IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 229 of 2019

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF G3 EXPLORATION LIMITED (FORMERLY GREEN DRAGON GAS LTD.)

IN OPEN COURT

Appearances: Mr. Tom Smith Q.C., Mr. Sebastian Said, Mr. Daniel Hayward-Hughes, and Ms. Janaki Tampi of Appleby for the Petitioner, Nordic Trustee AS

Ms. Gemma Lardner, Mr. Marc Kish and Ms Nour Khaleq of Ogier for the Company, G3 Exploration Limited (Formerly Green Dragon Gas Ltd) (in Provisional Liquidation)

Mr. Matthew Dors of Collas Crill for GIC Private Limited

Mr. Rupert Bell and Mr. Andrew Gibson of Walkers for the Joint Provisional Liquidators of the Company

Mr. Mark Goodman and Ms. Natasha Partos of Campbells for the Receivers of Greka Gas China Limited

Before: The Honourable Mr. Justice Robin McMillan

Heard: 9, 10, 11, 12 June 2020

Judgment Delivered: 12 June 2020

Draft Reasons for Judgment Circulated: 21 July 2020

Reasons for Judgment Delivered: 24 July 2020

HEADNOTE

The standing of a secured creditor to present a Winding Up Petition – The weight to be given to the views of a secured creditor at least in so far as the debts are unsecured – The principles and practice applicable to the adjournment of a creditor's Winding Up Petition.

REASONS FOR JUDGMENT

The Background

1. This matter concerns a Winding Up Petition brought by Nordic Trustee AS ("the Petitioner") against G3 Exploration Limited (formerly Green Dragon Gas Ltd) ("the Company") dated 18 November 2019 (the "Petition").

2. The Petitioner has alleged that on 21 October 2019, the Petitioner was owed a total amount of US$124,334,330.31 being the total amount outstanding under certain Norwegian law governed secured bonds issued by the Company ("the Debt") and that the Company does not have sufficient liquid assets to pay any of the Debt and it is unable to pay its debts.

3. As this matter currently stands, this is not a subject of dispute by the Company.

4. On 11 December 2019, the Court issued an order for the provisional liquidation of the Company (the "Provisional Liquidation") and appointed Mr. Alexander Lawson and Mr. Christopher Kennedy of Alzarez & Marsal Cayman Islands Limited, and Ms. Tiffany Wong of Alvarez & Marsal Asia Limited as Joint Provisional Liquidators of the Company ("the JPLs").

5. The JPLs, *inter alia,* were directed to prepare and submit a Report to the Court on the conduct of the Provisional Liquidation and, specifically, the questions of whether or not, in all the circumstances and in light of their investigations as at the date thereof, the JPLs considered that a restructuring of the Company deserved further consideration or whether it was appropriate that a Winding Up Order should be made in respect of the Company.

6. Since their appointment, the JPLs have prepared and submitted two Reports dated 5 February 2020 ("the First Report") and 13 March 2020 ("the Second Report").

7. Mr. Lawson has also sworn a relevant Second Affidavit dated 26 May 2020.

8. In the First Report, the JPLs explained the existence of a proposed refinancing ("the Proposed Transaction") and they indicated at paragraph 5.1 that making a final determination as to the viability of any restructuring at that time was premature.

9. In the Second Report, the JPLs stated at paragraphs 2.1.14 and 2.1.15:

> *"2.1.14 The JPLs acknowledge that, on a cash flow basis, the Company is insolvent, however, the JPLs do not see any benefit to creditors in the making of a winding up order in respect of the Company. The JPLs believe there is merit in continuing the provisional liquidation for the following reasons:*
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> – *It maintains the status quo in relation to the Proposed Transaction and provides it with every opportunity for success;*

