

BERMUDA SUPREME COURT

In The Matter Of Gerova Financial Group Limited 2011 Companies (Winding-Up) Commercial Court No. 369 [Original Location: Sc Vol. 76 P. 264], [2012] Sc (Bda) 18 Com (19 March 2012)

COMPANIES - WINDING UP PETITION -
STATUTORY DEMAND - DEBT COLLECTION

In this case the Court re-visited the well-travelled ground of the use of insolvency procedures as a method of debt-collection. The case involved, *inter alia*, the withdrawal of a winding up petition and consequential arguments on costs.

On the juxtaposition of insolvency law and commercial debt collection, the Court held: “...in my judgment there can be no impropriety in threatening or bringing winding-up proceedings where a company fails within a reasonable time to pay what reasonably appears to the unpaid creditor to be an undisputed debt”.

The Court cited the right of access to the Court under the Constitution and the costs of a writ action “*against offshore companies in a highly internationalized commercial environment*” and concluded: “*it can hardly be abusive to threaten or commence winding-up proceedings in the hope that one’s debt will be paid more inexpensively and expeditiously than by other enforcement means*”.

At the same time the Court emphasised that: “*What is and will likely always be recognised as abusive is the actual or threatened presentation of a petition based on a debt which is in fact disputed in good faith on substantial grounds*”.

The Judge (Kawaley J) also cautioned would-be petitioners that it may be wise for petitions to be forecast: “*...it seems to me that in most cases where a petitioning creditor has a comparatively modest presently due debt and the debtor company is not*

already involved in winding-up proceedings, one would expect some demand for payment to be made (coupled with a warning that winding-up proceedings may be commenced) before a petition is presented. Failure to take such a step could be found to be unreasonable because of the potentially draconian consequences of winding-up proceedings, in terms of both commercial damage and legal costs”.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.