IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 215 OF 2016 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND

IN THE MATTER OF BONA FILM GROUP LIMITED

Appearances:	**Mr. Stephen Moverley Smith Q.C. instructed by Mr. Lachlan Greig of Harneys for Bona Film Group Limited** **Mr. Robert Levy Q.C. instructed by Mr. Rupert Bell and Mr. Patrick McConvey of Walkers for Blackwell Partners LLC-Series A, Crown Managed Accounts SPC acting for and on behalf of Crown /Maso Segregated Portfolio and Maso Capital Investments Limited**
Before:	**The Hon. Mr. Justice Robin McMillan, In Chambers**
Heard:	**9th, 10th and 13th February 2017**
Draft Judgment Circulated:	**9 Mar 2017**
Judgment Delivered:	**13 Mar 2017**

HEADNOTE

Contingent creditors and section 238 of the Companies Law (2016 Revision) – Circumstances in which a debt is not bona fide disputed on substantial grounds - Factors giving rise to a prima facie case for the appointment of provisional liquidators.

REASONS FOR JUDGMENT

Introduction

1. This matter arises from an application by Maso Capital Investments Limited, Blackwell Partners LLC-Series A and Crown Managed Accounts SPC acting for and on behalf of Crown/Maso Segregated Portfolio ("the Petitioners") who have sought the appointment of Joint Provisional Liquidators ("JPLs") in respect of Bona Film Group Limited ("the Company").

2. In response the Company has bought a strike out application of the Petitioner's winding up Petition in relation to the Company on the grounds that it is just and equitable for the Company to be wound up.

3. The strike out application alleges that the Petitioners have no realistic prospect of success that the Company should be wound up, that the Petition is an abuse of the process of the Court, and that the procedure may prejudice, embarrass or delay the fair trial of a pending Fair Value Claim between the parties.

4. The background is that the Petitioners are former shareholders in the Company. The Company merged in March 2016, with the Petitioners dissenting.

5. The Petitioners have been paid US$11.1 million for their shares which the Company claims is a fair valuation of their interest, and in due course this issue will be considered by the Court by means of a trial pursuant to section 238 of the Companies Law.

6. On 13 February 2017, following extensive legal submissions and the consideration of a substantial amount of evidence, this Court made an Order for the appointment of JPLs, Mr. Michael Edward George Saville and Mr. David Bennet. Furthermore, the Court refused the strike out application to which reference has been made above.

The Petition

7. The Petition sets out in paragraph 2 that the Company was the ultimate holding company in a wider Group structure which has been described in U.S. regulatory documents as being one of the leading vertically integrated film companies in the People's Republic of China ("PRC").

8. According to paragraphs 4 and 5, the key businesses of the Company Group were operated by certain subsidiaries.

9. Then, as stated in paragraph 7, on 4 March 2016 a merger was effected between the Company and Mountain Tiger Limited ("Mountain Tiger"). In effect, ownership passed to a Parent Company, Mountain Tiger International Limited ("the Parent").

10. What is to be noted is the alleged circular nature of the transaction. At paragraph 8 it is stated that the new Parent was beneficially owned by a group of persons and companies which included Mr. Dong Yu who is the founder, chairman of the board of directors and chief executive of the Company in these present proceedings.

11. The Petitioners go on to allege that the Company has failed properly to respond to concerns raised by them with respect to a suspected dissipation of assets. They contend at paragraph 12 of the Petition that the Company has made a conscious and deliberate decision to attempt to put assets out of the Company's own reach *"such that any Judgment obtained by the Petitioners would be worthless"*. They also allege that the Company has been almost entirely disengaged from the Fair Value Petition proceedings, an important issue to which the Court will later return.

12. There appear to have been serious defaults in the Company's documentary discovery processes and ultimately a failure to put forward any expert evidence, resulting in its leave to do so being revoked in relation to the pending Fair Value Petition.

13. In all the circumstances the Petitioners state at paragraph 17 that as a result of the Fair Value Petition the Petitioners are presently contingent creditors of the Company and

are entitled to present the winding up Petition pursuant to section 94 (1) (b) of the Companies Law.

