IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD: 260 OF 2023 (MRHCJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF GLOBAL-IP CAYMAN

IN OPEN COURT

Appearances	**Mr. Christian La-Roda Thomas and Ms Tiana Ritchie of Maples for the Petitioner** **Mr. James Clifford and Mr. Max Galt of Ogier for the Company**
Hearing Date	**21 November 2023**
Draft Circulated	**2 February 2024**
Judgement handed Down	**7 February 2024**

HEADNOTE

Company Law - compulsory winding up - grounds for winding up - inability to pay debts - petition defended on ground that the debt is genuinely disputed on substantial grounds - arbitration clause applicable to matters in dispute - practice of court to dismiss petition in favour of arbitration if debt substantially and genuinely disputed - court may examine evidence to determine threshold issue whether dispute has reasonable prospect of success

Company Law - compulsory winding up - assignment of contract - whether assignment to petitioner effective - whether petitioner has standing to present the petition.

JUDGMENT

Introduction

1. This is the decision on the petition to wind up Global-IP Cayman (the "Company") presented on 4 September 2023 by the Petitioner, Avanti Space Limited ("ASL"), on the ground that the Company cannot pay its debts as they fall due.

Background

2. Avanti Communications Group Plc ("ACG") is the parent company of the Avanti Communications Global Group (the "Avanti Global Group") which is a Ka-Band Satellite operator for data communications and broadband operating five geostationary satellites. ACG entered into an agreement with the Company on 24 May 2018 under which it was agreed that ACG would provide certain satellite services related to ACG's satellites to the Company (the "Services Agreement") in exchange for certain charges and payments. The Services Agreement was subsequently amended by the parties on 17 April 2019.

3. Under the Services Agreement as amended, ACG undertook, first, to produce and deliver to the Company a technical report addressing, among other things, the re-positioning of ACG's satellite, HYLAS 1, to an orbital slot in space known as 18W and then to re-position HYLAS 1 into 18W and hold that position for the Company for 90 days, which was a requisite of bringing the Company's satellite network into use in that location. ACG also undertook to prepare and submit the relevant notification to the International Telecommunication Union ("ITU") to bring into use ("BIU") the Company's/Norway satellite network at 18W and obtain the necessary permissions from the UK Space Agency and the UK Office of Communications for the Company's satellite, GiSAT-1.

4. These services were all completed by 11 September 2019.

5. For the services provided by ACG, the Company agreed to pay the sum of $9 million in a series of "payment milestones" as follows:

   (i) A payment of US$1 million upon delivery of the Technical Report;
   (ii) A payment of US$750 thousand on arrival of HYLAS 1 at 18W;
   (iii) A payment of US$750 thousand on completion of the ninety (90) day period after the *"bringing into use"* date and
   (iv) Deferred payments of US$6.5 million, being four (4) payments of $1million payable on 15 March in each year from 2020 to 2023 and two (2) payments of $1.25 million, each falling due on 15 March 2024 and 2025 respectively.

6. agreement provided for the Company to pay the sums due in full without deduction, set off or counterclaim for on account of any taxes, levies, import duties, charges, fees and withholdings of any nature and provides for default interest to be paid on sums which remain unpaid from the date they fall due until they are paid.

7. On 13 April 2022, as part of a corporate restructuring, ACG assigned all its rights under the Service Agreement to ASL. ASL is satellite technology services provider which operates across Europe, the Middle East and Africa. It is part of the Avanti Global Group and was an indirect subsidiary of ACG up until the restructuring, after which it became an indirect subsidiary of Plate 4 Bidco Limited, the holding company for the Avanti Global Group.

8. The assignment was made pursuant to clause 20.1 of the Services Agreement which provided that either party may assign its rights to any affiliate provided that the assignee has expressly assumed all of the obligations of the assignor party and all terms and conditions applicable to such party under the Services Agreement. If the assignor were ACG, clause 20.1 required that the assignee have sufficient financial resources or funding and technical capability and know-how to fulfil ACG's obligations under the Services Agreement.