- *It does not weaken the negotiating strength of the Company, the JPLs or the Receivers, nor does it detrimentally impact market perception in relation to a sales process (which could be adversely affected by the entering of a winding-up order against the Company);*
- *There is the ability for the Company, the JPLs and the Receivers to work collaboratively towards a combined monetisation approach (refinancing and sales process) which would likely be frustrated in the event of the Company entering into official liquidation;*
- *Based on the information available to the JPLs, the creditors should be paid in full and the Company ought to be capable of continuing as a going concern in the future; and*
- *As such, the interests of the Company's shareholders, who have a clear economic interest based on the information available to the JPLs, should also be given weight.*

2.1.15 *The JPLs will continue to monitor this situation closely and, should circumstances change such that it is considered that the Company entering into official liquidation would provide tangible benefit towards a restructuring or realising assets to repay the Bondholders, the JPLs will of course update the Court immediately."*

10. The JPLs also describe in the Second Report the background to the Proposed Transaction, pointing out, however, that a signed term sheet had not yet been received by the Company and that the JPLs had not liaised directly with the Counterparty to the Proposed Transaction ("the Counterparty").

11. The JPLs point out at paragraph 5.2.14 of the Second Report that "*based on information provided to date, the JPLs consider that the Counterparty is a party with both the financial and political means* [in the People's Republic of China] *to provide the proposed funding*."

12. Although a required site visit by the Counterparty to view the operational assets of certain of the Company's subsidiaries had not taken place due to the COVID-19 situation, the JPLs make the following comment at paragraph 5.3.2 of the Second Report:

> *"5.3.2 If completed, the Proposed Transaction should realise sufficient funds to meet the debts of the Company, including the fees and related costs of the Receivers, in full. The risk of an extended delay to closing due to the travel restrictions could see the interest accumulate such that the total amount due to the Bondholders exceeds US$200 million. In such circumstances, the Company will seek to increase the amount sought from the Counterparty to ensure that payment in full can be achieved."*

13. In his Second Affidavit, Mr. Lawson states at paragraphs 22-23:

> *"22. It is apparent from the evidence filed by the Receivers and the Petitioner that they seek to put into question the viability of a restructuring of the Company in order to support the Petitioner's position that the Company ought to be now wound up. In particular, the Receivers have stated that they do not believe that*

the Proposed Transaction (as defined at paragraph 5.2.3 of JPL2), or any form of restructuring of the Company proposed by Mr Grewal, has any realistic prospects of success.

23. *Whilst the JPLs accept that the parties are of course entitled to their opinion as regards the viability of the Proposed Transaction and any potential alternative restructuring, existential decisions regarding the Company ought to be based on more than mere opinion (and the Receivers and Petitioner have not provided any empirical basis for their opinion). It appears to the JPLs that the Receivers' and the Petitioner's opinions are largely motivated by their distrust of Mr Grewal and incorrect belief that the JPLs automatically favour Mr Grewal's views over concerns raised by the Receivers. In addition, it is unclear to the JPLs as to the reason for the Receivers' emphatic resistance to keeping the Proposed Transaction 'on the table' as it remains possible to complete, there is no timing sensitivities from the perspective of the proposed counterparty to the Proposed Transaction (the "**Counterparty**") and does not in any way disrupt the Receivers' Sale Process."*

14. Mr. Lawson states at paragraph 32 of his Second Affidavit regarding the postponed site visit that the Proposed Transaction "*is a process and that process was materially interrupted by the COVID-19 pandemic, which is clearly outside of the JPLs', and indeed anyone's, control.*"

15. It is not the intention of the Court to set out all of the material which the Court was invited to consider before reaching the conclusion that the further adjournment of the Petition for four (4) months was in the ultimate interests of the Company's stakeholders.

16. The Court concluded that there was no immediate tangible benefit in granting a Winding Up Order and that there was credible evidence before the Court that there is a reasonable prospect that the Petitioner's debt would be paid within a reasonable time.

17. In coming to this conclusion the Court gave particular and significant weight to the views expressed by the JPLs, while at the same time fully recognising the legitimate concerns of the Petitioner, both as to the passage of time and as to the ultimate viability of the Proposed Transaction being explored.

18. The primary purpose of these Reasons for Judgment is to focus on two particular issues of law which emerged in the course of the June hearing and to set out a summary relating to the adjournment circumstances themselves.