14. Meanwhile the Petitioners assert that the Company is unable to put forward "*a positive case*" at the trial of the Fair Value Petition as to the valuation of the Dissenters' Shares, whereas the Petitioners have already served the expert evidence upon which they will be relying at the trial, valuing their shares at US$38,891,782.16 more than they have already received from the Company.

15. Finally at paragraph 21 the Petitioners allege that the Company's conduct has had the effect of leaving the Company as a potentially empty shell against which enforcement will be impossible.

The Directions Proceedings

16. It is of some concern to the Court that over a period of time the Company has failed to comply with the Court's Directions. The first Directions Order, in relation to adducing expert evidence, was dated 8 August 2016. This was a Consent Order. Then having failed to comply the Company became the subject of an "*unless Order*". It is as a result of its failure to comply with that subsequent Order that the Company is now unable to adduce any evidence at trial at all. The Court made clear at the time that the purpose of the "*unless Order*" was in fact to encourage the Company towards compliance, as

distinct from deterring the Company. The Court has also on several occasions urged the Company to provide as much transparency as possible as to its financial circumstances, so as to assuage and indeed even to negate the concerns which the Petitioners have expressed to the Court in that regard on an ongoing basis.

The Evidence

17. The evidence in these proceedings has been voluminous, and for the purpose of setting out these Reasons the Court does not propose to recount it at length.

18. Mr. Manoj Jain is the Chief Investment Officer of Maso Capital Partners Limited and he has provided evidence for the Petitioners. In his Second Affidavit he asserts at paragraph 10 that the only asset of value in the relevant Group has being transferred into a PRC Company.

19. Mr. Jain describes the highly complex structure of the Group Companies. He states at paragraph 24 (d) that the Company has become a *"wholly owned subsidiary of the Parent"*.

20. At paragraph 27 Mr. Jain states that the members of the Buyer Group who owned shares in the Company prior to the merger beneficially owned approximately 58.8% of the total issued and outstanding shares of the Company entitled to vote, making approval of the merger a foregone conclusion.

21. Mr. Jain proceeds to address the Directions chronology and the difficulties which have arisen, and he makes complaint as to perceived delays in scheduling the Fair Value hearing. He expresses the Petitioners' concerns as to dissipation of assets in the meantime and also as to alleged Company mismanagement and misconduct.

22. In Mr. Jain's Third Affidavit he replies to Mr. Qi's First Affirmation, expressing concern at paragraph 9 that consideration for a share transfer agreement could simply be amended or waived, leading to the loss of value of the Company's transferred subsidiary share assets. At paragraph 10 he questions a transaction between, ultimately, the same people. At paragraph 19 he described the Buyer Group as paying money to itself, and he disputes whether Bona International Film Group Limited ("Bona International") as a subsidiary of the Company has in fact a *"cash asset"* remaining which is still available to the Company.

23. In Mr. Jain's Fourth Affidavit he further analyses the complex nature of these underlying corporate transactions, again expressing concern at paragraph 7 (d) that even if the shares are to be returned to Bona International in the event of actual nonpayment, that might not be productive in any event.

24. He concludes at paragraph 8 that full consideration may not flow to Bona International outside of the PRC and be available for distribution to the Company, and ultimately to the Company's creditors, including the Petitioners.

25. Mr. Jain at paragraph 22 points out that the Company now holds US$225 million in debt (the Company disputes this amount) and that it has little or no assets *"available"* to it.

26. Mr. Nicholas Zhi Qi of the Company states in his First Affirmation that he is the Chief Financial Officer of the Company.

27. He asserts at paragraph 5 that the Company fully intends to pay any judgment awarded against it in the ongoing section 238 proceedings, and that the Company is not deliberately transferring assets to avoid any judgment.

28. He states at paragraph 14 that the Company is not allowed to own the assets of the PRC Group, being itself incorporated in the Cayman Islands. The Company is however the 100% shareholder in a British Virgin Islands registered company Bona International, which in turn owns a British Virgin Islands Company which *"contracts"* with Companies in the PRC Group itself.

29. Mr. Qi affirms at paragraphs 19-22 that as a result of a recent transaction the amount received by Bona International will be approximately US$589 million. Mr. Qi then goes on to explain that payment is only permitted in tranches, and that the share transfers involved do not complete until 100% of the consideration is paid. If it is not all paid, then Bona International can cancel the share transfer agreement and will remain entitled to ownership of its own subsidiary, Beijing Bona New World Technology Co. Limited, which itself contracts with companies in the PRC Group.