9. The Company was notified of the assignment on the same day.

10. Payments were made under the Services Agreement as and when they fell due under the payment schedule up until 15 March 2023 when the Company failed to pay the sum of $1 million which fell due. On 21 March 2023, ASL sent an email to the Company attaching an invoice for the sum due and requesting confirmation of when it would be paid. On 26 July 2023, following communications with the Company's majority shareholder, Bronzelink Holdings Limited ("Bronzelink"), the Petitioner's representative travelled to Hong Kong to discuss payment of outstanding sum. Bronzelink was unable to confirm that payment of the sum due would be made immediately or when it would be paid, if at all.

11. On 3 August 2023, the Petitioner served a statutory demand (the "Statutory Demand") on the Company's registered office. The Statutory Demand demanded payment in the amount of US$1,032,724.85, being (i) the outstanding sum of US$1,000,000 which fell due on 15 March 2023 and (ii) default interest calculated up to 18 July 2023.

12. The 21-day period for satisfying the Statutory Demand expired on 24 August 2023. The Company failed to pay the sum demanded within the 21 days or at all.

The Petitioner's Position

13. ASL now seeks an Order for the winding up of the Company pursuant to section 92(d) of the **Companies Act** on the ground that the Company is unable to pay its debts as they fall due pursuant to section 93 (a) in circumstances where the Company failed to comply with the Statutory Demand and the debt is not disputed.

The Company's Position

14. The Services Agreement provided at clause 7.1 that the Company and ACG make *"all reasonable efforts*" to define mutually agreed conditions that would enable the Company to grant ACG the rights to operate its satellite at 18 W as well, these conditions to be set out in a Schedule 4. If both networks were able to operate out of the same orbital slot, then ACG would discount certain sums due to it under the Services Agreement. The Company's position is that that ACG breached its obligation to *"make all reasonable efforts"* to agree these conditions. The Company contends that, had these conditions been agreed, the Company would have benefitted from the discount which, once applied, would have erased the balances which remained due to ASL at 15 March 2023.

15. Further and in the alternative, the Company contends that ASL does not have standing to bring the petition because the purported assignment of the Services Agreement to ASL was ineffective.

The Law
Substantial Dispute

16. Although the Company's written submissions suggest that the issue for resolution is whether the debt is substantially and genuinely disputed, it appears to me in light of the allegation of breach, that the real issue for resolution is whether the Company has a genuine and substantial cross-claim against ASL which exceeds the petition debt.

17. Notwithstanding my view of the real issue before me for resolution, I start with a survey of the law by reviewing the principles applicable when a petition is defended on the ground that there is a substantial dispute as to the debt as many of the judicial statements as to the practice of the Court where a petition is challenged are equally applicable.

18. In *Parmalat Capital Finance Limited v. Food Holdings Limited and Dairy Holdings Limited* [2008 CILR 202] an appeal to the Privy Council from the Cayman Islands Court of Appeal, Lord Hoffmann observed at [9] that,

> *"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 N.L."

19. The principle was reaffirmed by the Court of Appeal in *Camulos Partners Offshore Limited v Kathrein and Company* [2010 (1) CILR 303], Chadwick P citing Lord Hoffmann's dictum at [61] of the judgment.

20. The *Parmalat* principle was more recently restated by this Court in *Re Primus Investments Fund, LP and Mayer Investments Fund L.P* (Unrep.16 June 2020) by Parker J. In that case, the learned Judge undertook a substantial and helpful review of the authorities, including the decision of Vos JA in *In Re GFN* [2009] CILR 650 (CICA) in which the learned Judge of Appeal cited the oft repeated statement of Oliver LJ in *Re Claybridge Shipping* [1997] 1 BCLC 572,579 that:

"....the court must... remain flexible in its approach... it ought not, in my judgment, to be an inflexible rule that Companies Court should never take upon itself the burden of determining the matter on the hearing of the petition. It does so in petitions on the just and equitable ground, and it is only too easy for an unwilling debtor to raise cloud of objections on affidavits and then to claim that, because a dispute of fact cannot be decided without cross-examination, the petition should not be heard at all but the matter should be left to be determined in some other proceedings... I think that [the rule] ought not to be assumed to be inflexible and to preclude the Companies Court from determining the issue in an appropriate case... The court must, I think, reserve to itself the right to determine disputes - even, perhaps in some cases, substantial disputes - where this can be done without undue inconvenience and where the position of the company... is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether".

