

Judgment 22/2009

**Public Services Department v Miller and Baird (CI)
Limited – Royal Court (Civil Action File 1340) – 15
May 2009**

Companies (Guernsey) Law, 2008 (s.406) – States’ application for compulsory winding up order – circumstances in which the court may exercise its discretion not to grant such an order – must be a genuine and serious cross-claim which the company had not reasonably been able to litigate and which exceeded the amount of the States’ debt – a substantial cross-claim had been referred to arbitration – no exceptional circumstances why the court should not exercise its discretion not to grant the order sought – no reason to depart from the modern practice to dismiss rather than stay the application (See Judgments 51, 57, 59 and 68 of 2005)

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

Between

**THE MINISTER OF THE
PUBLIC SERVICES DEPARTMENT
OF THE STATES OF GUERNSEY** **Plaintiff**
and
MILLER & BAIRD (C.I.) LIMITED **Defendant**

**Before: Richard John Collas Esq., Deputy-Bailiff
and**

**Michael Henry De La Mare, Stephen Murray Jones and Peter Sean Trueman Girard Esquires,
Jurats of the Royal Court**

**Date of hearing: 6th May 2009
Decision handed down: 15th May 2009**

Advocate for Plaintiff: K E Walder

Advocate for Defendant: J P Greenfield

Cases, text and legislation referred to:

- 1) The Companies (Guernsey) Law 2008, Section 406
- 2) *Re Bayoil S.A. (1999) 1W.L.R. 147*
- 3) *Re L H F Wools Limited [1970] Ch 27*
- 4) Practical Law Company – Responding to a winding up petition: A Guide For Companies
- 5) *Atlantic & General Investment Trust Ltd v Richbell Information Services Inc (2000) B.C.C. 111*

Introduction

1. In this judgment we will refer to the Plaintiff as “the States”, to Miller and Baird (C.I.) Limited, the Defendant, as “the Company” and to the contract between the parties for major works to create a marina at St Sampson’s Harbour as “the Contract”.

2. In an amended application dated 7th April 2009 (“the Application”), the States applied for an Order that the Company be compulsorily wound up and for the appointment of two insolvency practitioners from the local firm of Grant Thornton Limited as joint liquidators.
3. The Application was supported by affidavit evidence. The States relied upon an affidavit sworn by Adrian Robin Lewis, the Chief Officer of the Public Services Department, on 24th March 2009. The Company produced three affidavits: one from Ian Graham, a director of the Company, sworn on 24th April 2009; another from Simon Graham, his son, sworn on the same day; and a third sworn by Advocate Greenfield on 5th May 2009. We had the benefit of written submissions filed on behalf of each of the parties and of the clear and concise oral arguments of their respective Advocates, who we heard on 6th May.
4. At the conclusion of the hearing, the Deputy Bailiff and Jurats retired to consider their decision. The Jurats decided unanimously to dismiss the Application and the Court reserved its reasons, which are now handed down in this judgment.
5. In this judgment, questions of law and procedure are decided by the Deputy Bailiff; all questions of fact are decided by the Jurats who agree unanimously on all factual conclusions.

The Law

6. Section 406(e) of the Companies (Guernsey) Law 2008, provides that:

“A company may (emphasis added) be wound up by the Court if –

(e) The company is unable to pay its debts within the meaning given in section 407”

7. The parties agreed that the requirements of Section 407 had been satisfied in that the States served a Statutory Demand on the Company on 22nd December 2008 in the sum of £95,396.87, that amount had not been paid and it remained outstanding at the date of the hearing. The amount claimed is the total of two separate sums; the first is the amount due under a judgment dated 14th November 2008 in respect of occupation fees payable in lieu of rent for land occupied by the Company at St Andrew’s Reservoir, together with interest thereon and costs; and the second is the amount due to the States in respect of recoverable costs awarded against the Company by the Court of Appeal on 15th December 2005.
8. The Company is therefore deemed to be unable to pay its debts under the provisions of Section 407 of the Companies Law and the Court has a discretion whether or not to grant the application.
9. Neither Counsel was able to refer the Court to any decision of the Guernsey Court as to the circumstances in which such discretion is to be exercised. Both Counsel agreed that the decision of the English Court of Appeal in *Re Bayoil S.A. (1999) 1 W.L.R. 147* is a persuasive authority establishing that the Court should only consider exercising its discretion so as not to grant the Application if:
 1. There is a genuine and serious cross-claim or, as Norse L J expressed it at page 155 F, a claim of substance; and
 2. The Company must have been unable to litigate the claim or, to quote the head note of *Re L H F Wools Limited [1970] Ch 27* there must be a claim which the Company had not reasonably been able to litigate; and
 3. The cross-claim is in an amount exceeding the amount of the States debt.

