Neutral Citation Number: [2021] EWHC 210 (Ch)

Case No: 6237 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)
In the matter of Sarjanda Ltd
And in the matter of the Insolvency Act 1986

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 05/02/2021

Before :

HHJ DAVID COOKE

- -

Between :

Sarjanda Ltd (in liquidation)	**Applicant**
- and -	
Aluminium Eco solutions Ltd (1)	**Respondents**
Mr James Stares (2)	

- -
- -

Edward Ross (directly instructed) for the **Applicant**
No other party appeared or was represented
Hearing date: 19 January 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment

HHJ David Cooke:

1. On 19 January 2021 I heard an application to rescind the order for the compulsory winding up of Sarjanda Ltd made by DJ Rouine on 29 August 2018. The applicant was represented by Mr Ross but no other party appeared. At the end of the hearing I stated that the application would be refused, for reasons to follow in writing. These are my reasons.

2. The application is brought in the name of the company itself, but is in substance pursued by Mr Stuart Woodley, who is a director of and shareholder in the company and has filed evidence in support of it. I treat it as being brought jointly by the company and a contributory, for the purposes of para 9.10 (3) of the Practice Direction-Insolvency Proceedings. The first named respondent is the petitioning creditor and the second is the liquidator. The liquidator made a witness statement which is relied on, but neither he nor the petitioning creditor appeared at the hearing.

3. The application is made pursuant to Rule 12.59 of the Insolvency (England and Wales) Rules 2016, which gives the court in insolvency proceedings a general power to "review, rescind or vary any order made by it in the exercise of that jurisdiction". It is not controversial that that power in principle extends to permit the rescission of a winding up order, but by sub para (3) of that Rule:

> "Any application for the rescission of a winding up order must be made within five business days after the date on which the order was made."

4. This application is long outside that time limit, having been filed at court on 25 October 2020, over two years after the date of the winding up order. It is also the second such application, the first (also made by Mr Woodley) being dated 5 September 2018. That would have been the last permissible date, but it appears from the file that the application was not received at court until two days later, so it was also out of time. It was nevertheless listed for hearing on 3 January 2019, adjourned on that date for further evidence to be filed but eventually dismissed by order of DJ Musgrave at the adjourned hearing on 22 January 2019.

5. There is in principle power to extend the five day time limit; the court's general power in that respect pursuant to CPR 3.1 being incorporated into the Insolvency Rules by R 12.1 except as might be inconsistent with any other provision of those Rules. In *Preston v Green* [2016] EWHC 224 (Ch) Registrar Briggs (as he then was) held that there was no inconsistency preventing that power from applying to an application such as this (he was considering the equivalent provisions of the 1986 Rules, but the position would be the same under the 2016 Rules) but that given the context of an application to extend time in relation to rescission of a winding up order it fell to be treated as an application for relief from sanctions pursuant to CPR 3.9 and determined in accordance with the well known *Denton* criteria. In so holding the Registrar followed the judgment of Mr Philip Marshall QC, sitting as a judge of the High Court, in *Metrocab v Siddiqui* [2010] EWHC 1317 (Ch), though giving different reasons.

6. Mr Woodley in his application and Mr Ross in his submissions have approached the matter in that way. They accept that the breach, ie the delay of over two years, is "serious and significant", but submit that there is a good reason for the breach and that on consideration of all the circumstances the application should be allowed.

The facts

7. The factual background is as follows. The company was formed to acquire and develop property. Its shareholders and directors were Mr Woodley and Mr Brian Wilson. Between 2009 and 2014 it purchased and developed various residential sites, and in 2014 it bought a commercial building with a view to redevelopment into flats. That project was completed, but there were delays and remedial costs incurred as a result, according to Mr Woodley, of defective fireproofing and electrical installation. He and Mr Wilson wish to cause the company to bring claims against professional advisers which, they say, may be worth up to £600,000. The company has no further current development projects but, they say, depending on the outcome of the claims they may pursue other projects through the company in the future.

8. The petitioning creditor was a contractor working on the commercial project, for which it claimed to be owed some £17,800. The first application stated that this debt was disputed, apparently on the basis that the creditor was a subcontractor whose debt was owed by the main contractor, but that point has not been pursued. According to Mr Woodley, there were similar disputes with a number of others.

9. The witness statements of Mr Woodley and Mr Wilson in support of the first application asserted that the company was solvent, having received substantial proceeds from its various developments, though it appears that these monies, or what remained of them, had been paid out from the company's own bank account either to Mr Wilson or to another company he controlled. Mr Wilson said this was in satisfaction of debts owed to him on director's loan account. They both said that Mr Wilson could transfer monies back as and when required to pay any outstanding debts of the company.

10. By the time of the adjourned hearing of the first application, the Official Receiver had filed two reports:

    i) He noted the petition debt and that Mr Woodley had disclosed two other potential creditors claiming some £22,500 between them, though he said they were disputed.

    ii) Three other creditors had submitted proofs totalling about £9,000.

    iii) By the date of that hearing the petitioning creditor had been paid in full, but other creditors and the costs of the liquidation had not, and Mr Woodley was disputing the amount of those costs.

    iv) He noted the substantial sums (some £1.4m) paid to Mr Wilson from the development proceeds, and that a sum of £343,000, said to be available to pay creditors, was not held by the company in liquidation but by another company.