21. Parker J adopted the following summary of the relevant principles by Vos JA at [94] of *Re GFN:*

(a) A person with a good arguable case that a debt is due and owing to him from the company may present a petition to wind up as a creditor under the Companies Law.

(b) The normal rule of practice is that the court will dismiss or stay a petition in circumstances where there is a bona fide and substantial dispute as to the existence of the debt upon which the petition is based.

(c) In an appropriate case, however, the winding up court can refuse to dismiss or stay the petition and can determine the question of the disputed debt in the petition itself.

(d) Appropriate cases include those where the court doubts that the debt is actually disputed bona fide on substantial grounds, or where the creditor if he established his debt would otherwise lose his remedy altogether or where other injustice might result.

(e) Where the winding up court decides to hear a petition based on a disputed debt it will only make a winding up order on the grounds that the company is unable to pay its debts or that it is just and equitable to wind up, having determined that the petitioner is, on a balance of probabilities, a creditor of the company."

Genuine and Serious Cross-Claim

22. It is also not controversial that, where it can be shown that an alleged cross-claim is genuine and based on substantial grounds, the Court, by analogy with the disputed debt, will dismiss the petition.

23. As Sanderson J noted in Quarry *Products v Austin International Incorporated* [2000] CILR 265, in which he cited the observation of Lord Edmund-Davies in *Malayan Plant (Pte) Ltd. v Moscow Narodny Bank Ltd.,*

"There is no distinction in principle between a cross-claim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground on which to reject a winding up petition."

24. In *LDX Intl. Group LLP v. Misra Ventures Ltd.* [2018] EWHC 275 (Ch)[1], Mr. David Stone sitting as a Deputy High Court Judge reviewed a number of well-known judgments and distilled the principles where the putative debtor raises a cross-claim as a defence to the petition. At [22] of the judgment, the learned Deputy High Court Judge said this:

"22. It seems to me that a number of uncontroversial propositions can be drawn from these cases. Given the clarity of the language of the Court of Appeal and judges of this court, it is appropriate, where possible, for me simply and respectfully to repeat their remarks:

[1] Not cited by Counsel but uncontroversial and a useful summary of the relevant principles

a. In the absence of special circumstances, it will be appropriate to issue an injunction to prevent the presentation and advertisement of a winding up order where there is a genuine and serious cross-claim in an amount exceeding the petitioner's debt. The cross-claim must be genuine and serious, or, in other words, one of substance: In re Bayoil[2] at page 155.

b. If there is a genuine and serious cross-claim, the company should be allowed to establish its cross-claim in ordinary civil proceedings: the Companies Court is not the right court in which to engage in a detailed examination of claim and counterclaim: Dennis Rye[3] at paragraph 19.

c. It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious: Orion Media[4] at paragraph 31. Bare assertions will not suffice: there is a minimum evidential threshold: Re a Company at paragraph 33.[5]

d. But it is not practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. A lengthy hearing is likely to result in a wasteful duplication of court time: Tallington Lakes[6] at paragraph 41.

e. If there is any doubt about the claim or the cross-claim, then the court should proceed cautiously. This is because a winding up order is a draconian order, which, if wrongly made, gives the company little commercial prospect of reviving itself: In re Bayoil, at page 156.

f. Petitioning creditors must take a realistic view of whether the company is likely to establish a genuine and substantial dispute: Tallington Lakes, at paragraph 41.

g. A company is not prevented from raising a cross-claim simply because it could have raised or litigated the claim earlier, or because it has delayed in bringing proceedings on the cross-claim. However, the court is entitled to take any delay into account in its assessment of whether the cross-claim is genuine and serious: Dennis Rye, at paragraph 19."