10. Counsel agreed that in relation to these matters, the burden is on the Company to satisfy the Court that it should not exercise its discretion so as to grant the Application.
11. If the Court so decides, Counsel agreed that the Court has a residual discretion not to dismiss the Application exercisable only in exceptional or rare circumstances, namely if the Company has ceased trading and there would be no prejudice suffered by other creditors and members of the Company if it is wound up. In relation to that issue, the parties agreed that the burden shifted to the States.
12. The Deputy Bailiff directed the Jurats that the standard of proof is the normal civil standard of the balance of probabilities and that to establish something on the balance of probabilities means to prove that something is more likely so than not so.

Genuine and Serious Cross-Claim?

13. Advocate Greenfield referred to an extract from Practical Law Company – Responding to a Winding-up Petition: A Guide For Companies, which, at page 13 of 20 in the extract produced to the Court states, under the heading “Disputed Debt on Substantial Grounds”:

“The court will not make a winding-up order against a company where the petition debt is genuinely disputed by the company on “substantial grounds”. In this context “substantial” means that the dispute must be “real as opposed to frivolous” (Commissioners of Customs & Excise v Arena Corporation Ltd [2004] EWCA Civ 371). A “mere honest belief that payment is not due” will not suffice (Re a Company (No 0010656 of 1990) [1991] BCLC 464). There must be sufficient evidence to persuade a court that objectively there is a genuine dispute as to the company’s liability to pay the debt. Once it is established that there are substantial grounds for disputing the claim, “the court should not go on to consider the prospects of success of either party to the dispute (Abbey National plc v JSF Finance & Currency Exchange Co Ltd [2006] EWCA Civ 328).”

Factual Background

14. The cross-claim arises out of the Contract whereby the Company was employed to carry out major works in order to create a marina in St Sampson’s harbour. The works commenced on 9th June 2003. The Company claims that it encountered a number of problems thereafter, including unforeseen ground conditions beneath sea level, which led to an extension in time for the completion of the works and as result the Company incurred additional costs and expenses which it seeks to recover from the States.
15. Each party produced to the court a chronology of relevant events. We prefer to refer to that produced by Advocate Greenfield at page 42 of the exhibit to his affidavit as it is more comprehensive than that produced on behalf of the States.
16. The Company has submitted four claims for payment of additional costs. The first was submitted on 8th April 2005 for “*the additional costs incurred as a consequence of unforeseen geological conditions encountered during the construction of the South Cill.*” The other three were submitted on 25th July 2005 and were in respect of “*drilling and socketing for guide piles – additional works*”, “*additional direct costs incurred as a consequence of Ordered Variations in the method and timing of sediment excavation, transport and other excavation work*”, and “*additional costs arising due to disruption of the works and prolongation of the contract period.*”
17. The claims were all submitted to the States Engineer in his capacity as the Independent Engineer appointed by the parties under the terms of the Contract. A copy of each of the four

claims is included at Exhibit IG2 to the affidavit of Ian Graham. The Court is unable to assess the merits or validity of the claims but it notes that each claim is detailed, documented and lengthy. The States Engineer responded to the first submission on 5th October 2005, to the third submission on 21st February 2006, to the second submission on 20th March 2006 and to the fourth submission on 15th June 2006. The latter was nearly eleven months after the claim was submitted.

