

A **Re Lummus Agricultural Services Ltd.**

Chancery Division.

Park J.

Judgment delivered 7 August 1998.

B *Winding up – Petition to wind up – Company unable to pay its debts – Petition opposed by other creditors – Most other creditors associated with company – Whether court should exercise discretion to order winding up – Insolvency Act 1986, s. 122(1), 125(1).*

This was a contingent creditor's petition to wind up a company whose liabilities considerably exceeded its assets where the petition was opposed by the company's other creditors, the majority of which were associated companies of the debtor company.

C The company's latest balance sheet showed assets of US\$559,030 and liabilities of about \$13,310,000 owing to four creditors, one of whom was the company's auditors owed \$1,692 and the others were associated companies. The reason why the company had continued in existence lay in litigation in Zambia in which it was plaintiff but had lost at first instance and awaited an appeal to the Zambian Supreme Court. The petitioning creditor was also involved in the Zambian litigation and had been awarded costs in interlocutory proceedings against the company in the English High Court. The costs were to be taxed at an assessment set for about four months after the hearing of the winding-up petition. It was not disputed that the petitioner had standing to petition as a contingent or prospective creditor for the amount of costs to be determined.

D The company asked the court to exercise its discretion under s. 122(1) and 125(1) of the Insolvency Act 1986 not to order winding up of the company or to adjourn the matter until after the taxing master's assessment of the costs order. It argued amongst other things that the petition was oppressive, likely to stifle the appeal in the Zambian litigation, opposed by the company's other creditors and various other points.

E *Held, making the winding-up order:*

F 1. It was well settled that if a creditor with standing to petition wished to have a debtor company wound up and the court was satisfied that the company was unable to pay its debts, then a winding-up order would follow unless there was some special reason why it should not. The assumption therefore was that the order should be made unless the company could demonstrate why it should not.

G 2. The petition was not oppressive: the debt was only disputed in quantum, to be decided upon by the taxing master, and there was no evidence that the petition was intended to pressurise the company into paying in full the disputed bill of costs. If a winding-up order were made that would place the company's involvement in the Zambian litigation in the hands of its liquidator, but there was nothing wrong with that and indeed it might be a very good thing for the company's creditors for someone to take a dispassionate look at the Zambian appeal before going ahead with it.

H 3. If one creditor petitioned to wind up a company, but other creditors whose debts were greater in amount opposed the petition, the court would ordinarily be disinclined to order a winding up, but opposition was not simply a head count, or a value count, of creditors. Where opposing creditors were not independent outsiders but were associated with the company itself and with its directors (who opposed the petition), their views should be discounted, or at least in the judge's discretion, could be discounted.

4. Although intentions had been made known, such as the other creditors subordinating their claims if the company were not to be placed in liquidation or other parties agreeing to pay the taxed costs, these were attempts to bargain with the court, were not backed up by

binding undertakings, had not tempted the petitioner to withdraw its petition and would not tempt the court to reject the petition.

The following cases were referred to in the judgment:

*Crigglestone Coal Co Ltd, Re* [1906] 2 Ch 327.

*Falcon R J Developments Ltd, Re* (1987) 3 BCC 146.

*Macrae (P & J) Ltd, Re* [1961] 1 WLR 229.

*Tottenham Hotspur plc v Edennote plc* [1994] BCC 681.

Daniel Lightman (instructed by Ritchie Samuel, Cambridge) for the respondent company and opposing creditors.

Andrew Thompson (instructed by Cameron McKenna) for the petitioner.

## JUDGMENT

### Park J: Overview

This is a creditor's petition to wind up the respondent company, which I will call 'Lasco'. The petitioner is a German company, which I was told is indirectly owned by the German government. I will refer to it as 'DEG'. Lasco opposes the petition, as do other creditors. Nevertheless, I propose to accede to the petition and make the winding-up order.

### Mr Koshy

Lasco has one director, Mr Thomas Koshy. According to the 1996 accounts he has a beneficial interest in 499,999 out of 750,003 issued shares. That is the only information I have as to the ownership of the company or as to the nature of Mr Koshy's interest in it. His affidavits give his home address as an address in this country, but his second affidavit states that at an earlier time he lived for 20 years in Zambia.