25. I consider the forgoing summary useful in particular for the more nuanced analysis of the requirement in *Bayoil,* on which ASL relied, that the cross-claim must be one which the company had been unable to litigate.

---

[2] [1999] 1 All ER 374

[3] *Dennis Rye Ltd v Bolsover DC* [2009] EWCA Civ 372

[4] *Orion Media Marketing Ltd. v. Media Brook Ltd.* [2001] 10 WLUK 638

[5] *[2016] EWHC 3811 (Ch)*

[6] *Tallington Lakes Ltd. v. Ancasta Intl. Boat Sales Ltd.* [2012] EWCA Civ 1712

The Evidence

26. The Company did not adduce any evidence to show that the monies payable under the Services Agreement were not due because the services contracted for had not been delivered by ACG. That is to say, the debt is not disputed.

27. Rather, as I have already noted, the Company seeks to rely on the alleged breach by ASL of clause 7.1 (a) of the Services Agreement which, had it not been breached, would have allowed some of the payments reserved under the agreement to be discounted pursuant to clause 7.1(b). Were the discounted sums taken into account and set off against the petition debt, nothing would be owing.

28. I have set out the relevant clause below, highlighting the parts which are significant.[7]

"*7.1 Scope Relative to 18W*

(a) Global IP and [ACG] ***will make all reasonable efforts by June 23, 2018 to define mutually agreed*** *technical, operational and regulatory* ***conditions*** *in a new Schedule (Schedule 4) to this Agreement which would enable Global IP to grant to Avanti the rights to operate HYLAS 1, to be exercised at Avanti's discretion, at 18W under the 'DUB-DUB-5-1SW' satellite network filing up to the end of life of HYLAS 1 satellite and,* ***subject to mutual agreement****, operate Avanti Ka-band GEO satellites at 18W under the 'DUB-DUB-5-18W' satellite filing, in Ka-band frequencies after the end of life of the HYLAS 1 satellite.*

(b) If both Parties are able to agree such a Schedule 4, Avanti will implement a discount to the payments by Global IP to Avanti as set out in Option A of Schedule 2."

29. Option A which provides for the discount is set out in the Services Agreement as follows:

"Option to Offset Charges Payable by Global-IP to Avanti

If the parties are able to agree an amendment to this Agreement *whereby pursuant to clause 7.1, a Schedule 4A and 4 B are developed and agreed by June 23, 2018:*

a. for HYALS-1 co-located operations at 18W with GiSAT-1 via a TBD Schedule for Avanti operations up to the cessation of HYLAS-1;

[7] The Avanti entity which is referred to is referred to as ACG in this judgment

b. for content of TBD Schedule 4 B (Avanti operations at 18 W after cessation of HYLAS-1)

Then Table 1 (Payment Milestones Table for the Services) of this Schedule 2 shall be revised where Payment Milestone Numbers 4 through 8 shall be $600,000 and Payment Milestone Number 9 shall be US$0 (i.e. total payments would be equal to US $5.5 million."

30. As I understand the Company's case, but for the breach by ACG of its obligation to use reasonable endeavors, agreement would have been reached and the Company would have had the benefit of the discount and liable to pay only $600,000 in 2020, $600,0000 in 2021 and $600,000 in 2022 and not the million it had paid in each year. The sum of $1.2 million by which ACG had been overpaid as a result of the breach was a sum greater than the petition debt.

31. The evidence relied on by the Company to support the allegation of breach was given by Mr. Nagib Chahine, a director and the Chief Technology Officer of the Company. He explained that, in seeking to agree a Schedule 4, the discussions between the Company and ACG focused on the restrictions on the operating capacity of each of the satellites which would occur if both operated at or near 18 W. As neither satellite could use 100% of their available channels if they were sharing the same orbital slot, they would each generate less revenue. What each was willing to tolerate in terms of losses had to be negotiated.