18. The Company submitted a rebuttal of the Engineer's responses on 9th January 2007, to which the Engineer replied on 12th October 2007.
19. The Company submitted its final account on 16th November 2007 and the Engineer issued a Final Certificate on 16th February 2008.
20. Nothing further appears to have happened until 6th November 2008 when Bevan Brittan wrote to the Engineer on behalf of the Company requesting a decision on a dispute under clause 66 of the Contract. Bevan Brittan, we were told, is a firm of specialist solicitors instructed by the Company to represent it in relation to matters arising under the terms of the Contract. A number of letters have been exchanged between Bevan Brittan and the States Engineer since 6 November and a copy of the correspondence is at exhibit IG9 to the affidavit of Ian Graham. Bevan Brittan are challenging the States Engineer's decisions regarding the physical conditions encountered by the Company particularly in the area of the South Cill. The States Engineer has stood by his earlier decisions and the correspondence has not satisfied the Company's concerns.
21. In a letter dated 27 February 2009, the Chief Officer of the Public Services Department of the States agreed that under the Contract the Company had until 1st May 2009 to refer the disputes identified in the correspondence to arbitration. That agreement was expressed to be subject to any other remedies the States may have, including the winding up of the Company.
22. On 29th April 2009, the Company submitted a formal notice to refer a dispute to arbitration. A copy of the notice is exhibited to Advocate Greenfield's affidavit at page 37.
23. Advocate Greenfield referred the Court to a letter dated 5th May 2009 from Bevan Brittan in which Bevan Brittan advised that they continue to act for the Company in its disputes and in the matter of the reference to arbitration by the Company of its dispute over the Engineer's decisions. It confirms that the Company's claims have been supported by independent expert reports of a Mr Hislam and of a firm called Greyhawk Global. The letter concludes:

"Based on the views of the independent experts, Mr Hislam and Greyhawk Global, Miller and Baird have genuine, serious and substantial claims in the arbitration proceedings against the States which should far exceed the amount of £95,000 claimed by the States".

Is there a genuine and serious cross-claim?

24. Advocate Walder submits that the Engineer's decisions are binding unless and until they are overturned. The Court recognises that the Engineer has reached his decisions in an independent capacity and not as an employee of the States of Guernsey. However, the independent status of the Engineer does not preclude the possibility of his decisions being challenged before an arbitrator. In the opinion of the Court, neither the fact that the decisions are binding until overturned nor the fact of the Engineer's independence are a determining factor in deciding whether there is a genuine and serious cross-claim.
25. Advocate Walder also argued in her written submissions, that *"the chronology points to a plethora of wasted opportunities"* to arbitrate, which she submitted should be taken into

account in assessing the seriousness of the cross-claim. In her oral submissions, Advocate Walder identified two periods of delay.

26. The first period of delay was following the judgment of the Court of Appeal, handed down on 15th December 2005, whereby the Court of Appeal allowed an appeal from a decision of the Royal Court and ordered that proceedings instituted by the Company be stayed, pursuant to Section 4 of the Arbitration (Guernsey) Laws 1982 and 1986. Delay occurred because the Company failed to take steps to refer the matter to arbitration until it commenced proceedings by issuing the notice dated 29 April 2009.
27. The Company explained that it was reasonable to delay referring disputes to arbitration as it wanted to wait until it was able to submit a reference in respect of all disputes so as not to have a number of separate arbitrations. The Jurats accept that explanation.
28. The second period of delay relied upon by the States is from 16th February 2008, when the Engineer issued a Final Certificate, until 6th November 2008 when the Company filed its first request for a decision from the Engineer under Clause 66 of the Contract. She argued that the Company should have been prepared in advance of receiving the Final Certificate and should have acted more quickly, especially as its trading activities had either ceased or were winding down.
29. The Jurats have carefully considered the periods of alleged delay. They have done so by reference to the chronology as a whole and to the periods of time taken by the Company and the States Engineer to discharge their respective responsibilities and to respond to requests. No explanations have been given for what appear to be some delays on the part of the States Engineer at various times. The Jurats express no criticism of the manner in which the States Engineer has conducted himself and they have paid no attention to the apparent criticism by Lieutenant Bailiff Hancox in paragraph 73 of his judgment in the earlier court proceedings.
30. In the view of the Jurats, the length of time that has been taken to progress aspects of the matter is indicative of the complexity of the issues involved. The Jurats believe that any delays that have occurred have not been of such great length that the Jurats could conclude the delays are indicative of a lack of substance in the Company's cross-claims.
31. The Jurats are in no position to discuss the merits of the cross-claim and it is not their function to attempt to pre-judge the outcome of the arbitration. So, the Jurats cannot examine the cross-claims in detail, they can only observe that a very significant amount of work has been done to support the Company's claims; the requests for payment are detailed at some length and they are supported by the reports of independent experts who have, apparently, relevant expertise. They take note of the fact that Mr Simon Graham has sufficient confidence in the merits of the cross-claim to have supported it to the tune of £120,000 to date and he is willing to commit a possible further £55,000 to see the arbitration to a conclusion. In that respect, the matter bears a little similarity with the decision of HH Judge Weeks QC (sitting as a High Court Judge) in *Atlantic & General Investment Trust Ltd v Richbell Information Services Inc (2000) B.C.C. 111* although in that case the cross-claim was being funded by outside investors and in the present case it may be that Mr Simon Graham is motivated by family ties to support his father, as Advocate Walder suggested. However, the Jurats do not believe that Mr Simon Graham would be so supportive if he did not have confidence in the cross-claim. Bevan Brittan, the specialist solicitors instructed by the Company believe that, based on the views of the experts, the Company has genuine, serious and substantial claims in the arbitration proceedings. The Deputy-Bailiff cautioned the Jurats to take care in the weight to be attached to the letter which was not put forward as sworn evidence and which, as Advocate Walder suggested, could be considered to be self-serving. The Jurats accept that the letter must be treated with some scepticism, but nevertheless they consider that it is supportive and is not to be totally ignored.