### Lasco

Lasco no longer carries on any business. The reason why it still exists, and why Mr Koshy wants it to continue to exist, is because it is involved in litigation (of which more later) and Mr Koshy wants it to pursue the litigation under his control. In terms of assets and liabilities Lasco is hopelessly insolvent. The latest available balance sheet (as at 31 December 1996) shows assets of US\$559,030 and liabilities of \$13,309,595. The assets are all debts. There is no evidence of who the debts are owed by, but it would not surprise me if they are owed by associated companies. The liabilities are owed to four creditors, as follows:

- (1) to Haze Securities Ltd (a Jersey company), \$12,375,000;
- (2) to Lummus Industries Inc, \$877,918;
- (3) to Hi-Pro Holdings Ltd, \$54,985; and
- (4) to the auditors (Haines Watts), \$1,692.

Mr Koshy's first affidavit states that the first three creditors are associated companies of Lasco. It should be added, however, that Lummus Industries Inc is in a 'Chapter 11 bankruptcy' in the US, and appears to act, not by its directors, but by a trustee in bankruptcy and a creditors' committee.

It will be noticed that the creditors which I have listed do not include DEG, the petitioning creditor in this case. I shall explain about that below.

### Lasco's litigation

I said earlier that the real reason why Lasco is still in existence lies in litigation in which it is involved. I need to explain a little about this. It centres around a project in Zambia

A carried on by a Zambian company called Gwembe Valley Development Co Ltd ('GVDC'). Lasco is a majority shareholder in GVDC. DEG was also in some way involved in GVDC. I do not know the details of how it was involved, and I do not need to. I imagine that DEG was a lender to GVDC, and perhaps it had a shareholding interest as well. At all events it has all gone wrong, and legal proceedings have followed in Zambia and in this country.

B In Zambia GVDC is in receivership, and the receivers have been appointed by DEG. Mr Koshy says that the main issue in the Zambian legal proceedings is the validity of the receivers' appointment. It is being challenged by Lasco and a co-plaintiff, a Zambian company of which he is a director. He refers to it as Lasco Zambia, and I will call it 'LZ'. Lasco and LZ have lost at first instance, but have appealed to the Supreme Court. At present the appeal is expected to be heard in September 1998, that is within the next two months. A major issue in the proceedings before me is the impact which the placing of  
C Lasco into liquidation would have on the prosecution of its appeal to the Zambian Supreme Court. Mr Koshy says that if the appeal goes ahead and Lasco and its co-plaintiff win, the next stage will be an action by GVDC, by then again in the control of Lasco, against its former receivers. GVDC would hope to recover substantial sums, which would benefit Lasco.

D There is one other matter which I should mention about the Zambian proceedings. Although Lasco is a party to them, Mr Koshy says that all the costs are being paid by LZ and another Zambian company, 'Chempro', of which also he is a director. He does not say whether there are any terms for Lasco to reimburse LZ and Chempro for their expenditure on costs. I think that I am meant to assume that there are not, but it would be remarkable if the other two companies were funding Lasco's share of the Zambian litigation entirely gratuitously.

E In England there are two actions. In one Lasco is being sued by DEG, and in the other it is being sued by the receivers of GVDC (who, it will be recalled, were appointed by DEG). In 1997 there was a lengthy interlocutory application in the action brought by DEG. Harman J decided against Lasco and ordered it to pay DEG's costs. Further, he ordered that the costs should be taxed and paid forthwith. Lasco has not appealed against this order.

F The costs order was dated 20 March 1998. By a letter of 28 April 1998 DEG's solicitors sent to Lasco's solicitors copies of their client's bills 'in taxable form' and called for payment of the costs not later than 6 May 1998. The amount claimed related to two actions and was £446,568.78 for both of them. Lasco's solicitors replied to the effect that the costs claimed would have to be taxed, and any payment of costs would have to await the taxation. On 11 June 1998 DEG's solicitors submitted a bill of costs for taxation at  
G the Supreme Court Taxing Office. According to DEG's petition the amount of it was £359,415, which I imagine was the part of the £446,568.78 (referred to above) said by DEG to be the costs of the interlocutory application payable by Lasco. An appointment before the taxing master has been arranged for 11 November 1998, and two and a half days have been allocated for the hearing. Mr Koshy asserts that the taxing master is likely substantially to reduce the costs payable by Lasco to DEG.