11. With that evidence, DJ Musgrave dismissed the first application. His order does not state any reasons, but Mr Woodley accepts that by the date of that hearing certain of the debts were still outstanding, as were the costs, because he and Mr Wilson had not by then agreed those claims and discharged them.

12. Since then, Mr Woodley explains the extended delay as being due to the process of contacting and negotiating with creditors, many of whom were slow to provide details of their claims or insisted upon dealing through the liquidator or both. There were

additional delays in dealing with matters caused by Mr Woodley's medical problems and by the coronavirus restrictions.

13. On 18 September 2019 Mr Stares was appointed liquidator in succession to the Official Receiver, and after discussion with him an advertisement was made in the Gazette for creditors to prove by 7 September 2020. By October 2020 Mr Woodley had agreed the amount of the liquidator's fees and expenses and Mr Stares made a witness statement stating that

    i) All established debts had been paid in full, with statutory interest;

    ii) The Official Receiver's fees had been paid and sufficient funds lodged to pay his own fees and expenses; and

    iii) Having reviewed the information provided by the Official Receiver he had not identified any matters that required further investigation.

    Accordingly he did not object to the application for rescission.

14. Mr Stares says that he understands that the debts and costs have been paid "by Mr Wilson through his company Southwood Lodge Residential Homes Ltd".

Legal principles

15. Mr Woodley and Mr Ross addressed the principles identified by Barling J in *Credit Lucky v National Crime Agency* [2014] EWHC 83 (Ch), where he said this:

> "31. The principles governing the Court's exercise of its discretion to rescind a winding up order are conveniently listed in the judgment of Mr Philip Marshall QC, sitting as a Deputy High Court Judge, in *Metrocab Limited* [2010] EWHC 1317 at paragraph 36, in which reference is also made to a number of other relevant authorities, including *Re Dollar Land (Feltham) Ltd.* (1995) BCC 740, at 748D; *Re Piccadilly Property Management Ltd.* [1999] 2 BCLC 145; *Wilson v. Specter Partnership* [2007] BPIR 649, at 658); and *Papanicola v. Humphreys* [2005] 2 All ER 418, at 424). The principles are as follows (paraphrasing paragraph 36 to some extent):
>
> (1) The power to rescind is discretionary and is only to be exercised with caution;
>
> (2) the onus is on the applicant to satisfy the court that it is an appropriate case in which to exercise the discretion;
>
> (3) it will only be an appropriate case where the circumstances are exceptional and those circumstances must involve a material difference from those before the court that made the original order;
>
> (4) there is no limit to the factors that the court can take into account, and they may include changes since the original order was made, and significant facts which, although in existence at the time of the original order, were not brought to the court's

> attention at that time; but where that evidence could have been made available, any explanation the applicant gives for the failure to produce it then or any lack of such an explanation, are factors to be taken into account;
>
> (5) the circumstances in which the court's power will be exercised will vary but generally where the rescission application involves dismissal of the winding up petition, so that the company is free to resume trading, the court will wish to be satisfied:
>
> > (a) that the debt of the petitioning creditor has been paid, or will be paid, that the costs of the Official Receiver or any liquidator can be paid, and that the company is solvent at least on the basis that it can pay its debts as they fall due;
> >
> > (b) that the application has not been presented in a misleading way and the court is in possession of all the material facts and has not been left in doubt;
> >
> > (c) that the trading operations of the company have been fair and above board, and there is nothing that requires investigation of the affairs of the company."

16. Mr Ross submitted that I could be satisfied on the matters raised under (5) from the witness statement of Mr Stares. The case was exceptional, he submitted, in that all the debts and costs had been discharged, and insofar as there had been a delay in doing so that was explained by the difficulties referred to above, which also amounted to good reason for delay in making the application. The fact of such payment was a material difference from the circumstances at the time of the winding up order. It should not be an obstacle that the funds to pay debts had been provided by a third party, pointing to *Re Diamond Hangar Ltd* [2019] EWHC 224 (Ch) in which HHJ Worster, sitting as a judge of the High Court, was persuaded to rescind the winding up of a company operating an aircraft hangar, in large part because of the provision of very substantial funds by its ultimate shareholder together with assurances of provision of future funding and changes in its management structure.

Discussion

17. The first point to make is that the extension of time required if the application is to proceed, over two years from a specified limit of five days, is extreme. Mr Ross accepts that there is no reported case in which an extension of anything like that amount has been granted. The fact that the Rules impose such a short limit is itself unusual, and emphasises that the jurisdiction is intended to be limited to cases in which it can be very quickly shown that the order for winding up was clearly inappropriate.

