Neutral Citation Number: **[2023] EWHC 2020 (Ch)**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST

Case No: CR-2021-00622

Courtroom No. 8

The Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Wednesday, 28th June 2023

Before:
CHIEF INSOLVENCY & COMPANIES COURT JUDGE BRIGGS

B E T W E E N:

LIBERTY COMMODITIES LTD

and

CITIBANK NA LONDON
WHITE OAK FINANCE EUROPE (non-levered) LTD
and
NPS 40 GP LTD

MR Choo-Choy KC, Marcus Haywood, Patrick Harty instructed by Mishcon de Reya LLP on behalf of Liberty Commodities Ltd
MR FISHER KC instructed by Baker McKenzie LLP on behalf of Citibank NA London
MS PETERS instructed by Taylor Wessing LLP on behalf of White Oak Finance Europe (non-levered) Ltd
MS PETRIE instructed by Bryan Cave Leighton Paisner LLP on behalf of NPS 40 GP Ltd

JUDGMENT
(Approved)

CHIEF ICC JUDGE BRIGGS:

1. Citibank, N.A., London Branch presented petitions in March 2021 to wind up three companies namely, Speciality Steel UK Limited ("SSUK"), Liberty MDR Treasury Company UK Ltd ("MDR"), and Liberty Commodities Limited ("LCL") (together the "Debtor Companies"). The Petitioner presented the petitions in its capacity as Note Trustee, on instruction of the custodian of certain "Credit Suisse Funds".

2. At the time the petitions were presented Parliament had imposed restrictions on winding up a company by bringing into force the Corporate Governance and Insolvency Act 2020, Schedule 10 (Schedule 10). The 2020 Act was supplemented by a practice direction. One of the effects of the 2020 Act and practice direction was that petitions could not be advertised until either there was an admission that the respondent company that it could not pay its debts regardless of the effect of coronavirus or the court determined that the coronavirus did not have an effect on the company's inability to pay its debts. Another effect was that the date of an order to compulsory wind up became the date of commencement of winding up by the court (section 129 of the Insolvency Act 1986). This altered the relation back period (section 127 of the 1986 Act).

3. In this case a preliminary hearing was heard on 10 and 11 May 2022. I handed down a reserved judgment on 7 June 2022 [2022] EWHC 1359 (Ch), finding that it was likely that winding up orders would be made in respect of the Debtor Companies. Directions were given for the petitions to be heard in open court with permission for the Petitioner to advertise.

4. The Debtor Companies disputed the debts claimed in the petitions on what they claimed were genuine and substantial grounds. A hearing was fixed for 28 June 2023 to decide the issues raised and was listed for three days.

5. The petitions presented against the Debtor Companies have not been advertised by the Petitioner.

6. The court was informed by the parties that an agreement has been reached between the Credit Suisse Funds and LCL, SSUK and MDR. The Petitioner sought to withdraw the petitions as no notice of intention to support under rule 7.13 of the Insolvency (England & Wales) Rules 2016 had been received.

7. Permission to withdraw was given by the court on 20 June 2023 in respect of the petitions presented against SSUK and MDR.

8. Two creditors had given notice of intention to support the petition presented against LCL. The first in time creditor and greatest in number is White Oak Commercial Finance Europe (Non-Levered) Limited ("White Oak"). Notice of intention was given on 16 December 2022. White Oak claims that LCL is indebted to it in the sum of US$190,444,699.30. The second in time is NPS (40GP) Limited ("NPS") whose notice of intention is dated 31 March 2023. NPS claims that LCL is indebted to it in the sum of £6,556,167.13.

9. The Petitioner asks the court for dismissal of the petition against LCL with no order as to costs.

10. On 27 June 2023 the court received a consent order signed by LCL, White Oak and NPS. The order provided that the application for dismissal be adjourned to be listed for 2 days after 19 September 2023. The consent order provided for the filing and service of evidence of fact but at the hearing today expert evidence was also contemplated.

