In The Supreme Court of Bermuda

(COMMERCIAL COURT)

COMPANIES (WINDING-UP)

2011: No. 231

IN THE MATTER OF PROVIEW INTERNATIONAL HOLDINGS LIMITED

COMPANY NO: 23302

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR RULING/RULING ON COSTS

(APPLICATION TO SET ASIDE WINDING-UP ORDER)

(In Chambers)

Date of Ruling: September 29, 2011
Date of Reasons: October 3, 2011

Mr. Victor Lyon Q.C. and Mr. Rod Attride-Stirling,
Attride-Stirling & Woloniecki, for the Applicant/Company

Mr. Mark Chudleigh, Sedgwick Chudleigh, for the Petitioner

Ms. Venous Memari, Christopher Swan & Co, for the Official Receiver

Introductory

1. On July 14, 2011, the Petitioner, Ms. Chang Iok Leng, presented the Petition herein seeking to wind-up the Company pursuant to section 72(3) of the Companies Act 1981 on the grounds its failure to hold its annual general meeting ("AGM") as required by section 71 of the said Act.

2. On August 26, 2011, at a hearing at which the Petitioner (said to own 2.1 million out of a total of 2 billion shares-just over .001%) was represented by Mr. Cameron Hill, the Company failed to appear and a winding-up order was made on the grounds that:

    (a) rule 24 of the Rules had been complied with;
    (b) the time for convening the AGM was clearly past;
    (c) Company was in breach of the Hong Kong Listing Rules;
    (d) negotiations with the Company had broken down earlier that day in Hong Kong;
    (e) the Petition was not opposed.

3. A winding-up order was made at the conclusion of the August 26, 2011 hearing ("the Order") and the Official Receiver became Provisional Liquidator by operation of law.

4. On September 20, 2011, the Petitioner issued a Summons seeking to appoint three independent joint provisional liquidators. The Petitioner's Second Affidavit revealed that the two of the proposed liquidators were employed by Ernst & Young Transactions Ltd. in Hong Kong, while the third was employed by Ernst & Young Services Ltd. in Bermuda. The rationale was that the Company was now in the second phase of Hong Kong Stock Exchange delisting; urgent action was required to formulate a resumption proposal to avoid its listing status (a critical asset) being lost. This Summons was issued returnable for September 29, 2011.

5. On September 27, 2011, the Company issued a Summons seeking to set aside the Order. This application was also issued returnable for September, 29, 2011, and was argued at the end of the normal Thursday Chambers List. The principal grounds of this application were:

    (a) the last correspondence between the Petitioner and the Company's Bermuda attorneys prior to the hearing at which the Order was made represented that a four week adjournment would be sought at the hearing of the Petition;
    (b) the Order was made ex parte and without notice and should be said aside as of right (or, alternatively in the exercise of the Court's discretion);

(c) the Petitioner had failed to make full and frank disclosure by failing to ascertain the true status of the Company's affairs;
(d) the Company had itself prepared a scheme of arrangement which it was ready to seek leave to seek approval from in Hong Kong and Bermuda, with a view to preserving its listing status;
(e) the Petitioner lacked the standing to petition under section 163(2) of the Act as she had not been a registered shareholder for the requisite six month period.

6. I granted the application setting aside the Order and, consequentially, dismissed the Petition. Counsel made submissions on costs at the end of the hearing. I set out below the reasons for setting aside the Order and my decision as to costs.

Legal findings: jurisdiction to set aside winding-up orders

7. Mr. Lyon for the Company firstly submitted that the principles applicable to setting aside orders made in the absence of a party generally applied to winding-up proceedings by virtue of rule 159 of the Companies (Winding) Rules 1982, because the 1982 Rules made no provision in this regard. Rule 159 provides as follows:

> "***Application of existing procedure***
> *159 In all proceedings in or before the Court, or any Judge, Registrar or Officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure and regulations shall, unless the Court otherwise in any special case directs, in the Court be in accordance with its rules and practice.*"

8. Although Mr. Chudleigh sought to challenge this submission, it is well settled that this provision incorporates by reference the Rules of the Supreme Court 1985, as it were, to deal with procedural matters not explicitly dealt with by the 1982 Rules. This is clear from the original rule 227 of the Companies (Winding-Up) Rules 1949 (UK) from which rule 159 is derived. The UK 1949 counterpart rule provides as follows (distinctive wording underlined):

> "227. *In all proceedings in or before the Court, or any Judge, Registrar or Officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or Rules, the practice, procedure and regulations shall, unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a*

Palatine Court and County Court, in accordance, as far as practicable, with the existing Rules and practice of the Court in proceedings for the administration of assets by the Court."

