



# Getting Back on the Front Foot

## Applications to Restrain Presentation and Advertisement of Winding Up Petitions

Thomas Ames

# Overview

- Scenarios where solvent client faces WUP
- Impact of presentation/advertisement
- Procedure/practicalities of applications to restrain
- Case law
- Making the application
- Costs including third party costs orders

# Scenarios where a Client could face a WUP

- Petition is ultimate tool for creditors
- Some creditors use the WUP unscrupulously – opportunity to put pressure
- Common situations where WUP should not be presented:
  - Debt is disputed (Creditor should make Part 7 Claim instead)
  - Client has cross-claim (Creditor should make Part 7 Claim instead)
  - Serious procedural fault

# The Impact of the Presentation/Advertisement of a WUP

- Client vulnerable after presentation and advertisement - petition now in a block list where winding up order could be easily made
- Move quickly after statutory demand/petition is intimated
- After sealed petition is served on a company, waiting period of 7 days before advertisement – r.7.10(4) Insolvency Rules 2016
- Vital period owing to impact of advertisement in the Gazette
- Two serious impacts of advertisement:
  - Company's bank account is frozen (related to s.127 IA 1986) affecting company's ability to trade
  - Reputational damage (clients, landlord etc.)

# Procedure: Making the Application

- Act fast - 7 days after service petitioner can advertise (r.7.10(4) IR 2016)
- Insolvency Act Application Notice – Form IAA
- Comply with details set out in r.1.35 IR 2016 (Form IAA assists)
- Support the Application Notice with CPR-compliant statement
- Certificate of Urgency if in interim list – reasons and time estimate
- r.7.24 IR 2016:
  - Application to restrain presentation to court having jurisdiction to wind up
  - Application to restrain advertisement to court where petition is pending
- Include request for petition to be dismissed if appropriate

# What you are trying to show: Disputing the Debt

- *Enfield Highway Development Limited v Park Estate Holdings* [2025] EWHC 29 (Ch) for overview
- *Angel Group v British Gas Trading Ltd* [2012] EWHC 2702 (Ch) for core principles
  - Advance “in good faith a substantial dispute as to entirety of petition debt” (honestly advanced and more than bare assertion)
  - Dispute not “substantial” if it has no rational prospect of success
  - Why? Companies Court practice as it is aware of effect of petitions on companies
  - Similar consideration of evidence as in summary judgment

# What you are trying to show: Disputing the Debt

- Relatively low threshold – *Tallington Lakes*
- Court will be alert to “cloud of objections” – *Angel Group*
  - Court will examine evidence in detail if appropriate and be alert to debtors kicking up dust to claim a dispute exists which requires cross-examination
  - Consider settlement rather than incur the costs of making the application if necessary
  - So fewer, better arguments

# What you are trying to show: Cross-Claims and Procedural Defects

- Should be “genuine” cross claim which is “one of substance” - *Re Bayoil SA* [1999] 1 BCLC 62
  - Set off petition debt/deny status of petitioner as creditor
  - Value greater than petition debt, or at least brings petition debt under £750
  - Be sure to evidence value of cross-claim surely
- Consider also procedural defects which amount to abuse of process
  - Eg. client in group of companies and wrong company has been named



# The Application Itself

- Brief your representative on what the other side may say in relation to debt or cross-claim
- Be alive to procedural defects/abuse of process:
  - Eg. Undue pressure by petitioner providing sealed petition to commercial partners of debtor
  - Abuse of process
  - Abuse of principle that the winding up process should not be used for debt-collection (*Re a Company* [1983] BCLC 492)
  - Class remedy
- In applications to restrain advertisement – push for dismissal

# Costs and 3<sup>rd</sup> Party Costs Orders

- Seek costs on indemnity basis - very likely if successful owing to abuse of process (*Invenia Technical Computing Corp v Hudson* [2024] EWHC 1302 (Ch))
- Consider 3<sup>rd</sup> party costs order against director of petitioner
  - Useful where petitioner's financial position is uncertain
  - Include that 3<sup>rd</sup> party on the IAA application form and a request that they be joined for the purposes of costs
  - Costs order can be made against petitioner at hearing then separate costs hearing if needed
  - Additional hearing likely so consider costs risk for your client

# Costs and 3<sup>rd</sup> Party Costs Orders

- s.51(1) Senior Courts Act 1981 – costs are in discretion of court
- CPR 46.2 - 3<sup>rd</sup> party should be added for purposes of costs only and be given reasonably opportunity to attend costs hearing
- Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39:
  - Ultimately question is whether just in all the circumstances
  - Generally discretion not exercised against pure funders
  - Where non-party funds and then controls or benefits from proceedings, justice will ordinarily require they pay
  - A non-party funding insolvency company's proceedings for their financial benefit should be liable
- Key question: was director seeking to benefit?

Any Questions?



# Don't be too hasty?

## The risks of an expedited bankruptcy petition

Chris Dunk

# Context – ss.267 and 268 IA 1986

- s.267(2)(c) *“a creditor’s petition may be presented to the court in respect of a debt or debts only if...the debt...is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay”*
- s.268(1)(a) *“a debtor appears unable to pay a debt if, but only if, the debt is payable immediately and either... the petitioning creditor... has served on the debtor a demand in the prescribed form...[and] at least 3 weeks have elapsed and the demand has neither been complied with or set aside”*

# s.270 IA 1986

## ***Expedited petition***

*270 In the case of a creditor's petition presented wholly or partly in respect of a debt which is the subject of a statutory demand under section 268, the petition may be presented before the end of the 3-week period there mentioned if there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during that period and the petition contains a statement to that effect.*

# Procedure

- Must contain s.270 statement
- Permission not required\*
- Statutory demand must have been served: *Wehmeyer v Wehmeyer* [2001] BPIR 548
- Expedited petition may be presented even where extant application to set aside demand: *In re a Debtor* (No.22 of 1993) [1994] 1 WLR 46
- No power to order bankruptcy until at least 3 weeks after demand: s.271(2)



# So what?

## Risks

- Lack of case law
- Petition must\* be dismissed if no serious possibility that debtor's property would be significantly diminished – lack of jurisdiction

# Case study

- Debt under capped personal guarantee (£64.5m)
- Statutory demand dated 27 March 2024 served 28 March
- Petition filed on 5 April – contained s.270 statement - plus application to be heard (and issued) on expedited basis
- Court issued petition on 16 April
- Petition served on D 19 April
- 22 April D's solicitors confirmed agreement to expedited hearing
- Breathing space moratorium 27 June
- 11 September D filed notice of opposition
- Petition then transferred to local BPC centre
- Judgment 7 February 2025

# “...serious possibility...”

- Objective consideration of the facts that were or reasonably could have been available to a creditor in the position of the petitioning creditor at the date of presentation
- Was there a serious possibility that the debtor’s property or its value would be significantly diminished during the relevant three-week period?
- “*Possibility*” – objectively verifiable state of affairs; forward-looking
- “*Serious*” – proper evidential foundation

# Intention

- No requirement for petitioner to prove any intention, desire or motive on part of debtor under section 270.
- Relevant but not necessary.

# Risk management and tactics

- Lack of case law
- Petition must\* be dismissed if no serious possibility that debtor's property would be significantly diminished – lack of jurisdiction
- Expedited petition required?
- Consider coupling with other remedies
- Consider having point dealt with in early hearing
- (type and quality of) evidence

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