H The current position, therefore, is that Lasco has a present liability to pay DEG's costs of the interlocutory application, but the amount of them has to be determined by the taxing master, something which is expected to happen in November, which is in four or five months from now.

#### DEG's winding-up petition

DEG founds its petition to wind up Lasco on Lasco's debt for the costs which Harman J directed Lasco to pay. Under s. 124(1) of the *Insolvency Act 1986* – I interject that

#### British Company Cases

henceforth all statutory references are to that Act – an application to the court to wind up a company may be presented ‘by any creditor or creditors (including any contingent or prospective creditor or creditors)’. Although the amount of the costs which Lasco is liable to pay to DEG remains to be quantified by a decision of the taxing master, DEG is a creditor of Lasco, particularly so given that a creditor is expressly stated by the Act to include a contingent or prospective creditor: see in particular the decision of Rattee J in *Tottenham Hotspur plc v Edennote plc* [1994] BCC 681.

The proposition in the foregoing paragraph is not disputed by Mr Lightman (who appeared for Lasco and the opposing creditors). It is therefore common ground between him and Mr Thompson (who appeared for DEG) that DEG has the requisite standing to present this petition before me. It is also common ground that I have power to order that Lasco be wound up. Mr Lightman’s case is that, although I have that power, I should not exercise it.

The provisions which give me the power to order a winding-up are s. 122(1)(f) and s. 123(1)(e) and (2). By s. 122(1)(f) a company *may* (not shall) be wound up by the court if it is unable to pay its debts. By s. 123(1)(e) it is deemed unable to pay its debts if it is unable to pay its debts as they fall due. By s. 123(2) it is also deemed unable to pay its debts if the value of its assets is less than the value of its liabilities.

Mr Thompson says, and I do not think that Mr Lightman disagrees, that either of the two conditions by which a company is deemed unable to pay its debts could apply to Lasco. The principal reliance is placed on s. 123(2): Lasco’s liabilities exceed its assets by a massive margin. In addition, however, in so far as it has any debts which may become due it does not have any apparent money with which to pay them. Its legal costs of the Zambian proceedings, for example, are only being met because LZ and Chempro are paying them. Reverting to s. 123(2), there was some discussion in the hearing, which I will address more fully later, of the creditors subordinating their debts to DEG’s claim for the costs awarded to it by Harman J. Even if that were to be done, it would not make any difference on this aspect of the case: as Mr Thompson points out, whether liabilities are subordinated or not, they are still liabilities. Lasco’s other creditors would have to release their debts altogether, or convert them into equity, if they wanted to bring about a situation where Lasco’s liabilities did not exceed its assets.

#### Lasco’s opposition

Lasco opposes DEG’s petition to wind it up. It points out that under s. 125 the court may, on hearing a winding-up petition, dismiss it or adjourn the hearing. Its primary submission to me is that I should dismiss the petition. In the alternative it submits that I should adjourn the matter until after the result of the hearing before the taxing master. I said that that was fixed to begin on 11 November. A particularly important effect of the petition being adjourned until after that date is that the appeal of Lasco and LZ to the Zambian Supreme Court would have been heard in the meantime.

Lasco puts forward a number of grounds for opposing DEG’s petition. I shall describe them in the next section of this judgment, where I shall indicate why I accede to DEG’S petition and do not accept the reasons why Lasco says that I should dismiss it or adjourn it.

#### Decision

I begin with the basic proposition that, although both s. 122 (which uses the word ‘may’) and s. 125 give the court a discretion whether to make a winding-up order, it is well-settled that, if a creditor with standing to make the application wants to have the company wound up, and if the court is satisfied that the company is unable to pay its debts, a winding-up order will follow unless there is some special reason why it should

A not. It is sometimes said that, in such a case, a petitioning creditor is entitled to a winding-up order 'ex debito iustitiae'. I therefore start with the assumption that such an order should be made in this case, and the burden of argument rests on Mr Lightman to show me why it should not.