9. The position as regards setting aside winding-up orders in the United Kingdom is clearly different today. Rule 7.47 of the Insolvency Rules 1986, which Mr. Chudleigh placed before the Court, now expressly confers on courts which exercise winding-up jurisdiction the power to rescind winding-up orders. However, it was clear that the English courts had for over 100 years before these rules were adopted rescinded winding-up orders using the powers conferred by civil rules of court. According to French, '*Applications to Wind Up Companies*'[1], in a passage upon which Mr. Lyon Q.C. relied: "*A provision in rules of court for setting aside a judgment in default was used when there was no power to review or rescind winding-up orders.*"

10. Examples cited by *French* (at paragraph 5.2.2.2.1) of cases where an order was so fundamentally defective that the inherent jurisdiction to set aside was engaged included:

    (a) the instance of a contributory's petition presented by a person who was not in fact a contributory;
    (b) the instance of an application for a winding-up order proceeding by mistake after an agreement not to proceed had been reached.

11. The Winding-Up Rules provide for notices of intention to appear to be filed (rule 25) and for affidavits in opposition to be filed (rule 26), but not provide for setting aside winding-up orders obtained where the respondent either (a) fails to appear, and/or (b) fails to file an affidavit in opposition. The Order was essentially obtained in circumstances broadly analogous to a Judgment in Default of Appearance in an action commenced by Writ. The relevant Bermudian governing rule, which is not just derived specifically from English Rules of Court but also reflects rules of natural justice adhered to throughout the common law world (and probably beyond as well), is the following:

> "***13/9 Setting aside judgment***
>
> *9 The Court may on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order.*"[2]

[1] 2nd edition (Oxford University Press), paragraph 5.2.2.2, citing *Re Aston Hull Coal and Brick Co* (1882) 45 LT 676.
[2] Order 19 rule 9 makes equivalent provision for judgments obtained in default of pleadings.

12. Mr. Chudleigh argued that the only way in which a winding-up order could be challenged was by way of appeal. Not without some initial uncertainty, I rejected this submission. It is true that a collateral attack cannot be made on a winding-up order (or any other order made by a superior court of record):*PricewaterhouseCoopers Bermuda-v- Kingate Global Fund Ltd. (in liquidation) and Kingate Euro Fund Ltd.(in liquidation)* [2011] Bda LR 57; [2011] CA (Bda) 6 Civ. The latter decision held that an appeal was the only remedy in the context of a collateral challenge made by a non-party contingent debtor in the context of opposing a substantive application made by liquidators in the course of the liquidation. The right of a company itself to apply to set aside a winding-up order made against it did not arise for consideration in that case.

13. I was satisfied, based on the authorities demonstrating an established practice of applications to set aside winding-up orders by respondents to winding-up petitions in jurisdictions comparable to Bermuda in insolvency law terms, that this Court possessed the jurisdiction to set aside the Order on the grounds relied upon by Mr. Lyon Q.C.

The Petitioner's standing to petition

14. The Petitioner conceded through her counsel that she did not possess the standing to petition as a contributory because she had not held her relevant shares for the six months qualifying period, <u>if section 163 of the Companies Act 1981 applied to her Petition</u>. Section 163 provided as follows:

> "*163 (1) An application to the Court for the winding up of a company shall be by petition, presented either by the company or by any creditor or creditors, including any contingent or prospective creditor or creditors, contributory or contributories, or by all of those parties, together or separately:*
>
> *Provided that —*
>
> *(a) a contributory shall not be entitled to present a winding up petition the shares in respect of which he is a contributory, or some of them, either were allotted to him or have been held by him and registered in his name, for at least six months during the eighteen months before the commencement of the winding up, or have devolved on him through the death of a former holder...*"

15. The Petitioner's counsel sought to argue that because the ground upon which winding-up order was sought was section 72 of the Companies Act 1981, section 163 (1)(a) did not apply. This was a hopeless submission (albeit one which I implicitly accepted on the ex parte hearing of the Petition). Section 72 provides in material part as follows:

> "*(3) Subject to subsection (2) if default is made in calling an annual general meeting in accordance with section 71 or to elect the required number of directors at such meeting the Registrar, any creditors or member of the company may apply to the Court for the winding up of the company and the Court on such application may order the company to be wound up or make any order that the Registrar might have made under subsection (2).*"

16. I considered it was settled law that Part XIII of the Companies Act 1981 was a comprehensive code for the winding-up of companies under the Act. It is generally recognised that while other statutory provisions might complement the grounds for winding-up set out in section 161, petitioners must nevertheless meet the standing requirements of section 163 (unless these requirements have been clearly modified by the provision the petitioner relies upon). There is nothing in the terms of section 72(3) which suggests the legislative intention of displacing the operation of section 163(1)(a) where a petition for winding-up relies upon this ground.