30. Mr Qi explains that the Company's failure to comply with the disclosure exercise was due to pressure of work and that the Company was not equipped to cope. He states that the section 238 proceedings will be defended, however.

31. In Mr. Qi's Second Affirmation he highlights at paragraph 12 the day to day regulatory complications of running a substantial business in the PRC, and claims that the share structure criticized by the Petitioners is "*appropriate and necessary*".

32. At paragraph 13 he expresses confidence that regulatory approval will be given to move the consideration payable out of the PRC.

33. Finally, Mr. Qi states in paragraph 14 that on 3 January 2017 the first transfer, in accordance with the share transfer agreement, to Bona International took place.

34. At this point having referred in summary form only to this complex and tangled background, the Court shall now address the relevant issues of law and their application.

Are the Petitioners Contingent Creditors?

35. The Petitioners' central contention is first found in footnote 2, page 3 of their Skeleton Argument. They submit that the notion that the Company, unable to adduce any evidence, or to rely on more than a handful of documents, will successfully defend the entirety of the Petitioners' claim that their shares were worth US$49,987,521.76 is *"fanciful"*. While they accept that there is a possibility that the Petitioners may not recover the full amount of their claim, nonetheless they maintain that as against a party who cannot adduce any expert evidence and therefore cannot adduce a positive case, the notion that the Petitioners will not recover *"at least many millions of dollars"*, let alone CI$100 (being the minimum amount upon which a petition can be based if brought in reliance upon an unsatisfied statutory demand) is *"simply nonsense"*.

36. The Company on the other hand contends, for example in paragraph 11 of its Skeleton Argument, that unless and until it is determined at the trial of the Fair Value Claim in July 2017 that the Fair Value is more than the US$11.1 million which the Company has already paid, the Petitioners are not creditors of the Company. Therefore the

Petitioners would have no standing to bring the Petition for just and equitable relief in any capacity.

37. The Company proceeds to argue that a claimant with a disputed debt against a company in the present circumstances is not a creditor and thus has no locus to present a petition.

38. The Company develops the point further in paragraph 17 of its Skeleton Argument to submit that a claimant with a disputed debt against the company is not a "*contingent creditor*" properly so called: a contingent creditor is a creditor to whom the Company has an obligation which is contingent on a future event.

39. In this context the Company relies, inter alia, upon *Re Wilson Market Research Pt Ltd.* (1996) 131 FL R361 at 367, 369-371 and 372, where it is stated that there is the ever-present danger of an "*unqualified claimant*" using the winding up procedure as a threat to force concessions from the company concerning a claimed debt.

40. The Company likewise draws to the Court's attention the proposition that the winding up procedure is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions or be used to put inappropriate pressure on the Company.

41. As the Court understands it, the leading expression of the applicable relevant principle is to be found in *Parmalat Capital Finance Ltd and others v. Food Holdings Ltd I (In Liquidation) and another* [2009] I BCLC 274. In this Privy Council authority, on appeal from the Cayman Islands Court of Appeal, Lord Hoffman states at paragraph 9:

"If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute: see, for example, Brinds Ltd v. Offshore Oil NL (1985) 2BCC 98,916."

42. Accordingly the threshold question for this Court is whether there is an actual debt, or contingent debt, such that in the circumstances of this case it is not one which is bona fide disputed on substantial grounds.

43. In addressing these issues, the Petitioners reiterate at paragraph 53 of their Skeleton Argument that whilst Mr. Qi may say that the debt is disputed, his evidence discloses no grounds for the dispute nor for any finding there the alleged dispute is bona fide. Once again the Petitioners rely upon the fact that the Company is now debarred from

calling any evidence. The Company will be able to ask questions of the Petitioners' expert witness, but absent evidence, it cannot itself assert a positive case.

44. In light of the procedural history of this matter, which has been set out and discussed above, I agree with the Petitioners' central argument that the Company is unable to demonstrate that it contests the amount itself bona fide on substantial grounds , as distinct from grounds which are merely either nonexistent or of the most tenuous nature. The Company's failure to adduce evidence when it had ample opportunity to do so is strongly indicative of that conclusion.