B I would only add in this connection that it would not help him to persuade me that it would be more in the interests of DEG to allow Lasco to continue for the time being without being put into liquidation. If DEG and its experienced advisers take the view that it is best for DEG, as a creditor of Lasco, to have the company wound up by the court, I am not going to second-guess them and ask myself whether I think that they are misguided. Some reason other than that would be needed for me to depart from the normal consequence of a properly presented petition by a creditor of a company which is unable to pay its debts.

C Mr Lightman has put a number of reasons before me. I shall now describe and comment on them individually.

1. He says that the petition is oppressive, and is intended to put pressure on Lasco to pay a disputed debt. I do, of course, accept the proposition that in a case like that a winding-up petition will be struck out. A claimant whose debt is disputed should sue for it in the normal way, and not use the insolvency procedure as a means of securing payment of the disputed debt. But I do not accept that this case is like that. There is no dispute that Lasco has a liability to pay costs to DEG. Harman J has ordered it to pay them, and Lasco has not appealed against that particular order. Lasco is disputing the quantum, but I do not accept that DEG's purpose in seeking to have Lasco wound up is to pressurise Lasco into paying in full the disputed bill of costs. There is no specific evidence that that is DEG's purpose, and in the absence of such evidence I am not prepared to draw an inference that it is.

D  
E 2. Mr Lightman says that DEG's purpose is, or might be, to stifle Lasco's appeal to the Zambian Supreme Court. Again, I do not accept that that is correct. I do accept that, if the petition succeeds and a liquidator is appointed, he will probably wish to review the Zambian proceedings and reach his own decision on whether Lasco should persevere with them. But in my judgment there is nothing wrong with that. On the contrary, it may be a very good thing in the interests of creditors of Lasco that someone should take a dispassionate look at the Zambian appeal before Lasco finally goes ahead with it.

F  
G Although I can imagine that Mr Koshy will find this hard to understand or to accept, it is not the case that a court-appointed liquidator will be the creature of DEG. In contrast, if a liquidator is not appointed Mr Koshy, who is the sole director of Lasco and will take the decisions about the Zambian proceedings, is, in Mr Thompson's expression, 'partisan' in relation to them. Mr Thompson accepts that DEG could also be described as partisan in the opposite direction, but he stresses, rightly in my judgment, that a liquidator will act, and will be required by law to act, in accordance with his own independent judgment, and not at the behest of DEG.

H If the liquidator takes the same optimistic view of the Zambian appeal as does Mr Koshy, he may decide to continue with the appeal, and he would presumably hope to have the assistance of Mr Koshy in connection with it. In Mr Koshy's second affidavit he says that he knows all about the Zambian appeal, whereas a liquidator would not. The inference is that he would not be willing to co-operate with a liquidator. That is a matter for him, but I am not impressed if it is presented as a reason why I should decline to make a winding-up order and leave the control of Lasco in the sole hands of Mr Koshy.

