Re Management Recruiters International (Asia) Pte Ltd (formerly known as Humana International (Asia) Pte Ltd)
[2002] SGHC 179

Case Number : CWU 33/2002

Decision Date : 13 August 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Engelin Teh SC, Daniel Koh and Wendy Yu (Engelin Teh Practice LLC) for the petitioner; Mohan Pillay, Paul Sandosham and Tan Teck Wang (Wong Partnership)for the respondent

Parties : —

Civil Procedure – Costs – Standard or indemnity basis – Dismissal of winding up petition – Petitioner founding winding up petition on inadmissible evidence – Petitioner asserting existence of indisputable debt – Whether to award costs on indemnity or standard basis

Companies – Winding up – Company failing to pay debt – Amount of debt in dispute – Counterclaim against petitioner – Need for debt to be unambiguous and clearly above statutory sum – Whether dispute as to debt genuine and plausible – Whether to grant petition – ss 254(1)(e) & 254(2)(a) Companies Act (Cap 50, 1994 Ed)

Companies – Winding up – Stay of winding up proceedings – Option to either dismiss or stay winding up petition – Whether to stay or dismiss petition

Evidence – Admissibility of evidence – "Without prejudice" correspondence – Whether admissible – Nature of such correspondence – Whether admission of debt in such correspondence can support petition for winding up – Affidavit evidence – Nature of such evidence – Relevancy of such evidence

Judgment

GROUNDS OF DECISION ***Cur Adv Vult***

1. This was a petition by MRI Worldwide Ltd to wind up the respondent company, Management Recruiters International (Asia) Pte Ltd under s 254(2)(a) of the Companies Act, Ch 50. The basis of the petition was that the company is insolvent and unable to pay its debts amounting to 62,366.32.

2. The petitioner is an international management recruitment company that sells franchises of its name and operations to franchisees all over the world. The respondent is one such franchisee, having signed two franchise agreements, namely, the Singapore Franchise Agreement and the Malaysia Franchise Agreement. The respondent also signed two other agreements known as the International Master Franchise Agreement and the Umbrella Agreement with the petitioner. By these agreements, the respondent was permitted to grant sub-franchises to other parties upon payment of requisite royalty fees and commissions to the petitioner. The fee and commission structures are not important for the proceedings before me. The contractual obligations that are relevant are the terms requiring the respondent to report monthly sales and gross revenues, and to pay promptly all fees due.

3. On 10 May 2002 the petitioner terminated all the agreements it signed with the respondent on the ground of "persistent defaults". The main ones being the failure to pay royalties and not reporting of payments received from the sub-franchisees as required under the agreements. Prior to that, on 14 December 2001, the parties agreed on a schedule for the payment of monies due from the respondent to the petitioner. The matter was not resolved satisfactorily and fresh negotiation began on 29

January 2002. More correspondence followed. Even after the agreements were terminated the parties were still writing to each other. The more significant letters were two letters dated 17 May 2002, one from the respondent to the petitioner and the other a reply by the latter to the former; as well as a letter from the respondent's solicitors to the petitioner dated 28 May 2002.

4. Mrs. Teh, counsel for the petitioner submitted that the respondent owes a debt of 62,366.32, but even if the exact amount is disputed, there is no dispute that there is a debt owed which exceeds the statutory amount of $10,000 entitling the petitioner to petition for a winding up order against the respondent. The respondent challenges the petition on three grounds. The first of these grounds is that the petition was founded on an assertion of a debt referred to in "*without prejudice*" correspondence. Secondly, Mr. Pillay, counsel for the respondent, submitted that the petitioner attempted correct the defect by filing an affidavit in which the deponent Mr. Steven Mills referred to other correspondence and other amounts of purported debt. Thirdly, counsel submitted that the debt is disputed.

5. The petition was based on s 254(1)(e) and s 254(2)(a) of the Companies Act, Ch 50. Section 254(1) provides: "The Court may order the winding up if - (e) the company is unable to pay its debts". Section 254(2) provides:

> "A company shall be deemed to be unable to pay its debts if - (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $10,000 then due has served on the company by leaving at his registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor".

The relevant part of 5 of the petition states that "[the respondent] is indebted to [the] petitioner in the sum of at least 62,366.32". The particulars of this debt was set out in a letter dated 12 June 2002 from the petitioner's solicitors to the respondent in which the sum of 62,366.32 was referred to in these terms:

> "In any event, our clients note that you have taken the position that you presently owe them the sum of 62,366.32 in royalty payments due to them under the said contracts. This is contained in your calculations stated in your letter to our clients, dated 17 May 2002. In the letter from your solicitors, Wong Partnership, dated 28 May 2002, you have further agreed that you will make such payments that are required".

