former employee and director of) the company Against the Head Limited, of which he is a founder member. He seeks an order from the court winding that company up, and appointing an interim liquidator, founding upon section 122(1)(g) of the Insolvency Act 1986, which provides that a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up. The petition is opposed by the company and its directors (together, the respondents).

[2] It is common ground that the company is insolvent, its liabilities being greater than its assets. At the outset, this presents a formidable obstacle to the petitioner's case (one which, as will be seen, he has failed to surmount).

[3] There is no dispute as to the petitioner's title to bring the petition, having been the holder of shares for at least 6 months during 18 months before the commencement of the petition: section 124(2)(b) of the 1986 Act. However, there is an issue over his interest to do so, and whether or not he stands to derive a tangible benefit should the petition be successful (in circumstances where he concedes that if the company were to be wound up, there would be no return to shareholders). There is also an issue as to whether the petitioner has in any event relevantly averred circumstances which could, taken at their highest, entitle the court to be satisfied that it was just and equitable to wind the company up. I heard the parties on these issues at a non-evidential hearing on the petition and answers, at which the petitioner represented himself (extremely ably) and the respondents were represented by counsel. In short, counsel for the respondents submitted that the prayer of the petition should be refused for the lack of any relevant averments as to interest, or on the merits. The petitioner's position is that a proof should be allowed, the petitioner acknowledging that further inquiry into the facts would be required before the court could conclude that the just and equitable ground was made out.

Background

[4] The company was incorporated on 24 January 2014. Its share capital comprises 334 A shares of £1 each, of which the petitioner holds 34, and 200 B shares, held by D C Thomson & Company Ltd. The company's sole business interest was the operation of the Electronic Research Interchange (ERIC), which involves the sale of third-party-created

investment research via an electronic online platform to the investment community, the company having been formed with a view to exploiting the effect of the EU Market in Financial Instruments Directive (2014/65/EU) legislation prohibiting fund managers from receiving undisclosed inducements without passing them on to their customers. The petitioner was not at first a director of the company but was an employee. In November 2018 he was appointed as managing director, in terms of a service agreement dated 12 November and 7 December 2018. Meanwhile, (this leading to one of the petitioner's bones of contention), one Daren Riley had been appointed to the post of Business Development (Sales) in early 2017, and he was appointed as CEO at around the same time as the petitioner became managing director. Relations between the petitioner and the company soured, and the petitioner left the company's employment in July 2019, pursuant to a settlement agreement dated 18 July 2019, in terms of which, among other things, the petitioner received a sum of money in lieu of notice and undertook to resign immediately as a director, which he did. Mr Riley is still the CEO and continues to be paid his salary in line with his own service agreement, much to the petitioner's dismay.

The petitioner's case

[5] Although the petitioner has made detailed averments about his dissatisfaction with the manner in which the company is being managed by the board, he succinctly summarised his complaints in his note of arguments as follows. The company has been driven to insolvency by its directors and CEO (Mr Riley); it has no tangible assets; it has liabilities approaching £1.4 million; it has one employee (Mr Riley) who is significantly overcompensated for his output and contribution to the company; the company does not need that employee as it has long been the case that commission-only consultants work for

the benefit of the company; and the company loses money consistently every quarter due to the payments made to that employee. The petitioner avers that it is just and equitable that the company be wound up because of (a) loss of substratum; and (b) justifiable lack of confidence in the directors due to mismanagement. In his submissions he also argued that the directors had been guilty of a lack of probity, this stemming from his averments in the petition that he was induced to enter into his service agreement with the company as a result of misrepresentations as to the level of Mr Riley's salary, which, says the petitioner, caused him to accept a lower salary than he would otherwise have agreed to. The petitioner wishes the company wound up in order that a liquidator might carry out a thorough investigation into the company's affairs, and the directors' conduct.

The respondents' case

[6] The respondents accept that the company is presently balance-sheet insolvent although it is meeting its debts as they fall due. However, it has the support of its major creditors (one of whom is a company in which a major shareholder has an interest). There is no deadlock at board level. The petitioner's dissatisfaction amounts to no more than a "domestic squabble" over how the company is being run. The proper forum for the petitioner's grievances is a general meeting of the company. Even if there was any misrepresentation as to Mr Riley's salary, which is not accepted, any claim relating to that was effectively swept away by the settlement agreement.

Tangible benefit

[7] As a general rule, a shareholder seeking a winding up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after

payment of the company's debts and the costs and expenses of the liquidation, and a shareholder will not therefore be permitted to petition under section 122(1)(g) for the winding up of an insolvent company: *Fulham Football Club (1987) Ltd* v *Richards* [2011] EWCA Civ 855, [2012] Ch 333 at [54] and [55]. Counsel for the respondents accepted that was not an absolute rule, but nonetheless submitted, correctly, that the petitioner must be able to demonstrate some tangible benefit in order to demonstrate an interest to bring a winding-up petition.