17. Moreover, the construction contended for would lead to bizarre results. It would be easier for an interloper to acquire shares and immediately petition to wind-up an actively trading company under section 72 than it would be for a shareholder to petition under section 161 (1)(c) to wind-up a company which has failed to commence its business at all, or which has suspended its business for one year. The absurdity was made manifest in the present case where the Petitioner acquired the shareholding relied upon for the purposes of her standing to petition only days before the Petition was presented.

18. The Order (and, by necessary implication the Petition itself) was accordingly fundamentally defective and liable to be set aside, either as of right and/or in the exercise of the Court's discretion.

Was the Company given adequate notice of the fact that a winding-up order would be sought at the hearing of the Petition?

19. The Company's evidence suggests that for several months following a change in management in or about April, 2011, the current Board has been engaged in a battle for effective administrative control with the former governing faction. The duly appointed officers of the Company received no actual notice of the present winding-up proceedings until after the Order was made. As the Petitioner had no adequate opportunity to file evidence in response, I proceeded on the basis of the following undisputed facts:

(a) on August 25, 2011, the day before the hearing at which the Order was obtained, the Petitioner's attorneys sent a letter to the Company's registered office advising that a four-week adjournment would be sought at the first return date of the Petition;
(b) that same day the Petitioner's attorneys wrote the Court advising that she did not wish to proceed with the Petition and indicating: "*We have recommended that Mrs. Chan seek the company's consent to withdrawal through its officers in Hong Kong*";
(c) prior to the hearing on August 26, 2011 when the Petitioner's attorneys were requested to seek a winding-up order after all, the "adjournment letter" sent the previous day to the Company's registered office was not retracted;
(d) if the August 25 adjournment letter had been retracted, the proper officers of the Company would not have received actual notice that an adjournment was no longer being sought;
(e) the Petitioner's attorneys as at the date of the hearing of the application to set aside had no instructions tending to suggest that evidence could be adduced to the following effect; namely, that actual or constructive notice had been given to the Company's lawful agents in Hong Kong that a winding-up order would be sought on August 26, 2011, contrary to the representation made in the August 25, 2011 adjournment letter.

20. The Petition was listed for hearing in part based on the fact that the Petitioner had complied with the statutory requirement (rule 20) of serving the Petition on the Company's registered office. The Petitioner, thereafter, was free to send other correspondence to the Company to such address as she (or her attorneys) felt was best likely to come to the proper officers' attention. Having elected to notify the Company via its registered office that she intended to seek an adjournment, the Petitioner could not fairly change course without effectively notifying the Company of that fact. At a bare minimum, a further letter to the registered office was required to establish constructive notice, even though it was conceded this would not have afforded actual notice to the Company's proper officers.

21. The technical legal position might have been otherwise if the Petitioner had been able to demonstrate that the agents of the Company with whom she was supposedly negotiating in Hong Kong both (a) had actual or apparent authority to bind the Company, and (b) had actual or constructive notice that at the August 26, 2011 hearing a winding-up order would be sought. It appeared self-evident that her points of contact with the Company were not with its lawful agents but with the pretenders to the throne; the very individuals whom the Company contends were wrongfully in receipt of communications from the

registered office at all material times. However in terms of substantial justice, it seemed obvious that the entire winding-up proceedings had taken place without coming to the actual notice of those actively managing the Company's affairs in Hong Kong until after the Order had been obtained.

22. In light of the uncontroverted facts, I was satisfied that there were compelling grounds for setting aside the Order, whether as of right and/or in the Court's discretion, on the grounds that it was obtained without even constructive notice being given of the fact that the August 26, 2011 hearing would be an effective one.

Material non-disclosure

23. I was not satisfied, having regard to possible explanations which the Petitioner might have advanced but could not, that further investigations ought to have been carried out into the true status of the Company. The only matter which clearly ought to have been disclosed but was not was the fact that the Company's local representatives had been advised in writing on the day prior to the hearing that an adjournment for four weeks would be sought.

24. This was material non-disclosure constituting a further ground for setting aside the Order and is a matter which is dealt with in further detail below in relation to costs.

Costs

25. I reserved the issue of costs, having heard counsel, primarily to ascertain from the recording of the Court hearing whether I was seriously misled on the hearing of the Petition as to the notice given to the Company of effective nature of the hearing. This hearing lasted for 49 minutes, which is far longer than the typical unopposed application for a winding-up order.

26. Mr. Hill opened his submissions by explaining that the Petitioner had acquired her share certificate before the presentation of the Petition and the circumstances in which the relief of winding-up was being sought. He explained that the previous evening at 7.00 pm he had been instructed to seek an adjournment of the Petition as Mrs. Chan was in negotiations with the present directors of the Company. However, negotiations broke down this morning Hong Kong time and late last night Bermuda time, so he was now instructed to proceed with the Petition.