11. Prior to the provision of the consent order, correspondence between Taylor Wessing LLP (acting for White Oak), Baker McKenzie LLP (acting for the Petitioner, Mishcon de Reya (acting for LCL), Norton Rose Fulbright LLP (also acting for LCL) and Bryan Cave Leighton Paisner LLP (acting for NPS) had ensued.

12. Taylor Wessing had written to Norton Rose Fulbright in April 2023 to inform it of the liability claimed by White Oak against LCL. Norton Rose Fulbright responded that LCL "will respond to any allegations in the context of the Petition to the extent it considers it appropriate to do so and to the extent permitted by the procedural timetable for those proceedings". That was not particularly helpful. Nevertheless, it made clear that it would oppose substitution of the petition.

13. On 19 June 2023, White Oak was informed, by letter of the same date, that the Petitioner had applied for the petition to be dismissed, following a confidential settlement with LCL.

14. Given the different positions of the parties, the multitude of claims, the nature of the correspondence, and the terms of the consent order, I determined that I should hear from the parties at the hearing already allocated for their dispute on 24 June 2023.

15. At the hearing the Petitioner invited the court to dismiss the petition against LCL, White Oak and NPS asked the court to make immediate orders for substitution, and LCL asked the court to agree the consent order directing a timetable to determine if LCL could raise a genuine and substantial dispute in respect of the debts claimed by White Oak and NPS.

The White Oak Claim

16. White Oak explains the basis for the debt said to be due and owing from LCL in its substitution application (filed on 19 June 2023) which is supported by a witness statement of Nicholas Moser, a partner at Taylor Wessing LLP, dated 26 June 2023. He states that:

> "In April 2020, White Oak Europe began to participate in the receivables purchase programme, which was pursuant to a Master Assignment Agreement entered into between White Oak Europe (as Purchaser) and GCUK dated 29 April 2020 (the "MAA")."

17. To summarise, a purchase deed for receivables had been entered into in October 2018 between Greensill Capital and LCL. There followed a master assignment agreement made in April 2020 between White Oak and Greensill Capital. The MAA provided White Oak with the right to enforce certain payment obligations that had various maturity dates. The maturity dates having passed, White Oak claim the sums due on pursuant to the payment obligations.

18. In his statement Mr Moser gives evidence that a notice of assignment was given in March 2021 and a demand made. He says that the detailed documentation demonstrates that the receivables were offered by Greensill Capital and accepted by White Oak who is now permitted to enforce the debt due as it stands in the shoes of Greensill Capital. His evidence is that:

> "While the Company had made vague assertions in correspondence that the debt is disputed, no particulars or evidence have been provided and the Company identified no valid basis on which any one of the debts comprising the total sums due can be genuinely disputed."

19. Mr Moser has exhibited a schedule of the debts said to be due. Three days prior to the hearing on 28 June 2023 Norton Rose Fulbright wrote a letter which purports to provide grounds for a dispute.

20. The 28 June letter sets out four grounds:

a. The debt is not due as there was an oral modification to the receivable finance documentation to the effect LCL need not be concerned with the terms of the agreements. In his statement dated 22 August 2022 Mr Gupta says that Mr Greensill informed him, contrary to the agreements, that finance provided by Greensill Capital was for a minimum of three years. This ignores the maturity dates. Mr Gupta says that Mr Greensill made certain oral representations such as: "you don't have to worry about the documents" and "the documents are irrelevant". Against this is professionally drawn finance documents that include an entire agreement clause and non-oral modification clause.
b. A modification to the agreements that a particular method of payment by White Oak for the receivables enables LCL to claim a set-off.
c. The payment obligation in the MAA is governed by the laws of the State of New York. Any dispute as to the construction of the MAA is to be decided in accordance with the laws of a foreign jurisdiction where expert evidence is required. It is said that the payment obligations are unenforceable or "do not exist".
d. There is insufficient evidence of a valid assignment.