32. A number of emails exchanged between Mr. Chahine on behalf of the Company and Mr. Singarajah on behalf of ACG between May and July 2018 were put before the Court which show their attempts to negotiate and agree a Schedule 4.

33. In an email sent on 17 May 20128, Mr. Chahine observed that if the parties were unable to resolve the matter by May 31, it would mean that either one or both of them had taken the view that the two satellites could not co-exist and operate at or near 18W.

34. In his email in response, Mr. Singarajah made the point that, in the same way that the Company would not want to unduly or excessively constrain its satellite, ACG would not wish to place and operate its HYLAS 1 satellite at 18 W if they could not viably make use of it. He suggested there could be an agreement where ACG obtained for the Company a timely Ka-Band BIU for the Company at 18W, without ACG also obtaining the scope to operate HYLAS 1 at 18 W.

35. The discussions continued. In a later, email, Mr. Singarajah, referring to ACG's latest proposal made the point that it would restrict the HYLAS 1's use to fewer than 5 out of 8

KA user beams - thus reducing its scope for generating revenue - and that mutually agreeing a Schedule 4 would take more time.

36. Mr Chahine, responding on behalf of the Company, acknowledged the difficulty of reaching mutual agreement and stated, *"discussing 18 W and negotiating it further may prove inhibiting to both our space-craft."* He suggested that the parties move forward on a "*strict BIU deal*" without any strings, as Mr. Singarajah had proposed.

37. That response suggested that the Company accepted that agreement was unlikely to be reached. In later correspondence, Mr. Chahine confirmed with Mr. Singarajah that the following observation was included in the Technical Report:

"*Conclusion on Colocation at 18W:*
It is therefore on a provisional basis concluded that coexistence on a medium term to longer term basis (eg up to 2025) of HYLAS-1 and GiSAT-1 (at 17.6W) would not be in practice be acceptable to either Global-IP or Avanti under the considered ***scenario -A*** *above,"*

and asked:

"*So you agree that there is no need to discuss any further the Annex 4 associated with the initial agreement under scenario A,"*

to which Mr. Singarajah responded:

"We agree there is no current need to discuss any further development and agreement of a Schedule A/Schedule 4B to be included into the Initial Agreement."

38. Mr Chahine's evidence is that he referred specifically to *scenario A* because there were other possible scenarios which might have permitted the two satellites to co-locate at 18 W.

39. After this exchange, Mr. Chaine asserts that ACG chose not to make good their obligation to use *"all reasonable efforts"* to agree the conditions that would allow the satellites to operate from 18W as required by clause 7.1(a). Mr. Singarajah left the company. No technical person remained at ACG who could progress the discussions with the Company which was ready and willing to negotiate further terms with respect to the ongoing use of HYLAS 1 at 18W.

40. Mr. Chahine asserts his belief that, had ACG used "all reasonable efforts" to do so, then it was very likely that an agreement would have been reached and the Company would have benefitted from the discounted payments schedule.

Discussion

41. The obligation contained in clause 7.1 of the Services Agreement required the parties to *"make all reasonable efforts by June 23 2018 to define mutually agreed technical, operation and regulatory conditions in a new Schedule 4 to the Agreement which would enable Global IP to grant to Avanti the rights to operate HYLAS 1, to be exercised at Avanti's discretion, at 18W under the 'DUB-DUB-5-1SW" satellite network filing up to the end of life of HYLAS 1 satellite".*

42. If the parties were able to agree such a schedule and the Company granted ACG the right to operate its satellite at or near the Company's orbital slot, then ACG would discount the fees owed to it under the Service Agreement.

