IN THE SUPREME COURT OF BERMUDA

COMPANIES (WINDING-UP)

2007: No. 12

IN THE MATTER OF (1) IPOC CAPITAL PARTNERS LIMITED
AND IN THE MATTER OF (2) IPOC INTERNATIONAL GROWTH FUND LIMITED
AND IN THE MATTER OF (3) GAMMA CAPITAL FUND LIMITED
AND IN THE MATTER OF (4) CONVERGENCE CAPITAL LIMITED
AND IN THE MATTER OF (5) COM TEL EASTERN LIMITED
AND IN THE MATTER OF (6) FIRST NATIONAL TELECOMMUNICATIONS FUND LIMITED
AND IN THE MATTER OF (7) CONVERGENCE CAPITAL MANAGEMENT LIMITED
AND IN THE MATTER OF (8) AUGMENTATION INVESTMENTS LIMITED
AND IN THE MATTER OF (9) TELCO OVERSEAS LIMITED
("the Companies")

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

Date of hearing: November 15, 2007
Date of Reasons: November 23, 2007

Ms. Renee Foggo, Attorney-General Chambers, for the Petitioner, the Registrar of Companies
Mr. Mark Diel, Marshall Diel & Myers, for the Companies
Mr. Jeffrey Elkinson, Conyers Dill & Pearman, for LV Finance Group Limited ("LVFG")
Mr. David Kessaram, Cox Hallett & Wilkinson, for Santel Limited, Avenue Limited and Janow Limited ("the Alfa Companies")
Mr. Rod Attride-Stirling and Mr. Nathaniel Turner, Attride-Stirling & Woloniecki, for OAO CT-Mobile ("CTM")
Mr. Justin Williams, Williams, for Leonid Rozhetskin

Introductory

1. On November 15, 2007, after hearing counsel, I gave directions for the further conduct of the Respondents' Summons issued on November 1, 2007 for an Order that, in the event that the Companies are wound-up, the Master Settlement

Agreement ("MSA") should not be avoided by virtue of section 166 of the Companies Act 1981.

2. Thereafter, a dispute arose between counsel for the Petitioner and counsel for the Respondents as to the terms of the formal order which should be signed, which I was requested to resolve. I determined that the recital in the form of Order submitted on behalf of the Companies on November 21, 2007, accurately reflected the undertaking I accepted on November 15, 2007, as a basis for rejecting the Petitioner's application for an adjournment and directing that the Companies' application should proceed substantively on November 29, 2007. The recital proposed by the Petitioner, and forwarded by email to the Court on November 21, 2007, did not accurately reflect the undertaking offered by Mr. Diel and accepted by the Court, despite the forceful submission by Ms. Foggo that a broader undertaking should have been required.

3. I set out below, very briefly, my reasons for this decision. The need to do so now seems obvious, the Court of Appeal having clarified the proper approach in a different aspect of the IPOC-related litigation when I resolved a dispute between two forms of order without explaining why I preferred one version over the other. In *IPOC International Growth Fund Ltd. –v- OAO "CT-Mobile" and LV Finance Group* COA [2007] Bda LR 43, the Court of Appeal for Bermuda implicitly accepted the complaint advanced by Richard Hacker Q.C. that "*the judge gave no reasons for his decision. When question of the scope of the order was discussed before the judge the matter seems to have proceeded on the basis of rival orders*" (paragraph 64). Although the merits of the Order I made were attacked as well, Sir Murray Stuart-Smith (giving the judgment of the Court) held that the Court of Appeal could exercise its discretion afresh "*for the reasons advanced by Mr. Hacker*" (paragraph 68).

4. While there may be cases where the differences between rival orders are trivial and/or insignificant, the parties are clearly entitled to know why any dispute of substance has been resolved in the manner the Court chooses to adopt. In this case, it is also necessary for me to explain why, on November 15, 2007, I accepted the undertaking in the form given by Mr. Diel on behalf of the Respondents.

The competing versions of the undertaking given by the Respondents' counsel

5. The Respondents' form of Order contains a recital in the following terms: "***AND UPON*** *the Companies undertaking to respond to the Petitioner's letter dated 13 November 2007 by 5.00p.m. on 16 November 2007*". The Petitioner's version contains a recital which reads as follows: "***AND UPON*** *the Companies undertaking to respond to the Petitioner's letter dated 13 November 2007 by way of affidavit evidence by 5.00 p.m. on 16 November 2007*" [emphasis added].