6. The letter of 17 May 2002 relied upon was indeed marked "*without prejudice*" as Mr. Pillay said, but Mrs. Teh argued that nonetheless, the statement of admission was a categorical admission of a debt for 62,366.32. She referred to the authority of Lord Griffith in *Rush & Tomkins Ltd v Greater London Council* [1988] 3 All ER 737, 740 in who held that: "There is also authority for the proposition that the admission of an "independent fact" in no way connected with the merits of the case is admissible even if made in the course of negotiations for a settlement". Lord Griffith gave as an example, the admission that the document was in the handwriting of one of the parties, as was the case in *Waldridge v Kennison* (1794) 1 Esp 143. But, more importantly, he qualified his statement by saying that he regards this as "an exceptional case and it should not be allowed to whittle down the protection given to the parties to speak freely on all the issues in the litigation both factual and legal when seeking compromise". The letter of 17 May when read in full shows exactly what it was - an attempt to speak freely on the dispute between the parties. I would not extract a short sentence

from the lengthy letter and regard it as an "independent fact". It forms an integral part of the negotiation. So far as the letter of 28 May is concerned, it has no direct reference to any specific debt and was a letter written by solicitors regarding the choice of forum and interim positions. In my view, therefore, there is no basis in the petition upon which I can safely act on in finding a debt which the respondent was unable to pay. On this ground alone I would dismiss the petition.

7. I proceed to Mr. Pillay's second point, namely, that the affidavit of Mr. Mills should not be given any force. It is well accepted that affidavits are not pleadings. The deponent may make all manner of statements and even if they are serious and important, they would have been made in vain because the court will have no regard for them however well made they may be unless they are relevant. Relevancy is a relative term. It must relate to the primary action and that can only be the original cause papers, be it the statement of claim of a winding up petition. In this regard, I accept Mr. Pillay's submission that the affidavit of Mr. Mills had ventured well beyond the focal point of 5 of the petition. As such, little weight, if any, is to be given to it.

8. Lastly, in respect of the issue as to whether there is a disputable debt, I shall preface my decision with a statement of settled law that a judge sitting in a companies' winding up court is not well placed to adjudicate on the merits of a commercial dispute. The debt on which the petition is founded must be unambiguous and obviously above the statutory sum. Mrs. Teh relied substantially and repeatedly on the judgment of LP Thean J in *Re People's Park Development Pte Ltd* [1992] 1 SLR 413, 416 for the proposition that the petitioner had a right to present the petition if the court found as a fact that *some* amount was owing by the company. So too, in *Re Claybridge Shipping Co SA* [1996] 1 BC LC 572, 575 Lord Denning held that "a person is a 'creditor' so long as he has a good arguable case that a debt of sufficient amount is owing to him. In the Companies Court it appears that a rule of practice has been adopted to the effect that the debt should be undisputed. I do not think that is correct. It certainly is not so in regard to the amount of the debt." The same point was emphasized by Plowman J in *Re Tweed Garages Ltd* [1962] Ch 406. These cases, however, merely cautioned against accepting a mere assertion that the debt is disputed. In that regard, the principle is clear and sensible. What it all means is that the court must be satisfied that the dispute of debt is genuine and plausible. In some cases, it may be plain that although the debt is disputed generally, there is an undisputed amount that exceeds $10,000, but where it is not so obvious, the court ought to dismiss the petition. In the present proceedings, if the 'without prejudice' correspondence is admitted (on which I have made my point above) it would appear that some debt may be due, but the amount is still questionable without a full inquiry or trial. Moreover, in this case, the company alleges that it has a counterclaim based on a wrongful termination of contract as well as damages for defamation. The dispute over the termination of contract was based, among others, on the determination of the term 'persistent breaches' of the agreements. The libel issue came about because the petitioner had sent out various letters to various third parties alleging that the company was guilty of "systematic under reporting of cash-in" and other comments including, "We are concerned that there may be fiscal irregularities which could be doing damage to our brand and possibly a criminal offence". Whether the allegations and fears are true, the consequence is plainly serious, with the possibility of substantial damages either way. Mr. Pillay had sufficiently drawn my attention to evidence that indicates that, at the very least, a genuine fight between the parties is at hand. But, as I have said, the winding up court is not the appropriate arena. I end with the reminder that a winding up order is the death knell for a legal entity. It should only be rung in the clearest circumstances.

9. In some cases the court may exercise its discretion and stay the winding up proceedings pending the resolution of the dispute. That would be so where there is already pending litigation in the courts or by way of arbitration. However, in this case, I have determined that the petition itself was bad in that it had recited a debt based upon an inadmissible document, and there being nothing

else to support the petition, I would in this case dismiss the petition rather than have it stayed.

10. Whether costs should be on a standard or indemnity basis is a slightly more difficult question in this case. Mr. Pillay submitted that the company ought to be awarded costs on an indemnity basis on the ground that the petition was commenced unnecessarily and was founded on an inadmissible document. Furthermore, he submitted, the alleged debt was disputed on legitimate grounds. If it were based on a straightforward reliance on an inadmissible document I might have leaned in favour of awarding indemnity costs. In this case, it seems to me that the petitioner took the view that there was an undisputed debt notwithstanding the reliance in question. Whether it was reasonable or not for it to have done so is, in my view, too fine a distinction to draw in the circumstances. I, therefore, hesitate to make an order of costs on an indemnity basis.

11. For the above reasons, the petition is dismissed with costs to be taxed on the standard basis, if not agreed.

Sgd:

Choo Han Teck

Judicial Commissioner