[8] The petitioner did not demur from that proposition, but contends that winding up would bring about a tangible benefit. His averments about that are at Stat 19 of the petition, where he avers, first, that there would be tangible benefit to the company as an entity in its own right in being wound up, in that the employment contract with Mr Riley would be brought to an end, removing monthly costs of approximately £11,000; and second, that the petitioner will:

> "gain the practical benefit of evidencing that taking a principled stand and continuing to highlight the march towards insolvency to the board, and being ignored, will provide the opportunity to rebuild his reputation. Being proven to be correct and not standing for wrongdoing despite the extensive experience of the directors concerned. Financial benefits related to this will follow."

[9] The petitioner asked what may have been intended to be a rhetorical question during the hearing: is a benefit to the company enough? Rhetorical or not, the short answer to that is: no. It must be the petitioner himself who is able to demonstrate a tangible benefit. The longer answer is that it is doubtful whether bringing about the demise of a company, even an insolvent one, could ever be said to be to its benefit. If it were otherwise, then it could be said of every insolvent company that it was to its benefit to be wound up; which would render somewhat nugatory the general rule that a shareholder will not be permitted to petition for the winding up of an insolvent company.

[10] Moving on to whether the petitioner has pled a sufficient tangible benefit for himself, his averments are plainly insufficient in that regard. At best, they hint at an intangible benefit; but even then are too vague to admit of inquiry. The petitioner not having been involved in the management of the company in the last five years, it is unclear why his reputation should have suffered; and "being proven to be correct" is far too nebulous a concept to qualify as a tangible interest.

[11] For that reason alone, the prayer of the petition falls to be refused. However, for completeness (and lest I am wrong in relation to tangible interest) I will consider the other arguments which were presented to me in relation to the merits of the petition.

The "just and equitable" ground – the law

[12] The starting point is to recognise that the discretion conferred on the court by section 122(1)(g) is wide and not confined to situations which are said to be of the same order as the other situations enumerated in section 122: *Symington* v *Symingtons' Quarries, Limited* (1905) 8F 121, Lord McLaren at 130; *Ebrahimi* v *Westbourne Galleries Ltd* [1973] AC 360, Lord Wilberforce at 374, 379.

[13] However, there are certain well recognised grounds on which a "just and equitable" order may be granted. The first is loss of substratum, that is, where a company has been formed to pursue a particular object or to carry on a business of a particular type, which it has abandoned to pursue an entirely different business: for a recent example, although not referred to in submissions, see *Re Klimvest Plc* [2022] BCC 747. The second is where, in the case of a company which is a corporate quasi-partnership, there has been an irretrievable breakdown in trust and confidence between the participating members. The third ground is where there is deadlock: see generally *Lau* v *Chu* [2020] 1WLR 4656 , [2020] UKPC 24 at [17].

However, the remedy may be granted in any situation where it is just and equitable to do so; one further example being where the directors have acted with a lack of probity in the conduct of the company's affairs.

[14] Since the petitioner founded strongly on lack of probity, it is worth exploring that in a little more detail, having regard to the words of Lord Shaw of Dunfermline in *Loch* v *John Blackwood Ltd* [1924] AC 783, quoted with approval by Lord Briggs in *Lau* v *Chu*, at 4666:

> "It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the *conduct and management of the company's affairs*. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring *not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company*. On the other hand, wherever the lack of confidence is rested on *a lack of probity in the conduct of the company's affairs*, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up (emphasis added)."

[15] It is clear from this that the focus must be on the company's affairs, by which is meant more than the manner in which the company conducts its business with third parties or its "domestic policy"; rather, loss of confidence, if it is to found a just and equitable winding up, must arise from the manner in which the directors are conducting the affairs of the company insofar as it affects the petitioner's relations with the company. For example, in *Loch*, the conduct consisted of a failure to hold general meetings or to submit accounts or recommend a dividend; in *Baird* v *Lees* [1924] SC 83, it included a failure to submit accounts to the shareholders, to declare a dividend and to keep a separate bank account in the company's name. So called domestic squabbles between two sets of shareholders are not sufficient, a point also made in *Symington*, above, Lord President Dunedin at 129: the company itself is the proper forum for the resolution of such disputes.

[16] Finally, the section 122(1)(g) remedy is one of last resort: *Lau* v *Chu*. The court must carry out a three-stage analysis, asking:

(i) Is the petitioner entitled to some relief?

(ii) If so, would the winding-up be just and equitable if there was no other remedy available?

(iii) If so, has the petitioner unreasonably failed to pursue some other available remedy instead of seeking winding-up?

[17] Having set out the law, I will now examine the various grounds on which the petitioner relies in asserting that it is just and equitable that the company be wound up.