21. In his submissions Mr Choo-Choy KC for LCL repeated the above arguments and expanded on the need for expert evidence to determine the issue of construction and the set-off argument. I agree that these arguments cannot be determined today.

The NPS Claim

22. NPS has not made a written application for substitution. The application has been made orally but Bryan Cave Leighton Paisner put LCL on notice of the application on 23 June 2023.

23. LCL entered a lease dated 21 October 2019 for the Second Floor of 40 Grosvenor Place, London, SW1. The lease gave rise to an obligation to pay basic rent, car park rent, insurance, utility charges and service charges. The debt relates to a failure to pay the basic rent and other charges that is charged at £3,115,134.50 per annum plus VAT. The rent

obligation commencement date was 19 February 2022, and it was submitted to the court that no basic rent has been paid.

24. LCL accepts that sums are due under the lease and have not been paid. It does not dispute a minimum of £1.3m is due and owing. It disputes the remainder of the sum claimed on the basis that NPS forfeited the lease on 8 April 2022. The issue of forfeiture is listed to be determined by a Chancery Master on 5 July 2023.

Law and procedure for substitution

25. Mr Choo-Choy argues that the court should now adjourn the hearing of the dismissal application made by the Petitioner pending the outcome of the substitution applications, which are disputed. He argues that evidence of fact needs to be filed and served, and expert evidence may be required to determine issues relating to the laws of New York. He argues that the time estimate for the return date of the substitution applications is 2 days plus court pre-reading.

26. I indicated to the parties prior to the hearing today that the usual court practice was to make an order for substitution and then give directions for the determination of any dispute the debtor company raises. Substitution first and deciding a dispute about standing later, I refer to as the "Substitution First, Standing Later" practice.

27. Mr Choo-Choy does not doubt the usual Substitution First, Standing Later practice exists but makes the understandable argument that as a matter of principle the court should not make an order for substitution before determining whether a party has standing to prosecute the petition (to use the language of Rule 7.17(2) of the Insolvency Rules (England & Wales) 2016). He relies on caselaw decided in Australia and other jurisdictions to support his submission as referred to in Applications to Wind Up Companies, French 4th Ed and McPherson & Keay, Law of Company Liquidation 5th Ed. He also relies on the language of Rule 7.17(2) and in particular the need for the court to have an opinion (again to use the language of to use the language of Rule 7.17(2)) that a creditor has a right to present a petition and wishes to prosecute it. I shall refer to a procedure where standing is decided before substitution as "Standing First, Substitution Later."

28. Ms Peters for White Oak and Ms Petrie on behalf of NPS argue that there should be no deviation from the Substitution First, Standing Later practice.

29. Mr Fisher KC, who was neutral on the substitution applications, confirmed to the court that the Substitution First, Standing Later practice has been in use since at least the beginning of his working life at the bar.

Determination

30. Rule 7.17 of the Insolvency Rules (England & Wales) 2016 (the "Rules") provides:

> "(1) This rule applies where the petitioner—
> (a) is subsequently found not to have been entitled to present the petition;
> (b) fails to give notice of the petition in accordance with rule 7.10;
> (c) consents to withdraw the petition, or to allow it to be dismissed, consents to an adjournment, or fails to appear in support of the petition when it is

> called on in court on the day originally fixed for the hearing, or on a day to which it is adjourned; or
> (d) appears, but does not apply for an order in the terms requested in the petition.
> (2) The court may, on such terms as it thinks just, substitute as petitioner—
> (a)a creditor or contributory who in its opinion would have a right to present a petition and who wishes to prosecute it…"

31. A policy emerges from a reading of Rule 7.17(1) (b)-(c) and Rule 7.17(2) that a petitioner must prosecute a petition following presentation. This policy is enforced by the judges sitting in the Companies List. I give two examples. First, it is not uncommon for a petitioner to fail to advertise by the first hearing. The practice of the court is to dismiss a petition for failure to prosecute unless there is good reason. Secondly, a petitioner may fail to attend the hearing of a petition. Similarly, the petition will be dismissed for failure to prosecute.