The Standing of a Secured Creditor to Petition

19. The first issue which emerged was in relation to the position of the Petitioner, and it focused on the proposition that a Petitioner who is a secured creditor can petition to wind up a company where there is likely to be a shortfall in the value of its security.

20. Ms. Lardner who raised the point on behalf of the Company as a broader impediment then qualified her proposition to contend that while such a creditor had standing, the position of a secured petitioner would simply reflect the weight to be given to its shortfall when it comes to how the Court should exercise its discretion to adjourn.

21. By way of clarifying the issue, Mr. Smith Q.C., on behalf of the Petitioner, stated that the fact that a secured creditor can present a winding up petition is well established by the legal authorities.

22. Mr. Smith Q.C. summarised the applicable principles at paragraphs 16-19 of his helpful Note for the Court dated 11 June 2020:

> *"16. As French, Applications to Wind Up Companies, 3rd ed., at 7.398 states: "Holding security for a debt owed by a company does not disentitle the creditor from petitioning for the company to be wound up if the debt is wholly or partly unpaid." (appended hereto).*
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> *17. Authorities supporting that proposition include:*
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> *(1) Moor v Anglo-Italian Bank (1879) 10 Ch D 681, where a winding up petition had been presented by a secured creditor and the issue was whether the petitioner, who had not given an estimate in the petition of the value of the security or stated that he would be ready to give up his security for the benefit of creditors in the event of the debtor being adjudged bankrupt, thereby forfeited the benefit of the security. It was held that he did not, as this rule did not apply in winding up. There was no doubt that the secured creditor had standing to present a petition.*
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> *(2) In re Borough of Portsmouth (Kingston, Fratton and Southsea) Tramways Company [1892] Ch 362. In that case a debenture holder who had brought an action to enforce his security and had obtained the appointment of a receiver was held to be entitled to present a petition to wind up the company. At p.367 Stirling J said this: "I fail to see why a debenture-holder, whose debt is payable and who has exhausted all his remedies except a winding-up petition without obtaining payment of his*

debt, should be in a worse position than an ordinary creditor who has got no security upon the undertaking."

18. *In her submissions yesterday, the Company's counsel referred to this passage. However, it does not assist the Company in any way since it makes clear that, provided that the secured creditor has not actually been paid the debt (which is the position in the present case), he is entitled to present a winding up petition.*

19. *In one more recent case, it was said that [i]t was trite law that a secured creditor could get a winding up order": Re Sushinho Ltd [2011] All ER (D) 32 per Mann J (appended hereto)."*

23. The submission was also made at paragraph 21 that there is nothing whatsoever in the legal authorities, the Companies Law or the Companies Winding Up Rules which states that a secured creditor must show that there is a shortfall on his security in order to pursue a winding up petition and obtain a winding up order.

24. As this question does not appear to have arisen previously in our Courts, it is perhaps appropriate to observe that the Court entirely agrees with Mr. Smith Q.C.'s analysis of the position. To the extent that security may be relevant, its relevance would be as to the weight rather than as to standing in any event, as previously explained.

The Principles Governing the Adjournment of a Winding Up Petition

25. This last comment brings the Court to an additional legal issue with which it has been concerned in these proceedings, and that is the circumstances in which the Court may direct the adjournment of a Winding Up Petition.

26. In *Sekhon and another v Edginton* [2015] 1 WLR 4435 Lewison LJ makes the statement previously identified that the Court has the power to adjourn the petition, but the practice is to do so only if there is credible evidence that there is a reasonable prospect that the petition debt will be paid within a reasonable time.

27. The learned Judge adds at paragraph 20 that a decision whether or not to grant an adjournment is, of course, a discretionary case management decision and, consequently the Judge's exercise of his discretion in this case cannot be impugned on appeal *"except on the usual grounds for impeaching a judicial exercise of discretion."*

28. In *Re the General Rolling Stock Co., Ltd* (1865) 34 Beav 313 Sir John Romilly MR describes the standing over of a creditor's petition as an *"indulgence"*. Clearly it therefore arises as an exceptional event or circumstance.