43. The Company asserts there has been breach by ACG of its obligation under clause 7.1 as giving rise to a cross-claim which it should be given the opportunity to litigate. The allegation of breach has to be considered against the fact that the technical report was concluded some 5½ years ago, that over that period the Company has made payments in relation to the services provided by ACG under the terms of the Services Agreement and did not raise any issue then with respect to the content or effect of the technical report or ACG's failure to make reasonable efforts post-June 2018 to develop and agree a Schedule 4. The issue was not raised when payment was demanded or when the petition was presented. The putative breach was raised for the first-time in correspondence, days before the scheduled hearing of the petition.

44. The ready inference to be drawn from the fact that it was raised so late in the day, in the absence of any explanation for the delay in doing so, is that the putative cross-claim is not genuine.

45. In any event, the obligation to develop and agree the terms of a Schedule 4 had a long stop date of 23 June 2018 following which the obligation was terminated.

46. As Mr. La-Roda Thomas noted in his written submissions on behalf of ASL, the parties entered into an Amendment Agreement on 17 April 2019, some ten months after the expiry of the negotiation period, with no complaint of any failure by ACG to comply with its obligations under clause 7.1 being raised by the Company. No amendment of the Services Agreement was sought or made to extend the deadline for agreeing the relevant conditions

under clause 7.1 or to include some form of Schedule 4 in the amended Services Agreement in place of the placeholder.

47. More importantly, the parties agreed a new Schedule 2 of the Services Agreement, which set out the revised payments milestones, including the payment dates and amounts. Given that the Amendment Agreement superseded the long stop date for negotiations under clause 7.1, the only reasonable inference is that the payment schedule in the amended Services Agreement reflected what the Company understood to be its payment obligations.

48. Further, the email correspondence to which Mr. Chahine referred the Court was consistent only with a mutual agreement having been reached that the two satellites could not operate out of 18 W in a way that made economic sense to both parties. It was Mr Chahine, on behalf of the Company, who requested that the negotiations move forward *"on a strict BIU deal"* without further negotiation of Schedule 4.

49. His evidence, that other scenarios had been discussed that might have allowed for the two satellites to operate in a mutually beneficial way at 18W, adds nothing to the Company's case.

Agreement to agree

50. What in any event is the content of an obligation to use all reasonable efforts to agree? Does it give rise to a binding contract of which ACG could be said to be in breach? Mr. La-Roda Thomas submitted on behalf of the ASL that clause 7.1 created no enforceable obligation on ASL as it is merely an agreement to agree - an agreement to negotiate - which lacks the certainty required for agreements to be binding.

51. Counsel relied in support of this submission on the decision of Lord Denning in English Court of Appeal case of *Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297 who said this at p301:

> *"If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."*

52. The decision in *Courtney & Fairbairn* has received positive judicial treatment in a number of cases and was cited with approval by the House of Lords in *Walford v Miles* [1992] 2 A.C. 128.

53. In *Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd [2006] EWHC 1341* where the Court considered a clause requiring the parties to use *"reasonable endeavours to agree"* the completion of outstanding works under a construction contract work, Jackson J undertook a helpful review of a number of authorities at paras 634 to 638 of the decision:

"[634] In Walford v Miles [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174, the Plaintiff's claimed damages for a failure to negotiate in good faith. The House of Lords held that such a contractual term lacked certainty and was unenforceable. In Little v Courage Ltd (1994) 70 P & CR 469, [1995] CLC 164, Millett LJ, giving the judgment of the Court of Appeal, said this at page 169:

> *"An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced: an undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."*

[635] In London & Regional Investments Ltd v TBI plc, [2002] EWCA Civ 355 it was held that an obligation to "use reasonable endeavours to agree the terms of a joint venture regarding Cardiff and Belfast Airports" was no more than an agreement to agree. It was therefore unenforceable.

[636] I have come to the conclusion that the principle of law which formed the basis of those three decisions is directly applicable in the present case. The first sentence of cl 7 of the supplemental agreement contained a statement of aspirations. It is too uncertain to impose a contractual obligation and as such it is unenforceable.