18. Such cases may no doubt include circumstances in which it can be clearly and swiftly shown that, contrary to the finding that formed the basis of the winding up order, the company is able to pay its debts, at least as they fall due, and to show that it is appropriate to permit it to continue to trade. In principle that might be done by injecting a sufficient amount of funds to enable it to be shown that, whatever the exact amount of liabilities, the company would be able to meet them- that is in effect what

happened in *Diamond Hangar*. But they do not, in my judgment, extend to allowing a period, still less a protracted period, in which the existence and amount of the company's debts can be investigated and established so that funds can be injected to pay them off in a piecemeal fashion. That is inherently unlikely to be capable of being established within the five day period provided, so the effect of allowing an extension of time to do so would not be to allow the purpose of the jurisdiction to be served, but to change that purpose into something wholly different.

19. Indeed if this application were allowed it would in effect create a jurisdiction for a winding up to be set aside in any case in which the debts proved (and the costs of liquidation) were in fact discharged however long it took to do so. Such a jurisdiction is explicitly provided for in bankruptcy, as one of the grounds for annulment, but not in winding up, and that is no doubt a deliberate policy choice by the legislature.

20. It follows that there is no good reason for the failure to comply with the time limit required. The non compliance was caused not because the applicant was inadvertently prevented from complying with the rule but because he was seeking to do something that the rule was not intended to allow.

21. Even if such a purpose was within the contemplation of the rule, it is a further indication that there is no good reason for failing to comply with the time limit that this is a second application- the shareholders had one opportunity to show the court that all debts had been paid, if that was to be relied on, but they failed or were unable to do so before the first application was heard.

22. Secondly, this is not a case in which the company is solvent and seeking to continue its trade. It was not trading at the date it was wound up and is not presently intending to resume trading, but to realise its assets (in the form of the cause of action) for the benefit of its members. It is not solvent, contrary to the assertions made by the applicant, because it has no funds of its own but only what is transferred or returned to it by its shareholder to meet its liabilities. It is not shown by the evidence that these funds belong to the company; indeed it must be assumed that the shareholders' case is that funds were properly paid out to Mr Wilson and so are his property and are being returned by him as a voluntary act.

23. The circumstances are very different, in my judgment, from those in *Diamond Hangar*, which were held to be exceptional. In that case the company was actively trading and intended to continue to do so. There was a history of very substantial financial support for such trading by the principal shareholder, coupled with an undertaking to maintain that support in the future, subordinate the shareholder's claims to those of other creditors and to make changes to management that were accepted as appropriate to avoid likelihood of similar cash shortages in the future.

24. It would be undesirable, in my judgment, to allow the present exceptional jurisdiction to be extended as it would be if an application such as this were allowed. Since creditors can only be paid from funds volunteered by the shareholders, it would be likely to lead to a situation in which the shareholders negotiate directly with the creditors on an individual basis, with the substantial advantage that each creditor can be told he is likely to realise nothing in the liquidation if he does not accept what the shareholder offers.

25. It may be said that that is in effect what may happen in an application to annul a bankruptcy, where the debtor may rely on third party funding, but it is the legislative

policy to allow that, no doubt because of the particular consequences to an individual from his personal bankruptcy. The same does not apply to shareholders who insulate themselves from debts by trading through a limited company which they fail to fund sufficiently to pay debts when due.

26. Thirdly, this is not a case that can in my judgment properly be viewed as exceptional. In this context, the exceptionality referred to relates to the circumstances in which a company came to be wound up when, in the light of the facts as known to the court at the date of the hearing, that can be seen to be inappropriate. In this case, the circumstances were not exceptional at all- the directors and shareholders simply failed to provide funds to the company to deal with a claim by a creditor in good time to avoid the order being made, and now seek a second (or third) chance to do so. The exceptionality suggested is that it is not usual for shareholders to offer to discharge a company's debts after winding up, but that seems to me to be no more than saying that it is unusual for the rescission application itself to be made.

27. Finally, there has not in my judgment been any good reason put forward why the order needs to be made. There is no business to preserve for the company, only a question of realisation of its asset. The shareholders say they may choose to pursue projects through the company in future but have advanced no reason why they would not be equally able to use some other vehicle. If the shareholders wish to pursue the cause of action, on the face of it that could be achieved by having it assigned to them, either by way of sale by the liquidator or, now that the winding up is concluded, by way of distribution to the members. Mr Ross was unable to suggest any reason why that could not be done, and when I asked why the application had been brought, could say only, on instructions, that the liquidator had requested that it should be made before he would consider an assignment.

Conclusion

28. These reasons go largely to the merits of the application and factors that would be relevant to the exercise of discretion if it were to proceed, but they are also matters that can be considered as part of "all the circumstances" in the three stage *Denton* consideration of whether the extension of time that should be allowed. The upshot is that there is in my view no good reason for the delay in making the application, and nothing arising from a consideration of the circumstances of the case to make it appropriate nevertheless to allow the extension of time. I accordingly refuse to allow that extension and dismiss the application itself as being made out of time.

29. I will list a date for this judgment to be handed down, without attendance, by release of the approved final version to the parties and to BAILII for publication, and invite Mr Ross to submit a draft order to reflect the result.