32. A creditor has the right to present a petition under section 122(1)(f) of the Insolvency Act 1986 ("IA 1986") where a debtor is unable to pay its debts as they fall due. Section 123 of the IA 1986 deems a debtor unable to pay its debts where a demand requiring the company to pay the sum due has been served and the company has for 3 weeks or more neglected to pay, secure or compound the debt, if an execution or other process issued on a judgment is returned unsatisfied or if it is proved to the satisfaction of the court that the debtor is unable to pay its debts as they fall due. A debtor company will also be deemed unable to pay its debts if it is proved that the value of the company's assets is less than the amount of its liabilities.

33. In *Perak Pioneer Limited v Petroliam Nasional BHD and others* [1986] AC 849 the question for the Privy Council was whether a petitioner could assign a debt that founded the petition after the petition was presented. The opinion of the board was that a post-petition assignment of a debt did not fetter the exercise of the court's discretion to permit substitution. The relevant rules did not limit substitution to a creditor who had the right to present a petition at the date of the original petition. At 857C Lord Brightman said:

> "…the discretionary jurisdiction to order substitution would clearly not be exercised in favour of a would-be petitioner who would not be able successfully to invoke the jurisdiction to make a winding up order."

34. In *Tokich Holdings Pty Ltd v Sheraton Constructions (NSW) Pty Ltd* (in liq) (2004) (unreported) the Supreme Court of New South Wales found that a time limit for determining winding up petitions is a policy embodied in the New South Wales Corporation Act: winding up proceedings must be determined within six months after commencement. In *Tokich Holdings* the six-month period had expired when an application for substitution was made. The judge had to determine whether the debt was disputed on genuine grounds. He found that the statutory demand was "invalid". The Judge explained [65] that in New South Wales "the only persons who may be substituted as applicants are those who might themselves have applied for an order that the company be wound up." At paragraph [67-68] White J said:

> "As a matter of power as distinct from discretion, the Court may order a company to be wound up in insolvency where the creditor's debt is disputed if the Court determines that the applicant has standing to bring the application. The Court has the power to determine the disputed question and if it determines that the applicant is a creditor it may make an order for winding up. (Re QBS Pty Ltd [1967] Qd R 218 per Gibbs J at 225; Community Development Pty Ltd v Engwirda Construction Co (1969)120 CLR 455… As a matter of discretion, where the debt and hence the applicant's standing is disputed, the Court will usually not entertain the application for winding up."

35. He expanded on the issue of standing at paragraph [71-72]:

> "There is some authority that a "creditor" in this context was a person who claims to be a creditor. (Re A Private Company at 127 citing Ex parte The Rydydefed Colliery Co, Glamorganshire Ltd (1858) 3 De G & J 80 at 84; 44 E.R 1199 at 1201). However the decision in Ex parte The Rydydefed Colliery Co was to stand over the petition until it was established at law whether the petitioner was a creditor or not. When Turner LJ said that a "creditor" in s 68 of the Joint Stock Companies Act 1856 (UK) meant a person who claimed to be a creditor, his Lordship was contrasting the plaintiff with a creditor whose debt is admitted. The case provides no support for the view that an insolvent company could be wound up on the petition of a creditor whose debt was disputed without that dispute being resolved. The preponderance of authority is that a company may not be wound up on the application of a person claiming to be a creditor whose debt is disputed unless that dispute is resolved."

36. The approach is summed up, in Applications to Wind Up Companies (French). The authors comment [7.573-4]:

> "A person who does not have standing to petition will not be substituted as petitioner. In particular, in Australia and New Zealand, it has been held that the court will not permit a disputed creditor to be substituted as petitioner…In one Australian case, it was held that a disputed creditor may be substituted as applicant for the winding up of a company if the court has found that the company is insolvent and adopts the view that it can order the company to be wound up without resolving the dispute about the petitioner's debt.1393 But in subsequent cases, Australian courts have maintained the rule that a creditor whose claimed debt is disputed on substantial grounds cannot even be substituted as petitioner."