[637] I am reinforced in this conclusion by the decision of the Court of Appeal in Phillips Petroleum Co (UK) Ltd v Enron (Europe) Ltd [1997] CLC 329. The court held that an obligation to use reasonable endeavours to agree did not preclude a party from refusing to reach agreement on grounds of commercial self-interest.

54. Counsel for ASL also relied on the following extract from Chitty and Contracts 35th Ed. at para 4-172 as setting out the approach which this Court should apply:

> "…*later decisions support the view that an express agreement to use best or reasonable endeavours to agree on the terms of a contract is no more than an agreement to negotiate, lacking contractual force", citing Little v Courage (1995) 70 P. & C.R. 469 at 475; London & Regional Investments Ltd v TBI Plc [2002] EWCA Civ 355 at [39]; Multiplex Construction (UK) Ltd v Cleveland Bridge (UK) Ltd [2006] EWHC 1341 (TCC), 107 Con. L.R. 1; Barbudev v Eurocom Cable Management Bulgaria EOOD [2012] EWCA Civ 548 at [44].*

55. Despite Mr. Clifford's valiant attempts to distinguish the cases relied on by ASL from the case at Bar, the fact that clause 7.1 appears in a professionally drafted, carefully negotiated agreement and was plainly crafted to give effect to the aspirations captured in the Recitals to the Services Agreement, does not give the words any greater contractual force.

56. As Counsel for ASL observed, the Services Agreement contains only a placeholder for a Schedule 4 *"To be developed if required;"* to be developed, in other words, only if the parties were able to agree the conditions in which both companies could operate their satellites out of the same orbital location.

57. The Company's own evidence is that agreement could not be reached with respect to the operation of both satellites at 18 W and that both parties agreed that a Schedule 4 would not be developed. Instead, it would be a *"strict"* deal to bring 18W into use for the Company and this service was provided by ASL.

58. Having regard to both the law and the evidence, there is no substance to the claim that ASL breached its clause 7.1 obligation.

The Petitioner's Standing

59. ACG's alternative position is that the assignment was in breach of the contractual provisions limiting the transfer of ACG's rights and obligations to ASL and, therefore, ineffective. Consequently, ASL has no right to petition for any sums due to ACG under the Services Agreement: see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85*

60. I set out below the assignment clause contained in the Services Agreement:

> *"Assignment.*

Neither Party may assign or transfer all or any part of its rights, benefits and/or obligations under this Agreement without obtaining the prior written consent of the other Party, which shall not be unreasonably withheld or delayed.

Notwithstanding the foregoing, either Party

(i) may assign its rights and delegate its duties and obligations under this Agreement as a whole, as part of a sale or transfer of all or substantially all of its assets or business, including by merger, consolidation or otherwise;

(ii) may assign its rights under this Agreement to any Affiliate of that Party,

provided that in the case of any such assignment described in the foregoing sub-clause (i) or (ii) the relevant assignee has expressly assumed all of the obligations of the assignor Party and all terms and conditions applicable to such Party under this Agreement and that... in case of assignment by Avanti, has demonstrably sufficient financial resources or funding and technical capability and know-how to fulfil Avanti's obligations hereunder."

61. Clause 1.1 of the Services Agreement defines "Affiliates" as "*in relation to a Party, any other entity which directly or indirectly controls, is controlled by, or is under common control with such Party."*

62. In her evidence on behalf of ASL, Ms Bridget Sheldon-Hill, a director of the company, stated that:

*"5. ... on 13 April 2022 Avanti Communications Group Pic **("ACG")** assigned all of its rights, title, interest and benefit in and to the satellite services agreement (the **"Services Agreement")** between the Company and ACG dated 24 May 2018 to [ASL] (the **"Assignment").***

*6. The Assignment was part of a confidential asset and share sale agreement between [ASL], ACG and the administrators of ACG (the **"Administrators")** (among other parties) dated 13 April 2022 (the **"Sale Agreement")** which was entered into as part of a corporate restructuring (the **"Restructuring").** The Restructuring involved the sale of substantially all of ACG's business assets to Plate Newco 1 Limited, which replaced ACG as the ultimate parent of the Avanti group of companies (the **"Avanti Group").** As at the date of the Assignment, ASL was an indirect subsidiary of ACG and was under its indirect control.*

