



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 383

IN THE SUPREME COURT OF BERMUDA

(COMMERCIAL COURT)

COMPANIES (WINDING UP)

IN THE MATTER OF TITAN PETROCHEMICALS GROUP LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 1981

Before:

Hon. Chief Justice Hargun

Representation:

Mr. Steven White and Mr. John McSweeney of Appleby (Bermuda)
Limited for Sino Charm International

Mr. Rhys Williams of Conyers Dill &
Pearman Limited for the Company

Ms. Lilla Zuill of Zuill & Co for Zhang Qiandong

Date of Hearing:

15 October 2021

Date of Judgment:

17 November 2021

RULING ON COSTS

Issue of costs following a contested winding up hearing; whether company entitled to the “usual compulsory order” providing for the payment of the company’s costs for preparing and appearing at the hearing; whether the court should make a Bathampton order; whether the court should make a non-party costs order; relevant principles to be applied in relation to non-party costs order

Hargun CJ

1. This Ruling deals with the identification of the appropriate order which the Court should make following its Judgment dated 11 August 2021 (“**the Judgment**”). The background to these proceedings is set out in the Judgment.
2. The winding up proceedings related to the Petition presented by Sino Charm International Limited (“**Sino Charm**” or the “**Petitioner**”) seeking a winding up order in relation to Titan Petrochemicals Group Limited (the “**Company**” or “**Titan Group**”) under section 161(e) of the Companies Act 1981 (the “**Act**”). The Petition was based upon a Statutory Demand for the debt which remained unpaid. The essential dispute between the parties at the hearing was whether the debt in question was disputed *bona fide* and on substantial grounds.
3. The parties filed extensive affidavit evidence in support of and in opposition to the winding up Petition. In support of the Petition, in addition to the affirmation of Xue Zhengye formally verifying the Petition, the Petition was supported by seven affirmations of Mr. Zhou Bing (“**Mr. Zhou**”), a director of Sino Charm. In opposition to the relief sought in the Petition, there were three affirmations by Mr. Lai Wing Lun (“**Mr. Lai**”), who is the non-executive Chairman of the Titan Group and has the day-to-day conduct of the liquidation of Fame Dragon International Investment Limited, (“**Fame Dragon**”), a 66.46% shareholder of the Titan Group, two affirmations of Zhang Qiandong (“**Mr. Zhang**”), an executive director of the Titan Group, and an affirmation of Lui Kit Yit of

Messrs. Michael Li & Co., solicitors acting for the Titan Group in the Hong Kong proceedings, who exhibited the pleadings filed in the Hong Kong action.

4. The Petition was supported by Marine Bright Limited (“**Marine Bright**”), who claimed to be a creditor of the Company for at least HK \$423,000,000. Marine Bright’s standing as a creditor of the Company was disputed by Docile Bright Investments Limited (In Liquidation) (“**Docile Bright**”), who claimed to be a creditor of the Company for the same debt and opposed the relief sought in the Petition. The Petition was also opposed by Fame Dragon.
5. Following a two-day hearing, the Court by its Judgment concluded that the Company’s dispute in relation to the Petitioner’s debt was not being pursued *bona fide* and on substantial grounds. In the circumstances, the Court dismissed the application of the Company that the Petition should be dismissed. The Court also expressed the view that there was persuasive evidence that the Titan Group was, in fact, insolvent and was likely to be insolvent at the time of the presentation of the Petition.
6. Having considered the views of the creditors and contributories, the Court concluded that the appropriate order to make was that the Company be wound up under the provisions of sections 161(c) of the Act.
7. The Judgment was formally handed down on 11 August 2021. At that hearing, the Court ordered that the Petitioner’s costs be paid out of the assets of the Company as an expense of the liquidation (i.e. in priority), as were the costs of Marine Bright, a supporting creditor.
8. The issue of costs in respect of the Company and other parties who appeared to oppose the Petition was adjourned, with directions for filing submissions. The hearing of that application took place on 15 October 2021.