32. Taking all the relevant evidence into account, the Jurats conclude that the claim is real, it is not frivolous and it appears to be genuine and serious in the sense of having substance.

Has the Company been unable to litigate the matter?

33. As we have said, the Jurats have considered the chronology and have concluded that the delays are not unreasonable for the reasons given above. It follows from that conclusion that the Jurats are satisfied that the Company has been unable to litigate the cross-claim, or that it has not reasonably been able to litigate the cross-claim, (if that is the relevant test, as is suggested in the head note to *Re L H F Wools Limited*).

Does the amount of the cross-claim exceed the amount of the States' debt?

34. The precise amount of the cross-claim is not clear to the Jurats. When Advocate Greenfield was asked the amount, he referred to the Final Account submitted by the Company which claimed a total balance of £3,761,544.85. Advocate Greenfield said there would be some "toing and froing" around that figure.
35. The Notice to Refer to Arbitration identifies a number of disputes and quantifies each one. The parties did not add up the individual items and the Jurats have not done so because some items might contain an element of duplication but they note that many of the items are substantial and they appear to add to a total well in excess of £3million. The Company may have pitched its claim in the highest amount possible and hence would not be expected to recover the total amount it is seeking. However, the sum claimed by the States in its Statutory Demand, £95,396.87, is small in comparison with the amount the Company is claiming that the Jurats are satisfied that the amount of the cross-claim exceeds the States' debt, even after allowing for the inevitability that the Company will not be successful in the full amount of its cross-claim.
36. The Court is therefore persuaded that it should consider exercising its discretion, so as not to grant the application for compulsory liquidation, unless the States can show exceptional circumstances not to dismiss the application.

Are there exceptional circumstances?

37. The legal test, counsel agreed, is whether the Company has ceased trading and there would be no prejudice suffered by other creditors and members of the Company if it is wound up
38. It is common ground that the Company ceased trading in September 2008, so the first limb of the legal test is not in dispute.
39. The second limb requires the Court to consider whether there would be no prejudice suffered by the other creditors and members of the Company if it is wound up. Mr Ian Graham produced a list of creditors at Exhibit IG6, showing that the total amount owed to creditors other than the States is £1,333,000 including preferential creditors totalling £58,000 (excluding rent owed to the States), trade creditors of £308,000, Directors' loans of £500,000, a loan to Barclays of £510,000 and £15,000 owed to claims advisors. £414,500 is owed to the States. So the total amount owed to creditors is £1,805,500.
40. The cross-claim against the States is the only asset of any substantial value; the other assets are items of plant estimated to be worth £20,000.
41. The creditors are therefore looking to the success of the cross-claim, if they are to receive payment.

42. The Company produced letters from four creditors, namely Ravestein BV, Mr Phillip Dunne, BDO Novus Limited and Marine and General Engineers Limited, indicating their opposition to the States' application for compulsory liquidation and confirming that they were hoping for a successful outcome to the cross-claim in order to recover some or all of the debts owed to them.
43. Advocate Walder advised the Court against attaching weight to these letters when we did not know what information had been provided to the creditors and it was possible they may not fully understand the issues involved.
44. In the view of the Jurats, the information contained within the letters demonstrates that the people who wrote them do have sufficient understanding of the consequences of compulsory liquidation. In particular, BDO Novus Limited said that as well as being a creditor, they were approached by the States with a view to acting as liquidator of the Company.
45. Mr Simon Graham indicated in his affidavit that he had been advised that if the arbitration proceeds, the total cost will exceed £175,000. He has already provided and raised funds for the Defendant to date in the region of £120,000 and said:

"I am prepared to continue to be actively involved in ensuring the Company has the funds to continue whilst at the same time attempting to minimise its costs in so doing".