27. As regards why the Company was not opposing the Petition or seeking an adjournment, Mr. Hill speculated that this might be because its affairs were in "*such a perilous state*".

He explained that the Petition had been served on the Company Secretary, Mr. "Chips" Outerbridge, at the registered office prior to advertisement. Notice had subsequently been given to the same office of the intention of advertising the Petition. Counsel, in answer to the Court, explained that negotiations had taken place with the Company in Hong Kong. He explained that the Petitioner was anxious because an AGM was required to elect new directors as the current directors were filling in after the previous chairman had resigned. I was extremely unhappy about the merits of the relief sought in relation to a company which did not appear to be a normal functioning company.

28. I queried why a winding-up order was sought in circumstances where the Company was listed on the Hong Kong Stock Exchange as the listing status was typically the most valuable asset of a Hong Kong company. Mr. Hill indicated that the Company was effectively delisted, and referred to the averments in the Petition about the suspension of its listing status. I asked counsel what the stake of the Petitioner in the Company was and (learning that it was extremely small) suggested that if the Petition had only been advertised locally, the vast majority of the Company's shareholders might well be unaware of the present proceedings, querying whether this was not "*unsatisfactory from a natural justice point of view*". I suggested that the modern practice was to advertise abroad to ensure that the widest number of people was aware; Mr. Hill submitted that it was sufficient to advertise and serve a petition locally as required by Bermuda law as there was a local representative, Mr. Outerbridge, at the registered office. It was the Company's obligation to advertise on the exchange.

29. I went on to express concern as to whether, just because no one else had appeared at the hearing, the Court could properly determine that a winding-up order (as opposed to appointing a provisional liquidator) was in the best interests of the shareholders as a whole. Counsel submitted that the provisions of section 72(3) operated in isolation from Part XIII of the Act which was a stand-alone provision so that the Petitioner did not have to meet the standing requirements of section 163(1)(a) of the Act, nor to satisfy the Court that it was just and equitable to wind-up.

30. Mr. Hill submitted that "*perhaps the most telling point is that, in these two chairs, no one is here from the Company*". The Company was the best person to oppose the present application. I expressed concern that the Company appeared to be not functioning at a management and possibly operational level as well so that shareholders were simply not aware of the present proceedings. I commented: " *so what you say is what has been happening to the Company they have actual or constructive notice of so if they are unhappy they are unhappy about the winding up order they should have to appeal to set it aside if they find out about when they do?*" Counsel agreed. I ultimately decided to make

the Order, having regard to the facts that, *inter alia*, the application was unopposed and the liquidation could ultimately be stayed in any event.

31. At no point during this extensive enquiry into the issue of whether adequate notice of the present proceedings had been given was it disclosed that on the previous day, the Company's registered office had been notified in writing that an application for a four week adjournment would be sought on hearing of the Petition. The letter was sent for the attention of the same Mr. Outerbridge whom counsel had indicated effective notice of the Petition had been given to. Most significantly, the letter was completely inconsistent with the implied representation that the Petition was being proceeded with following the breakdown of negotiations which had been aimed at resolving the need to seek a winding-up order. The second and third paragraphs of the letter stated as follows:

> "*Our client no longer wishes to proceed with her application for leave to withdraw the petition and we invite you to ignore the draft summons enclosed with the correspondence. Accordingly, we will appear at the winding-up hearing tomorrow at 9.30am.*
>
> *However, our client is minded to allow the company additional time to put its affairs in order, including by convening an annual general meeting. Accordingly, at the hearing we will seek a 4-week adjournment. If satisfactory progress is not made during that period, our client intends to proceed with the hearing of the petition.*"

32. Having regard to the good standing Mr. Hill enjoys with the Court based an unblemished record in terms of the way in which he has discharged his clients' duty of full and frank disclosure in other cases (and in all other respects in the present case), I have no doubt this was a genuine oversight on his part. The adjournment letter was signed by a colleague and it is entirely plausible that counsel, disoriented by conflicting instructions received from a distant time zone at inconvenient times of the day and/or night, had no actual knowledge of the letter and/or its significance. Nevertheless, this was a serious non-disclosure which pivotally influenced the obtaining of the Order in circumstances where the Court's primary concerns centred on the propriety of making the Order on a non-opposed basis.

33. The costs of the application to set aside the Order are awarded to the Company on a full indemnity basis, to be taxed if not agreed. Also certify that the application was suitable for the engagement of two counsel.

Dated this 3rd day of October, 2011 _____

KAWALEY J