Summary of the position of the parties in relation to costs

9. At the hearing, the Petitioner sought the following orders in relation to the issue of costs:

(i) The usual order that there should be no order as to costs for those contributories/creditors appearing on the Petition to unsuccessfully oppose it;

(ii) A non-party costs order against Mr. Zhang that he pay the Company's costs of the Petition on the basis that he was the person who instigated unjustifiable opposition to winding up and/or an order that;

(iii) The Company's costs of the Petition are not to be paid until all secured creditors have been paid in full (the Bathampton order).

10. The position taken by the Company was that the Court should make the "usual compulsory order" made on a winding-up petition which provides for the payment of the company's costs for preparing and appearing at the hearing of a successful winding up petition as an expense of the liquidation. The Company contended that there was no evidence that the sole executive director of the Company acted for an improper purpose or for personal gain. The Company submitted there is no factor which would justify anything other than the "usual compulsory order".

11. The position taken on behalf of Mr. Zhang was identical to the position taken by the Company. Mr. Zhang also urges the Court that the appropriate order to make in the circumstances of this case was the "usual compulsory order".

Applicable legal principles

12. As noted above, the “usual compulsory order” made on the winding up petition includes provision for the payment of the company’s costs for preparing and appearing at the hearing of the successful winding up petition as an expense of the liquidation. This proposition is supported in paragraph 3-157 of *French, Applications to Wind Up Companies*, 4th Edition, OUP.
13. Mr. Williams for the Company argues that in this case, such an order should be made because (a) the attorneys were duly instructed on behalf of the Company; (b) those directing the affairs of the Company at the relevant time considered that it was in the best interests of the Company to oppose the winding up petition in the way, and on the grounds, that it did; (c) those directing the Company were not acting in their own interests in a way which was in conflict with the best interests of the Company; (d) the work done by the attorneys on behalf of the Company was in fact in the best interests of the Company; and (e) there is no factor which would justify refusing to allow the Company’s costs to be an expense in the winding up.
14. Mr. Williams also highlights the importance of the “usual compulsory order” in relation to the representation of publicly listed companies in winding up petitions in the offshore context. He says that the “usual compulsory order” ensures that the attorneys instructed by a company to oppose the petition can expect that in the ordinary circumstances, win or lose, their fees and disbursements will rank as an expense of the liquidation. Were it otherwise, he submits, it would be difficult for attorneys to act for a company facing a winding up petition because they would have no assurance of being paid.
15. The Court accepts, as submitted by Mr. Williams, that whilst in some cases the attorneys might be able to come to an arrangement with those standing behind the company for the payment of fees and disbursements in closely-held companies, such arrangements are likely to be unsuitable for publicly listed companies. The Court also accepts, as pointed out by Hoffmann J (as he then was) in *In re A Company* [1991] 1 WLR 1003 at 1006 C-D, that the Court needs to keep in mind the fact that a particular costs order may result in depriving the attorneys instructed by the company of their costs. The unfairness of this result is a factor the Court needs to keep in mind when considering the appropriate order to make.

16. Mr. Williams accepts that of course, the Court retains a discretion on the facts of any individual case to make an order other than the “usual compulsory order”, but such an order can only be justified in rare, exceptional circumstances. This accords with the statement of Hoffmann J in *In re A Company* at 1005 D that “*Although [the “usual compulsory order”] is the normal practice, the Court retains a complete discretion and can vary the usual order.*”
17. An issue which occasionally arises is what approach the court should take in circumstances where substantial costs have been incurred by an insolvent company in unsuccessfully defending a winding up petition. The “usual compulsory order” in the circumstances ensures that the shareholders of the insolvent company have little or nothing to lose and the burden of the litigation costs incurred by the company falls on the general body of the unsecured creditors. In circumstances where the court is satisfied that the company’s opposition was unjustified, the court can order a modification to the “usual compulsory order” by postponing the timing of payment to ensure that the company’s costs will not be discharged out of the assets until unsecured creditors have been paid in full. This has been referred to as the *Bathamton* order following the judgment of Brightman J in *In re Bathampton Properties Ltd* [1976] 1 WLR 168. Brightman J justified the making of the *Bathamton* order in the case of an insolvent company on the basis that it produces “*a result of which is just and fair as between [the shareholders of the company] on the one hand, and the general body of creditors on the other.*”
18. In the case of an insolvent company, an order in the *Bathamton* form, as pointed out by Hoffmann J in *In re A Company*, is to deprive the attorneys retained by the company in relation to the winding up proceedings of their costs. Hoffman J considered that to be an unfair result and ought to be avoided:

“It seems to me unfair to make such an order on grounds which have no necessary connection with the conduct of the solicitors themselves. The court has of course jurisdiction under R.S.C., Ord. 62, r. 11 to disallow the costs as between the company and its solicitors if it considers that they have been unreasonably or improperly incurred. Under that rule, however, the court must give the solicitor a

reasonable opportunity to appear and show cause why such an order should not be made. The inquiry is into the conduct of the solicitor and not that of the shareholders or directors of the company.” (at 1006 C-D)

19. Following the approach of Hoffmann J set out above, the Court does not consider that the *Bathampton* order is an appropriate order in relation to the issue of costs in this case.
20. A possible solution to the problem identified in *Bathampton Properties* is to make a non-party order against a party responsible for incurring the costs on behalf of the company. It also has a result that the attorneys instructed on the behalf of the company have recourse for the payment of their costs. This was recognised as a solution by Hoffmann J in *In re a Company* at 1005 G: “*The obvious way to avoid such injustice would be to order the company’s costs to be paid by [the director] personally*” in accordance with the decision of the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.
21. In considering the issue of in what circumstances it is appropriate for a court to make a costs order against a director of an insolvent company, Mr. Williams referred the Court to the recent decision of the Court of Appeal in *Goknur Gida Maddeleri Enerji ve Sanayi As v Aytaccli* [2021] 4 WLR 101. In that case, Coulson LJ reviewed the leading cases on this topic including *Taylor v Pace Developments* [1991] BCC 406; *Metalloy Supplies Limited v MA(UK)* [1997] 1WLR 1613; *Gardiner v FX Music Limited* (2000) WL 33116500 (27 March 2000, unreported); *Re North West Holdings PLC and Anr* [2001] EWCA Civ 67; *Dymocks Franchise Systems (NSW) Pty Limited v Todd and others* [2004] UKPC 39; *Symphony Group Plc v Hodgson* [1994] QB 179; *SystemCare (UK) Limited v Service Design Technology Limited* [2011] EWCA Civ 546; *Threlfall v ECD Insight Limited and Anr.* [2015] EWCA Civ 144; and *Housemaker Services Limited and Anr v Cole and Anr.* [2017] EWHC 924 (Ch). Having reviewed these authorities and without in any way suggesting that these authorities give rise to a mandatory checklist applicable to a company director or shareholder against whom a non-party costs order is sought, Coulson J offered the following guidance:

- a) *An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (Gardiner, Dymocks, Threlfall).*
- b) *The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as “the real party to the litigation” (Dymocks, Goodwood, Threlfall).*
- c) *In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (Taylor v Pace), s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (North West Holdings). Such an order does not impinge on the principle of limited liability (Dymocks, Goodwood, Threlfall).*
- d) *In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company’s pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (Metalloy). **But if the company’s stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the “real party”, and could justly be made the subject of a s.51 order (North West Holdings, Dymocks, Goodwood).***
- e) *In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (SystemCare).*

- f) *If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (Symphony, Gardiner, Goodwood, Threlfall).*
- g) *Such impropriety or bad faith will need to be of a serious nature (Gardiner, Threlfall) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.*

22. At paragraph 41 Coulson LJ concludes the guidance:

“Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, either that the director was seeking to benefit personally from the company’s pursuit of or stance in the litigation, or that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the court that a s.51 order is just. Mr Benson identified no authority in which a s.51 order was made against the director of a company in the absence of either personal benefit or bad faith/impropriety. Conversely, there is no practice or principle that requires both individual benefit and bad faith/impropriety on the part of the director in order to justify a non-party costs order. Depending on the facts, as the authorities show, one or the other will often suffice”

23. Mr. White for the Petitioner urges the Court that a non-party costs order should be made against Mr. Zhang having regard to the following factors.