37. In many ways the commentary begs the question. A debt is not disputed on substantial grounds until the court decides that it is so disputed.

38. The Bermudan Companies (Winding-Up) Rules 1982 relating to substitution of a creditor in Bermuda are not dissimilar to those that apply to England & Wales. Rule 27 provides that where a petitioner is found not to be entitled to present a petition or seeks to withdraw or does not seek a winding up order although entitled to one:

> "… the Court may, upon such terms as it may think just, substitute as petitioner any creditor or contributory who in the opinion of the Court would have a right to present a petition, and who is desirous of prosecuting the petition."

39. In *Gerova Financial Group Limited* [2012] SC (Bda) 18 Com (19 March 2012) it was submitted [47]:

> "that substitution could not take place unless the Court, in accordance with the terms of rule 27, found that the substitution applicant had standing to present a petition."

40. The Supreme Court of Bermuda adopted the Substitution First, Standing Later procedure:

> "In my judgment the Court has the power to grant substitution provisionally, pending a subsequent determination of any standing controversy which cannot conveniently be determined on the hearing of the substitution application. Rule 27 requires the Court to determine that a substituting creditor has "a right to present a petition" when making a substitution order, but the time for making the requisite determination can surely be extended…"

41. The Supreme Court acknowledged the commentary in McPherson & Keay, the Law of Company Liquidation, where Professor Keay explained [3.077] (repeated at 3-144 in 5th ed):

> "If the company wishes to object to a creditor being able to substitute, it must do so at the hearing of the application to substitute and not later at the hearing of the winding-up petition. Thus, once an order is made permitting substitution, the substituting creditor has standing to pursue the petition to wind up as the substituting creditor is taken to fall within the list of persons entitled to present a winding-up petition…."

42. I comment that this passage does not go on to explain that standing may be challenged at a later stage, nor that the court may make an order for substitution on "such terms as it thinks just".

43. The Supreme Court nevertheless found that it could use its procedural powers to substitute and then determine by extending time. It is notable that the court hearing *Gerova Financial Group Limited* had been provided with "copious amounts of evidence" and the hearing had "lasted a full-day". It is self-evident that the court will decide the issue of standing when it has the necessary evidence and is provided with sufficient time to hear submissions and make a decision. The approach taken by the Bermudan Supreme Court was, in my view, principled and pragmatic.

44. The courts of England & Wales rarely have the required evidence and is rarely provided with sufficient time to decide standing when an application for substitution is made. Most often an application for substitution is made orally in a busy winding up court where 200 or more petitions maybe heard in a morning followed by recission applications and petitions to

wind up partnerships. There is no time to hear a challenge to standing and, more often than not, the parties have not attempted to file and serve evidence. A pragmatic approach is adopted.

45. Consider the position where the original petitioning creditor informs the court (by words or conduct within the meaning of Rule 7.17) that it does not wish to prosecute the petition. Where there is no supporting creditor able and willing to be substituted, the petition should be dismissed as there is no basis for a class remedy. Where a dispute arises as to whether a supporting creditor has standing and the original petitioning creditor fails to prosecute the petition, the Standing First, Substitution Later approach will promote the policy to prosecute the petition. The pragmatic approach balances the competing policy that an applicant must have standing and the need to prosecute the petition. Substitution First, Standing Later is the practice adopted where the parties have failed to obtain an appropriate listing and/or failed to file and serve the necessary evidence.

46. I agree with Professor Keay, a debtor company should protest at the time the application for substitution is made even if it is not ready to provide full submissions as to why the substituting party has no standing to prosecute the petition. The debtor company should be able, however, to provide cogent reasoning why standing is disputed. The grounds for a dispute as to standing will vary from case to case. Common examples are a challenge to the debt on the ground it is unenforceable or has been satisfied, or where it is contended that there is a genuine crossclaim that equals or exceeds the debt claimed.