46. His evidence was not challenged in cross-examination. The Jurats are therefore satisfied that if the winding up petition is dismissed, the Company will have the financial resources to pursue the arbitration to conclusion.
47. If the Company is wound up, the evidence of the States was that it would not provide the funds to pursue any action against the States of Guernsey, but it will provide a maximum of £5,000 to the liquidators to enable them to seek guidance on matters arising in relation to the liquidation. (See page 20 of Exhibit ARL1 to the affidavit of Adrian Lewis).
48. No evidence was produced to show what advice could be obtained for £5,000 and whether that would be sufficient to fully investigate the merits of the cross-claim. One of the proposed liquidators, who was present in Court, appeared to cast doubt on whether he had underestimated the complexity of the issues involved. Even if the sum proposed is sufficient, if the liquidators were to conclude that there was merit in the arbitration proceedings, the States would be requiring them to approach either the Graham family to fund the arbitration, or to seek funds from one or more of the creditors to enable it to do so.
49. There was no evidence as to whether either the Graham family or any creditor would be willing to provide the liquidators with such funds. Even if they were prepared to do so, Advocate Greenfield pointed out the difficulties that would arise if liquidators appointed on the application of the States and funded by the States were the persons taking decisions about the conduct of an arbitration in a dispute with the States.
50. In the view of the Jurats, the director (or directors if there is more than one) of the Company will be able to pursue the arbitration proceedings more robustly than the liquidators. It would be understandable that the Graham family might be prepared to fund the arbitration provided the director or directors of the Company is or are in control of the Company's case but would not be prepared to do so if the liquidators were in control.
51. If the Company is placed in liquidation and neither the Graham family nor the creditors are prepared to fund arbitration proceedings, the arbitration will not be pursued and after payment

of the liquidator's expenses, there will be little or no funds available for the preferred creditors and nothing for the non-preferred creditors.

52. Advocate Walder argues that the plant belonging to the Company is still located on the States-owned land at St Andrew's Reservoir in respect of which the arrears of rent are claimed. That plant could hamper proposals for redevelopment of St Andrew's Reservoir if it is not removed. The liquidators would be in a position to remove the plant and/or to sell it. In the view of the Court the continued presence of the plant on the land does not amount to serious prejudice if the Company is not placed in liquidation. The plant has been arrested by HM Sheriff at the instance of the States and appropriate steps could be taken, through the offices of HM Sheriff, to have the items removed and/or sold if appropriate.
53. In conclusion, the Jurats are not persuaded that exceptional circumstances have been established by the States to persuade them that the winding up petition should be allowed to proceed.

Dismissal or Stay?

54. The final issue considered by the Jurats is whether to dismiss the Application for winding up or to stay the Application pending the conclusion of the arbitration. The advantage of a stay would be that if at any time the arbitration proceedings are not being progressed expeditiously by the Company, the States could apply to reactivate the application for a winding up.
55. The Deputy Bailiff directed the Jurats that in the light of the English authorities, the modern practice is to dismiss, rather than stay, such a petition. (See, for example, the judgment of Nourse L.J. in *Bayoil* at page 151H). However, the Court has discretion to stay the Application if it is persuaded that there are good reasons for departing from the normal practice.
56. The Jurats are not persuaded that there is any need to stay the Application. The Company has now initiated the arbitration procedures. There is no reason to believe that the Company will drag its heels in the appointment of an arbitrator. Once the arbitrator has been appointed, he will have the conduct of the arbitration proceedings.
57. If those proceedings are delayed, or delayed to an unreasonable extent, at the instance of the Company, it will be open to the States to bring a fresh application for winding up in support of which the States could rely upon the material already produced to the Court if it wishes to do so and then would only incur the additional expenditure of updating that information to explain what has happened in the conduct of the arbitration proceedings.
58. So, the Court can see no reason to depart from the modern practice of dismissing, rather than staying, the Application.

Conclusion

59. Accordingly, the Jurats unanimously decided to dismiss the Application. The Deputy-Bailiff will sit alone to hear any application for costs; he points out that costs normally follow the event although Advocate Greenfield has indicated there may be an argument as to whether costs should be awarded on a basis other than the normal recoverable costs basis and Advocate Walder reserved the States' position until it had seen the reasons for the Jurats' decision.