45. The question which then remains to be decided in this context is whether the amount in issue also constitutes a contingent debt as a matter of law and fact.

46. The Petitioners rely, inter alia, upon *Stonegate Securities Ltd v. Gregory* [1980] Ch 578, where Buckley J explains at page 579 E-F that:

"...the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur; and a "prospective creditor" is a creditor in respect of a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events."

47. Bearing these dicta in mind, the Petitioners have previously submitted in paragraph 57 of their Skeleton Argument that there appears to be no authority for the Company's contention that a contingent creditor is a creditor to whom the Company has an extant obligation. Nonetheless, the Company draws to the attention of the Court the observation of Gleeson J in *Treadtel International PTY Ltd v. Cocco* [2016] NSWCA 360, where the learned Judge states at paragraph 58 that a contingent creditor and a prospective creditor will not be permitted to apply for a winding up "*unless there is an existing obligation of the Company*", which obligation can be viewed with a high degree of assurance as a source of financial liability. The Company's contention appears however to be inconsistent with Buckley J's characterization above, as being unduly narrow. The Court notes at this juncture that if the dictum of Gleason J were correct the Fair Value procedure in section 238 of the Companies Law in theory and in practice could be subject to abuse.

48. The Court would only add in this regard that in light of the unusual history of this matter the obligation in question of the Company may in any event have already become extant, even though it need not be necessarily be so in order to constitute a person or entity a contingent creditor.

49. In addition, in paragraph 60 of their Skeleton Argument the Petitioners argue that they are either contingent creditors, prospective creditors or creditors, and that it

would be wrong for someone who will unquestionably be liable to receive a substantial amount of money not to be considered a creditor.

50. The Petitioners further rely upon certain dicta of Scott J in *Re a Company (No 003028 of 1987*) (1988) BCLC 282, where the learned Judge states at page 294 D that a contingent creditor has, in his judgment, locus standi to present a petition. Scott J adds that whether the petition will succeed, and whether the petition is an abuse of process, will depend on the underlying facts and not upon a lack of status to present the petition.

51. Having reviewed and considered the various authorities presented to the Court, and having considered those authorities in light of the specific and unusual circumstances of this case, the Court prefers and accepts both the legal principles identified by the Petitioners and their application to the facts as they presently appear. Moreover in this regard the Court accepts and follows the guidance of Buckley J.

52. The Court finds that in law and in fact the Petitioners are contingent creditors of the Company and as previously indicated that the debt in question is not bona fide disputed on substantial grounds.

53. The Court will now proceed to consider whether the appointment of provisional liquidators is appropriate.

The Appointment of Provisional Liquidators

54. The Petitioners' application for the appointment of JPLs is made pursuant to section 104 of the Companies Law which relevantly states:

"104 (1) Subject to this section and any rules made under section 155, the court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the authority, on the grounds that -

(a) there is a prima facie case for making a winding up order, and

(b) the appointment of a provisional liquidator is necessary in order to-

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors".

55. The Petitioners state in paragraph 75 of their Skeleton Argument that they seek the appointment of JPLs specifically to prevent the dissipation or misuse of the Company's assets and to prevent mismanagement or misconduct on the part of the Company's directors.

56. Upon the basis that the Petitioners are contingent creditors, as the Court has now accepted, the Petitioners rely upon the following statement of Scott J in *Re a Company* at page 294 A-C:

"If the petitioner were a contingent creditor, the debt would not be immediately repayable, and in order to obtain a winding up the contingent creditor would have to show something in the affairs of the company to justify the apprehension that when the time for the repayment of the debt arrived, the company would be unable to repay, and that in those circumstances the company ought to be at once wound up."

57. Clearly in the context of section 104 the Court at this stage need not be satisfied that a winding up order will actually be made. Nonetheless, that aspect of Scott J's judgment which addresses the question of an apprehension that when the time for repayment of the debt arrives the Company would be unable to pay remains an aspect of significant weight both as a matter of law and as a matter of fact. In addition, the fact that a debt is not immediately payable is no impediment to the intervention of the Court.

58. The Petitioners allege a failure on the part of the Company to be transparent as to its financial position, a failure to engage in the disclosure process explicitly provided for, a failure to advance any positive case which disputes the share valuation put forward by the Petitioners, and a series of corporate transactions consistent with a *"stripping*

away" of the assets of the Group. In relation to these matters the Court accepts the validity of the Petitioners' concerns.