29. Then in *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 Neuberger J states at page 638 h-i that he would not accept that the mere fact that a majority of creditors support the making of a winding up order would be an absolute bar in all circumstances to the Court refusing a winding up order. This Court carefully notes however that in the present case refusing a winding up order is not itself an issue which arises. Neuberger J goes on to state at page 639 d-e that the Court will give little, if any, weight to the views of the secured creditors, at least so far as their debts are secured.

30. In this instance, for example, the views of the secured Petitioner are counterbalanced by the views of the unsecured creditor GIC Private Limited ("GIC") and the JPLs, who both see merits in an adjournment being granted. Quite apart from that, the Company itself seeks the adjournment.

31. Nonetheless, time is an important factor and as Neuberger J indicates at paragraph 640 e-f, the longer the adjournment sought, the closer the case becomes to a more significant interference with, or denial of, a petitioner's rights.

32. Bearing all of these legal principles in mind, the Court on this occasion was able to see its way to granting an adjournment in the interests of furthering what it regards as a reasonable prospect that the Petitioner's debt will be paid within a reasonable period of time.

33. Ultimate success of course is not guaranteed but the situation is sufficiently promising for it to be examined further and there is also in the meantime no immediate tangible benefit to granting the Petition. Moreover, the evidence in this case is sufficiently credible that there is a reasonable prospect that the Petitioner's debt would be paid within a reasonable time if this initiative succeeds.

A Summary of the Adjournment Circumstances

34. The Company is the holding company of a group of companies specializing in the exploration and development of coal-bed methane gas in the People's Republic of China ("PRC"). A principal asset of the Company is its ownership of the shares in Greka Gas China Limited ("GGC").

35. Underneath GGC is a sub-group of 13 direct and indirect subsidiaries which ultimately operate production sharing contracts in the PRC. This includes Green Dragon Gas Ltd ("GDG") and GDGF Ltd ("GDGF").

36. The bonds which have led to the event of the default were and are secured by a Cayman Islands law governed share mortgage granted by the Company in favour of the Petitioner, over the Company's 100% shareholding in GGC and a Norwegian law governed guarantee granted by GDG and GGC.

37. Joint Receivers were appointed over the shares of GGC, and as a result of that appointment the Receivers control the operating subsidiaries owned by GGC.

38. As Mr. Cosimo Borrelli, Joint Receiver, points out in his Fourth Affirmation dated 2 June 2020, at paragraph 7, "*the effect of the appointment of the Receivers is, therefore, that we control the GGC Group with a primary duty to realise the assets of the GGC Group (at the best price reasonably obtainable in the circumstances) in order to repay the security indebtedness*."

39. The Petitioner contends that GDG and GDGF would be required to provide security for the Proposed Transaction. The Receivers are the directors of both GDG and GDGF, and it is their position that they cannot execute the Proposed Transaction consistently with their duties as directors of GDG and GDGF.

40. GIC as a creditor, however, has argued persuasively that in terms of structuring the Proposed Transaction there may be other routes commercially available which do not impinge upon the scope of the Receivers' responsibilities and that in any event, the more positive and optimistic approach of the JPLs is to be preferred.

41. In addition to that, as the Court has previously observed in the course of the oral submissions, the Receivers have not yet taken a definite position and also acted on it, and so it remains open to them if presented in due course with the right opportunity structured in the proper manner to adopt a more favourable view.

42. These two points in particular are extremely cogent and in light of the JPLs' broad recommendations and the weight which these recommendations should be accorded by the Court, granting a further final adjournment is the course which this Court has resolved to adopt. It finds that it has a credible basis to do so. As the Court has previously emphasized, there is no immediate tangible benefit to winding up.

Robin McMillan

GRAND COURT CIV-02 CAYMAN ISLANDS

MR JUSTICE ROBIN MCMILLAN

HONOURABLE JUDGE OF THE GRAND COURT