> *7. [ASL] has obtained consent from the Administrators to disclose, solely for the purposes of the Petition, a redacted copy of the Sale Agreement which discloses only those parts of the Sale Agreement that are relevant to the Assignment. A redacted copy of the Sale Agreement is exhibited hereto at pages 1 to 14 of BS-1.*
>
> *8. Prior to the Restructuring, ACG was the ultimate parent company of the Avanti group of companies (the* ***"Avanti Group").*** *Whilst ACG was the Avanti Group entity which entered into the Services Agreement, ACG did not itself directly own any satellite assets or employ any technical staff, required to perform the services under the Services Agreement. The satellite assets and technical staff were, and continue to be, owned and employed directly by the relevant operating subsidiaries within the Avanti Group.*

63. Mr. Clifford on behalf of the Company submits that there is no evidence that the assignment was made under sub-clause (i) as there is no evidence that the assignment was "*a part of a sale or transfer of all or substantially all of [ACG's] assets or business.*" Counsel posits that ACG might have retained part of its assets or business as part of the restructuring or transferred them to somebody else.

64. He submits further that there is no evidence that when the Services Agreement was assigned to ASL it remained an affiliate of ACG. Rather, the evidence showed that the assignment was not to an affiliate because at the moment of the assignment ASL ceased to be an affiliate of ACG and instead became an affiliate of Plate Newco Ltd.

65. Mr. Clifford also relied in support of this submission on ASL's Financial Report which he said made it apparent that ASL had ceased to be an affiliate of ACG:

> *"At the balance sheet date, [ASL] was wholly-owned subsidiary of Avanti Communications Infrastructure Limited and was ultimately owned by [ACG]*
>
> *On 13 April 2022 the group of which [ASL] is a member completed a capital restructuring…The restructuring saw a change in the ultimate parent undertaking and controlling party of the Company from [ACG] to plate newco 1 Limited…"*

66. In his written submissions, he put it this way: sub-clause (ii) requires the assignment to be to an affiliate, not to someone who ceased to be an affiliate at the moment of assignment. In order for the assignment to have been valid, Plate Newco Limited would have to have been an affiliate of ACG at the moment of the assignment, but there is no evidence that it was.

Discussion

67. The evidence given by Ms Bridget Sheldon-Hill is that the *"assignment was part of a confidential asset and share sale agreement between the Petitioner, ACG and the administrators of ACG... which was entered into as part of a restructuring…which involved the sale of substantially all of ACG's business assets..."*.

68. In my judgment, that evidence is sufficient to establish ASL's standing to present the debt as it is evidence that the assignment was part of the sale of substantially all ACG's assets bringing it within Clause 20.1 (i).

69. If more were needed, I would hold that the assignment to ASL also fell within Clause 20.1(ii) as it is Ms Sheldon-Hill's uncontroverted evidence that, at the time of the assignment, ASL was an indirect subsidiary of ACG and under its indirect control.

70. With respect to the other requirements for an assignment set out in Clause 20.1, it was not in issue whether ASL had expressly assumed all the obligation of ACG or ASL had sufficient financial resources to fulfill ACG's obligations. Ms Sheldon-Hill deponed that ASL had the requisite technical capability to fulfil ACG's obligations under the Services Agreement as required by Clause 20.1 and that position was accepted by the Company during the hearing.

71. In my judgment, there is no arguable case that ASL has no standing to present the petition.

Conclusion

72. The authorities are clear that where a petition is presented by a creditor for an undisputed, unsecured debt, the petitioner is entitled to an order winding up the company *ex debito justitiae.*

73. An order winding up the Company is made in terms of the draft Order.

DATED 7TH FEBRUARY 2024

Hon. Justice Margaret Ramsay Hale
CHIEF JUSTICE