

## Snapshot: Determining whether a petition debt is disputed on substantial grounds

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### Introduction

It is trite law that where a petition debt is disputed in good faith and on substantial grounds, the ordinary practice of the Court is to dismiss or strike out the winding up petition. However, this principle is more easily applied in theory than in practice. As a result, the Grand Court of the Cayman Islands has observed recently that "*It is remarkable how much case law has been generated in relation to a legal test which has essentially been settled for many years*" (*Re Sky Solar Holdings Ltd*).

That body of case law has been swelled in 2020 by a number of decisions of the Grand Court which provide further guidance as to whether a petition debt is to be considered genuinely disputed on substantial grounds, requiring that the creditor's winding up petition be struck out for abuse of process.

### General Principles

The general rule of practice and its justification were set out in *Parmalat Capital Finance Limited v Food Holdings Limited and Dairy Holdings Limited*, where Lord Hoffman observed 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."*

Nonetheless, as Vos JA cautioned in the subsequent Cayman Islands Court of Appeal decision in *Re GFN Corporation*, the Court should be wary of attempts by an unwilling debtor to raise

*"smokescreens or contrived arguments presented late in the day"* or what Jones J described as *"disingenuous delaying tactics"*.

The legal principles governing petitions based on disputed debts were re-stated by Parker J in his 28 July 2020 judgment in *Re Altair Asia Investments Limited*, and by Richards J in *Re Adenium Energy Capital, Ltd.*, both of which were subsequently considered and followed by Kawaley J in *Re Sky Solar Holdings Ltd* in his October judgment:

1. The rule of practice concerning a creditor's disputed debt is that the court will usually dismiss the petition and leave the creditor to establish his claim in an action if the debt is bona fide disputed on substantial grounds.
2. However, the court retains the discretion to make a winding up order even though there is a dispute on substantial grounds. In determining whether or not there is a dispute on substantial grounds:
  - a. The fact that there may be an appeal pending in a foreign court or arbitral tribunal does not itself demonstrate that there is a bona fide dispute as to the debt.
  - b. The court should be astute to identify cases where an unwilling debtor employs a tactical manoeuvre or raises technical objections late in the day and puts forward many issues of law and fact on affidavit or otherwise makes the matter deliberately opaque or overcomplicated.
  - c. In an appropriate case the court may refuse to dismiss or stay the petition or may determine the question of a disputed debt in the petition itself. Such cases include those where the court doubts that the debt is disputed bona fide on substantial grounds or where the creditor, if he established his debt, might otherwise lose his remedy altogether, or where other injustice might result.

Additional facts that the Court may take into account in determining whether or not a creditor's petition ought to be struck out include, but are not limited to:

1. The availability of cross claims and reverse cross claims (*Re Sky Solar Holdings Ltd* and *Re Weaving*);
2. Whether steps have been taken by the Petitioner to enforce and realise any security (*In re G3 Exploration Limited (in Provisional Liquidation)* and *Re Sky Solar Holdings Ltd*);
3. Whether an inference of insolvency may be drawn from the evidence (or lack thereof) before the Court (*Re Adenium Energy Capital, Ltd*, *Re Sky Solar Holdings Ltd*); and

#### 4. The views of other creditors of the company.

It is clear from the number of cases that have come before the Grand Court in recent months that the question of whether a petition debt is genuinely disputed on substantial grounds is one of fact, to be determined on a case by case basis.

*Ogier acted for the Petitioners in Sky Solar Holdings Ltd and Altair Asia Investments Limited and for the defendant company in G3 Exploration Limited (in Provisional Liquidation).*

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