Loss of substratum

[18] As already noted, the company was formed to operate the ERIC. It still does so. As the petitioner admits, the business of the company is stated in its articles of association to be the sale of third party created investment research via an electronic exchange or online platform to the investment community. That is what the company still does. It is common ground that the original intention of those who set up the company was that it would operate on a "demand-pull" basis to allow fund managers to buy research, but that the market was not receptive to such an approach. This has necessitated the company doing business in a different way, namely, by acquiring a sales function to enable it to profit from sales of investment research. As the respondents submit, taking the petitioner's averments at their highest, they indicate a change to the way in which the company has sought to generate revenue from the same business, rather than any fundamental change to the nature of the business itself.

[19] Accordingly, the petitioner's case in relation to loss of substratum is bound to fail.

Loss of confidence/lack of probity

[20] I deal with these headings together because the petitioner's averments do not raise the issue of lack of probity, and insofar as he founded upon a lack of probity in the course of his submissions, that appeared to be closely related to his averments of lack of confidence in the directors. The first point to make is that the petitioner has made no averments of any particular relationship of trust or confidence, nor does it appear that he would have been in a position to do so given that one major shareholder is a juristic person and another shareholder is a trustee for a trust. The petitioner does aver that he has been prevented from taking part in the management of the company since July 2019, but, as he also avers, that was the consequence of his entering into the settlement agreement to terminate his employment and directorship (having had the benefit of legal advice). That would on any view be insufficient to found a just and equitable winding up of the company at the time, let alone some four or five years later. As is clear from the petitioner's own succinct summary of his complaints, his grievance stems largely from his dissatisfaction at the manner in which the company has been managed since then, in particular, the continued employment of Mr Riley; and the pursuance of a strategy of trading (with the creditors' support) although insolvent, in the hope, to put it colloquially, that there will be light at the end of the (admittedly somewhat lengthy) tunnel. The petitioner has averred detailed criticisms of the respondents, including a lack of sales, the decision to appoint a sales person, the lack of investment in the ERIC platform, and the fact that the second respondent is not only the major shareholder but also (through another company in which he has an involvement) the major creditor. There is a large degree of repetition in the petitioner's averments, all coming

back to his dissatisfaction at the employment of Mr Riley coupled with the company's insolvency.

[21] As counsel for the respondents submitted, these complaints are of the nature of a domestic squabble, between the petitioner, a minority shareholder, and the directors over the manner in which the business of the company is being conducted by the latter; the petitioner does not agree with their business strategy. What the petitioner does not aver is any lack of probity on the part of the directors in the manner in which they are conducting the affairs of the company (as opposed to the manner in which they are conducting its business affairs, although even in that regard no relevant lack of probity is averred). As the petitioner fairly accepted, the lack of probity (as he sees it) sprang from the respondents' dealings with him in relation to his service agreement and the termination thereof, but on any view that was a domestic dispute between the company and the petitioner as an employee which was in any event settled by a compromise agreement at the time it arose. The petitioner clearly feels a lingering sense of resentment, not least due to his perception that the company has been mismanaged since then, but there is nothing arising from those circumstances from which the court could ever conclude that it was just and equitable to wind the company up. If the petitioner did have a remedy arising out of misrepresentation, the proper means of pursuing that would have been by raising a civil court action against the company.

[22] For completeness, insofar as the petitioner complains that the directors are continuing to trade a company which is insolvent, there is nothing inherently wrongful in that insofar as his interests as a shareholder are concerned. Indeed, given that the company is, it is agreed insolvent, the respondents must have regard to the creditors' interests in conducting the management of the company: *BTI 2014 LLC* v *Sequana SA* [2022] 3 WLR 709.

As Lord Briggs said in that case, at paragraph 176, there may be circumstances where directors require to treat shareholders' interests as subordinate to the creditors'; it may depend on who has the most "skin in the game", ie, the greatest economic interest. It must also be observed that if either the majority shareholders, or one or more creditors, were unhappy with the company's strategy, a petition could be presented to the court to wind the company up on the basis that it was unable to pay its debts. Such a course is not open to the petitioner, since he is not a creditor.

[23] Drawing all of this together, and reverting to the three stage analysis described in para [16] above, the petitioner's averments do not get him beyond the first stage: he has not relevantly averred that he is entitled to a remedy, whether on the grounds of loss of substratum, loss of confidence, lack of probity or otherwise. He clearly feels very strongly that the company is being mismanaged and that the directors' conduct should be investigated by a liquidator, but the law simply does not afford him a remedy, even if all he offers to prove is true.

Disposal

[24] I have refused the prayer of the petitioner principally on the basis that the petitioner has no interest to bring it, the company being insolvent. Even had that not been the case, I would have refused it on the basis that the circumstances prayed in aid by him are insufficient to show, on any view, that it would be just and equitable to wind the company up. I will reserve the question of expenses.