6. Articulating the reasons for my electing to sign the former and not the latter requires me to address both (a) the terms and effect of the decision that I actually made in Court on November 15, 2007, and (b) why I made such decision.

Reasons

7. I have listened to the Court Smart recording of the November 15, 2007 hearing to refresh my memory as to precisely what transpired. The hearing commenced at approximately 9.47 am. At around 10.04 am, Ms. Foggo commenced her submissions as to why the Petitioner felt he should not be required to proceed to file evidence or prepare for the substantive hearing until the Respondents' had responded on affidavit to the various questions raised by the Petitioner in his November 13, 2007 letter. At 10.11 am, Mr. Diel offered an undertaking to respond to the Petitioner's queries "*by letter*". At approximately 10.24 am, Mr. Diel reiterated that his clients would respond to a point of detail "*in the letter*".

8. At 10.31 am, I confirmed the directions that I was ordering "*upon the undertaking given Mr. Diel*". I made it clear that these directions were being given without prejudice to the Petitioner's right to renew his adjournment application on November 29, 2007, and I explained why I was rejecting the adjournment application at that stage. There is no question but that the only undertaking offered and accepted was the form of undertaking set out in the form of Order submitted to the Court by the Respondents. This is the principal factual reason why I have preferred the Respondents' form of Order to that proffered by the Petitioner. It is the dominant reason for my deciding today to sign the form of Order which I have decided to sign.

9. However, I did not explicitly articulate my legal reasons for declining to insist on an undertaking from the Respondents to file an affidavit response to the Petitioner's November 13, 2007 letter. The reasons for my declining, on November 15, 2007, to insist on an undertaking from the Respondents to provide an affidavit response are in large part indistinguishable from my reasons(stated orally on November 15, 2007) for declining to order the directions which the Petitioner sought. Ms. Foggo essentially contended that the Respondents' should be required to file evidence in response to their November 13, 2007 letter, the Petitioner should be afforded an opportunity to file evidence in reply and/or consider their position, and the matter should be effectively heard in the New Year. Having reviewed the Petitioner's November 13, 2007 letter, and taking into account the unified position of the creditors and the companies that delay would be prejudicial, I decided that the application should be effectively heard on November 29, 2007 in order to save costs. Investigating whether certain covenants in the MSA were contrary to public policy seemed to me to be a narrow legal point not requiring evidence, and there were no obvious risks that the application impacted on the solvency of the Companies, or indeed on the ability of the Petitioner to prosecute the Petition.

10. Having regard to the nature of the relief sought by the Respondents through the section 166 application, and the nature of the questions raised by the Petitioner in his November 13, 2007 letter, it did not seem necessary to me at that stage to insist on responses in affidavit form for the purposes of the November 29, 2007 hearing. The November 13, 2007 letter was 2 ½ pages long. Of these pages, 1 ½ pages dealt with a proposed share transfer agreement which counsel satisfied me was no part of the MSA and could not proceed without Bermuda Monetary Authority approval. The remainder of the letter raised the following complaints: (a) the covenant not to voluntarily cooperate with prosecuting authorities was contrary to public policy, (b) the MSA had unexplained changes such as the omission in the final version of Mr. Rozhetskin as party, and (c) the Registrar wished "*sight of*" the legal memoranda referred to in the MSA to determine whether it was in the Companies' best interests. Point (a) seemed to be a pure point of law and/or construction, and a tenuous one in light of counsel's clarification that the covenant in question was not intended to prevent compliance with any obligatory duties to assist such authorities. Point (b) did not seem to be a question requiring, in the first instance at least, a sworn response. And the nature of point (c) was inherently incompatible with a response in affidavit form. In these circumstances, I concluded that the need to compel the Respondents to answer the Petitioner's November 13, 2007 letter by way of affidavit did not, on the facts before me, properly arise.

Summary

11. For these reasons, I determined that the form of Order submitted for my signature by the Respondents, rather than the competing Order presented by the Petitioner, more accurately reflected the Order made on November 15, 2007 in this matter.

Dated this 23rd day of November, 2007

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KAWALEY J.