24. First, the Court found that the opposition to the Petition was unjustified and that Mr. Zhang had been misleading in his evidence on the back-to-back commodity trades at the heart of the case. Mr. White relies upon the following paragraphs in the Judgment:¹

- (a) *"72. In light of these facts and circumstances the Court is of the view that the Company's dispute in relation to the Petitioner's debt is not being pursued bona fide and on substantial grounds. It appears to the court that a mass of evidence has been filed on behalf of the Company to mask the underlying reality that there are no substantial grounds to dispute the Petitioner's debt which forms the basis of the Statutory Demand. The defences and counterclaims set out in the Affirmations of Mr. Zhang and set out in the Hong Kong proceedings, appear to the Court to be a desperate attempt to avoid the normal consequences of the Statutory Demand which has not been discharged by the Company, and in the words of Hoffmann J (as he then was) in Record Tennis Centres have "been conjured up by the company in an attempt to stave off liquidation". In stating this, the Court accepts that it will of course remain open to the Liquidators to consider and determine the Petitioner's proof of debt as they consider appropriate and indeed pursue any claims against it if they are so advised."*
- (b) *"46. As Mr. Zhou points out, by only providing one leg of the back-to-back trades, Mr. Zhang has created the illusion that the Company underwent cash outflow. In fact the Company's net cash flow of the back-to-back contracts was positive."*
- (c) *"59. ... However, Mr Zhang fails to point out to the Hong Kong Court that HT01 and Brilliance Glory entered into sales contracts in relation to the same commodities on the same date with Grand Treasure and have received the sale price from Grand Treasure which have left both subsidiary companies with a trading profit. The impression left with the Hong Kong Court is that as a result*

¹ The procedure for determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Accordingly, judicial findings are admissible in the summary procedure for the determination of liability of a non-party to costs as long as the non-party was closely connected with the underlying action (See *Symphony Group Ltd v Hodgson* [1994] of QB 179 at 193 E-F).

of the contracts entered into with Max Joy, the two subsidiaries, HT01 and Brilliance Glory are out-of-pocket for approximately the same amount as the payment made by Sino Charm for the purchase of the Bond. That impression is misleading.”

25. Second, Mr. White states that Mr. Zhang is to be considered as the “*prime mover*” albeit he may have acquired the co-operation of the other directors (*Secretary of State for Trade & Industry v Liquid Acquisitions Ltd* [2002] EWHC 180 (Ch) at [9]). Mr. White points to the undisputed evidence that he was the sole executive director of the Company. It is also undisputed that he is the second largest shareholder in the Company. I accept the submission that from the totality of his evidence, he was clearly at all times the “*prime mover*” behind the Company. The Court also finds that that Mr. Zhang controlled the present litigation in opposition to the Petition on behalf of the Company.
26. Third, it is now again undisputed that Mr. Zhang funded the litigation on behalf of the Company in opposition to the Petition filed by the Petitioner. This funding was advanced by Mr. Zhang in circumstances where the Company itself was unable to finance the litigation. In the Judgment, the Court found at paragraph 60 that there is persuasive evidence that the Company was in fact insolvent and was likely to be insolvent at the time of the presentation of the Petition.
27. The Petition in these proceedings was presented to the Supreme Court on 20 September 2019. Subsequent to the presentation of the Petition, Mr. Zhang advanced various amounts to the Company at 0% interest rate. Mr. Zhang accepts that those advances were used to fund the present litigation on behalf of the Company. Mr. Zhang says that the advances were also used for other corporate purposes such as paying salaries for the employees.
28. The exhibit to the Second Affidavit of Mr. John McSweeney, filed on the behalf of the Petitioner, shows that following the filing of the Petition, Mr. Zhang advanced during the

period 13 November 2019 to 9 February 2021 20 separate amounts totaling HK \$10,300,000.