3. Mr Lightman says that the other creditors all oppose the petition. This has been established by an affidavit of Mr Koshy sworn just before the hearing. In the light of it I gave Mr Lightman leave to represent the other creditors as well as Lasco itself. I accept that there are several authorities to the effect that, if one creditor petitions to wind up a company, but other creditors whose debts are greater in amount oppose the petition, the court will ordinarily be disinclined to order a winding-up. See, for example, *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327. A
- However, there are two important qualifications to make. First, it is not simply a head count, or a value count, of creditors. In *Re P & J Macrae Ltd* [1961] 1 WLR 229 the judge had made a winding-up order although a majority of the creditors opposed the petition. The Court of Appeal refused to interfere with the exercise by him of his discretion. Second, if the opposing creditors are not independent outsiders but are associated with the company itself and with its directors (who oppose the petition), their views should be discounted, or at least in the judge's discretion may be discounted. See the discussion by Vinelott J (including the citation of earlier authorities) in *Re Falcon R J Developments Ltd* (1987) 3 BCC 146 at pp. 148–153. B
- In this case, according to Mr Koshy's own affidavit three of the four opposing creditors are associated companies of Lasco. The fourth is the auditors, who are in any event creditors only for a small amount. The associated company creditors include Haze Securities Ltd, which is by far the largest creditor. I infer from the affidavit that that company and Hi-Pro Holdings Ltd (of which Mr Koshy is a director) are, to put the matter at its lowest, subject to his influence. It would be different if they were independent outside creditors, but, given that they are not, I do not think that their opposition to the petition adds anything much to the opposition of Mr Koshy himself. Further, in Mr Koshy's first affidavit he says that Lummus Industries Inc is an associated company. He also says that it is in 'Chapter 11 bankruptcy' in the US, but he does not go on to say that it is therefore in practice independent of him. It may be independent, but I am not satisfied that it is. C
- In all the circumstances of this case, I have concluded that the opposition of the other creditors does not lead me to depart from the normal consequences of a properly presented petition by an undoubted creditor of a clearly insolvent company, namely that a winding-up order should be made. D
4. Mr Lightman has drawn my attention to a number of statements in Mr Koshy's affidavit in which he says things about the intentions of other companies for which, apparently, he can speak. I will comment on them individually, but all of them are subject to a general point which I made earlier. If DEG and its advisers prefer to place Lasco into liquidation rather than leave it in the directorship control of Mr Koshy, it is not for me to refuse a winding-up order on the ground that (if it were the case, as to which I say nothing) I think that DEG's interests would have been better served by not proceeding with its winding-up petition. That general point remains valid where certain additional inducements to DEG to drop its petition are offered in the form of statements of intention by other third parties. E
- In any case, the statements of intention are not as attractive as they might superficially appear, as the following sub-paragraphs show. F
- (a) Mr Koshy says that, if Lasco is not placed into liquidation, the other creditors will subordinate their debts to that owed to DEG. This has not tempted DEG to withdraw its petition, and I do not like the feeling of being bargained with by the other creditors. In any case, they say nothing about how they would propose to bring about the subordination, and G

- A Mr Lightman, who in my opinion was placed (by no fault of his own, needless to say) in a very unsatisfactory position over this aspect of the matter, confirmed that he had no instructions or authority to offer any undertakings to the court that the statements of intention would be fulfilled. I am not asserting that they are insincere: I have no idea whether they are or not. What I am saying is that they are altogether too vague and indefinite to assist me at this stage of the case.
- B (b) Mr Koshy says that if Lasco is not placed into liquidation and is ordered by the taxing master to pay costs to DEG which do not exceed £160,000, LZ is prepared to pay that sum to DEG. This is now offered as an inducement to me to exercise my discretion against ordering a winding up. Again I am being bargained with, but there are other respects in which this offer is not of any real substance. No undertakings are offered to the court, and there is certainly no indication that LZ is willing to put up £160,000 or any other sum in cash at this stage to secure its offer. And what if, as must be a real possibility, the master determines the costs at more than £160,000? This offer sounds interesting at first hearing, but on reflection it cannot make any difference at this stage.
- C
- D (c) Mr Koshy says that LZ and Chempro are willing to pay all the costs of the Zambian proceedings, including any costs which Lasco might be ordered to pay by the Zambian court. This is just a statement of intent. Even if it was in some contractual form, being made by two Zambian companies with (so far as I know) no assets in this country, it would in practice be extremely difficult to enforce. If DEG is not attracted by it (which it is not), I am not going to allow it to influence me against making a winding-up order.
- E (d) Mr Koshy deposes that on behalf of Lasco he is prepared to undertake that it will not incur any trading debts to third parties, and, other than any necessary legal costs and statutorily required accounting costs, will not incur any liabilities of its own volition. That is all very well, but what about liabilities which Lasco might incur otherwise than by its own volition?

F Generally on all these offers or statements of intention, it appears to me that if they have not tempted DEG to withdraw its petition, they are not going to tempt me to reject it.

### Conclusion

For the foregoing reasons I will make the winding-up order requested by DEG.

*(Order accordingly)*

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