59. Accordingly the Petitioner's argue that they have shown sufficient circumstances and evidence to justify the apprehension which Scott J has succinctly described.

60. The Petitioners further rely upon the comment of Segal J in *In re Asia Strategic Capital Fund* [2015] 1 CILR N-4, where the learned Judge points out that it is not necessary to demonstrate that a winding up order will be granted: a prima facie case is established if the allegations made in the Petition for the appointment of the provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing. The Court has already indicated that it adopts this approach.

61. The Company furthermore properly submits that considerable care must be taken before making what is plainly a draconian order.

62. The Company also submits that either the Petition is based on the Company's insolvency and is justified by the non-payment of an undisputed debt, or there has to be some other, substantial reason why it is just and equitable to wind the Company up.

63. The Company asserts that it currently has approximately US$61 million in cash in a United States bank account, although in terms of formally adducing legally admissible evidence to that effect it has for whatever reason continually failed to do so.

64. The Company similarly asserts that Bona International also has the approximate equivalent of US$102 million in a United States bank account, and the Company claims that Bona International is entitled to receive a further approximately US$487 million under the share transfer agreement.

65. At paragraph 35 of its Skeleton Argument the Company contends that the stated apprehension as to dissipation is not based on evidence but on *"a crescendo of hyperbole"*.

66. The Company denies that it has a contemptuous attitude to the Court and maintains that there is no evidence that the Company's *"inability to comply"* with the disclosure orders was contemptuous or deliberate or that the Company has decided to ignore the Cayman Islands proceedings.

67. The Company contends at paragraphs 44 and 45 of its Skeleton Argument that as winding up is the exercise of a class right it should not be permitted where a petition is seeking a personal advantage or a personal benefit. However, taking into account the circumstances set out by the Petitioners and the actions and inactions complained of

the Court finds it difficult to give those circumstances and actions and inactions such a narrow and exclusive construction as the Company contends is appropriate. The Court refers once again to the concerns summarized in paragraph 58 of these Reasons and has found those concerns to be justified.

68. The Company also complains that a winding up petition must not be used as an instrument to put pressure on a company to settle or pay a disputed debt, but as this Court has already found the debt is not in any event bona fide disputed on substantial grounds.

69. Finally and importantly the Company draws to the attention of the Court the principle in *HMRC v. Rochdale Drinks Distributors Ltd* [2013] BCC 419, to the effect that the appointment of a provisional liquidator is a most serious step for a court to take. Rimer LJ states at paragraph 76, page 439:

"It is not an order to be made lightly and its making require the giving by the court of the most anxious consideration."

70. It should also be noted that Rimer LJ adds at paragraph 80, page 440 that the rule as to a debt being bona fide disputed on substantial grounds does not entitle a company to do no more than assert that it disputes the debt and then expect the petition to be struck out or, if the hearing is the substantive one, dismissed. The learned Judge

observes that it is not sufficient for the company *"merely to raise a cloud of objections"*.

71. The Court has taken into account both the evidence and the applicable principles of law and has carefully reminded itself that an order of the nature sought requires the most anxious consideration. The Court must also bear in mind the potential prejudice to the Company of granting the order and the potential prejudice to the Petitioners of not granting it. On this, occasion, the Court finds that the potential prejudice to the Petitioners outweighs that to the Company.

72. The Court concludes that the circumstances of this case do indeed create a justifiable apprehension of the kind that was succinctly described by Scott J.

73. Furthermore in light of the events which have taken place, the Court considers both that there is no realistic alternative remedy available to the Petitioners and that the Petitioners are not acting unreasonably in not pursuing such a remedy (see comment of Chadwick P *in Camulos Partners Offshore Limited v. Kathrein and Company [2010] I CILR 303* at paragraph 77).

Conclusion

74. Accordingly the Court finds that the Petitioners are contingent creditors, that the contingent debt is not bona fide disputed on substantial grounds, and that at least a prima facie case has been established for the appointment of provisional liquidators both to prevent the dissipation or misuse of the Company's assets and to prevent mismanagement or misconduct on the part of the Company's directors. Based upon the same reasoning, the Company's strike out application is refused.

Robin McMillan

The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court