47. If the debtor company fails to object, the court will not be alert to a challenge. One outcome of the failure is that no directions will be given to determine a dispute. The failure to object at the substitution hearing will inevitably delay proceedings and extend the time the debtor company is subjected to the rigours of the winding up procedure, but the debtor company will not be excluded from raising a challenge to standing following substitution at the hearing of winding up.

48. Substitution First, Standing Later has been adopted by the courts of England & Wales for at least a century. In Applications to Wind Up Companies the authors refer to a case heard in 1894:

> "In England, in *Re Invicta Works Ltd*, the court did permit a disputed creditor to be substituted, but adjourned the petition for the substituted petitioner to produce evidence of his debt."

49. Vaughan Williams J explained in *Re Invicta Works Ltd* [1894] WN 94 that a winding up order may be made at the same time as substitution without an adjournment. That is an unlikely outcome in modern practice. The court will usually order substitution, amendment of the petition, re-service and re-verification before bringing the matter back to court. On the facts before Vaughan Williams J he ordered substitution and adjourned the hearing for evidence and a longer hearing as the standing of the substituted party was disputed.

50. The settled practice is accurately explained, in my view, by the authors of Practice and Procedure of the Companies Court (1997), General Editors Alan Boyle QC and Philip Marshall (9.68):

> "In the vast majority of cases, a supporting creditor or contributory will make his application for an order for substitution orally in open court on the hearing or adjourned hearing of the petition when it becomes clear that the present petitioner does not appear or is not pursuing his petition, has failed to advertise the petition or seeks an adjournment. No formal application need be issued. Where more than one supporting creditor appears and seeks substitution, the court will usually substitute as petitioner the creditor claiming the largest undisputed debt. Where there is only one supporting creditor and the petitioner does not pursue the petition, the court will not refuse substitution merely because the company contends that the alleged debt of the applicant for substitution is disputed: in such cases, the court will usually order substitution and give directions for the filing of evidence."

51. Westlaw (Practical Law UK Practice Note 0-618-3418) says much the same thing:

> "If the debtor company objects to the creditor being substituted as petitioning creditor, it should make those arguments when the court hears the substitution application, rather than after substitution at the adjourned hearing of the actual petition. Arguments about whether the debtor company has a valid dispute about the debt claimed by the substituted creditor, should be dealt with at the adjourned hearing of the winding-up petition and not at the hearing of the application for substitution.

52. The adjourned hearing is a hearing directed by the court for the determination of the dispute when the court may make a winding up order if the dispute is not genuine and/or substantial or where the court is not satisfied that a cross-claim exists or is not satisfied that the sum claimed in the cross-claim is equal or exceeds the petition debt.

53. Returning to the facts of this case, Mr Choo-Choy has provided cogent argument to satisfy me that there is a dispute in respect of the White Oak debt, and that the dispute requires time to reflect before making a determination. That said, unlike the facts in *Gerova Financial Group Limited* the parties have not come to this hearing equipped with evidence to support their respective positions and are not ready to provide full submissions even though the court has time. If White Oak was the only applicant for substitution, I would make an order for substitution and give directions for evidence and direct a final hearing.

54. LCL are unable to raise a cogent or *prima facie* argument to support a dispute in respect of the debt claimed by NPS. Exercising my discretion, and having in mind the policy that a petition needs to be prosecuted, I shall order substitution in favour of NPS, and make consequential orders for amendment, re-service and reverification in the ordinary way. This is not opposed by White Oak.

> [Postscript: White Oak withdrew its application for substitution. White Oak stated that the withdrawal of the application was motivated by the realisation that the relation-back period did not apply owing to the provisions of the 2020 Act. Withdrawal was not made due to the arguments raised by LCL in respect of the debt claimed.]

End of Judgment

Transcript from a recording by Ubiqus
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Ubiqus hereby certify that the above is an accurate and complete record of the proceedings or part thereof