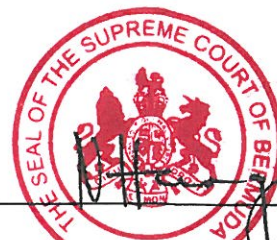
29. Fourth, even though the Company was facing a winding-up petition based upon deemed insolvency due to failure to honour the statutory demand served by the Petitioner and that there were allegations of actual insolvency in the evidence filed on behalf of the Petitioner, the Company continued to raise money from third parties. The exhibit to the Second Affidavit of Mr. John McSweeney shows two Convertible Bonds issued by the Company dated 13 March 2020 and 23 March 2020 in the amount of HK \$4,000,000 each. The exhibit to the Second Affidavit of Mr. John McSweeney also shows that the proceeds of HK \$8,000,000 raised by these two Convertible Bonds were used on 26 of March 2020 to repay Mr. Zhang the amount of HK \$5,400,000 and thus substantially retire the Company's indebtedness to Mr. Zhang.
30. In the circumstances, Mr. White contends, correctly in view of the Court, that the prolonged opposition of nearly two years to the Petition by the Company was used by Mr. Zhang to remain in control of the Company. This continued control over the Company allowed Mr. Zhang to raise funds from third parties on behalf of the Company and to use the funds raised to repay the indebtedness of the Company to Mr. Zhang. The Court accepts Mr. White's submission that the cover of litigation pursued on behalf of the Company for nearly two years, funded by Zhang, was used by him to derive personal benefit in the form of raising funds from third parties on behalf of the Company and then use the raised funds to repay the Company's indebtedness to him.
31. If the only facts relied upon by the Petitioner to support an application for a non-party costs order against Mr. Zhang were the findings of the Court (paragraph 24 above), it is unlikely that the Court would have made such an order. However, the Court's findings that (i) Mr. Zhang was the "*prime mover*" behind the Company and the litigation; (ii) Mr. Zhang controlled the litigation on behalf of the Company; (iii) Mr. Zhang funded the litigation on behalf of the Company for its entire duration of nearly two years; (iv) the cover of litigation allowed Mr. Zhang to remain in control of the Company and in particular allowed him to raise funds from third parties in the amount of HK \$8,000,000; and (v) the fact that most

of the funds raised were used to substantially retire the Company's indebtedness to Mr. Zhang, make this an entirely exceptional case and warrant the exceptional non-party costs order against Mr. Zhang. The Court is not persuaded by the fact that Mr. Lai, a director of RSM Corporate Advisory (Hong Kong), also supported the opposition to the Petition makes any material difference. The Court did not find that Mr. Lai's evidence in this regard was entirely objective.²

Conclusion

32. In all the circumstances, the Court considers that it is just that Mr. Zhang shall pay forthwith the Company's costs of the Petition, to be taxed on the standard basis if not agreed.
33. The Court also orders that there be no order as to costs of Sino Team Investment Development Limited, Fame Dragon, and Docile Bright in opposing the Petition and of this costs application.
34. The Court grants Mr. Williams' application that the costs order against Mr. Zhang be stayed pending the determination and/or withdrawal of the pending appeal before the Court of Appeal against the Judgment of this Court dated 11 August 2021.
35. The Court will hear the parties in relation to the issue of costs relating to this application, if required.

Dated this 17th day of November 2021



NARINDER K HARGUN
CHIEF JUSTICE

² See, for example, paragraph 17 of his Third affirmation where Mr Lai gives the legal opinion that "*there is various significant evidence which suggests that the title of the shares did not actually pass from Saturn to DBIL, and a fortiori, the title did not pass from DBIL to Marine Bright as follows: available information may support a view that DBIL may have acquired the beneficial interest of the Preferred shares on 10 October 2013...*"