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OFFSHORE CASES

JULY 2012

BERMUDA

SUPREME COURT

In the Matter of Gerova Financial Group
[2012] SC (Bda) 35 Com (6 July 2012)

COMPANIES - WINDING UP PETITION – INSOLVENCY - NON-ASSIGNMENT CLAUSE - COLLATERAL PURPOSE

This case concerned the winding up petition of the named Company, which was sought by one of its creditors (Maxim). In March of this year the Supreme Court had held that Maxim had standing to petition. The Company argued that Maxim's proceedings were "tainted by improper motives". Further, much of the Company's argument was dependent upon the fact that the other creditors supported their motion; that the application for winding up should be refused. The Petitioner sought a winding up order on the basis that the Company is insolvent on a cash-flow and balance-sheet basis and that as an unpaid creditor is entitled to a winding up order as of right.

It was held that the Petitioner was entitled to an order that the Company be wound up, but solely on the basis that the Company was unable to pay Maxim's debt, which was due and payable and it gave the Company time to secure the petition debt.

The Court firstly considered the three reasons why the petition should be dismissed, as argued by the Company: 1) because the Company has a cross-claim based on breach by Maxim of a non-assignment clause; 2) because Maxim lacked sufficient interest in the proceeding having assigned its claim to another entity; and 3) because the proceedings are being pursued for a collateral purpose. With regard to the breach of the non-assignment agreement, the Court did not find the argument extensive enough to dismiss the petition. In relation to the argument of sufficient interest, the Court found that Maxim did in fact have sufficient interest in the proceedings as they were an unpaid creditor with a presently due debt. Additionally, on the collateral purpose argument, the Court concluded that there was circumstantial evidence which suggested that the Petitioner was acting for an improper purpose. When dealing with such allegations, the Court adopted an analogy with the application of the "clean hands doctrine" in cases where injunctive relief is sought. It held that the Petitioner should not be afforded relief which goes beyond the scope of the petition and "the overt standing upon which the Petitioner relies" which was the non payment of a debt due to the Petitioner.

Further to the above, the Court declined to make findings as to balance sheet insolvency without any expert evidence. It also declined to make an order on the basis of the loss of substratum issues raised by the Creditors indicating that it was usually the shareholders who raise such complaints and not creditors. The Court took into account the fact that some of the creditors opposed the petition. The Court further held that a payment under pressure of legal proceedings by the Company to Maxim would not constitute a fraudulent preference.

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