



In The Supreme Court of Bermuda

COMMERCIAL COURT COMPANIES (WINDING UP)

2013: No. 333

IN THE MATTER OF LAEP INVESTMENTS LTD (“the Company”)

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

(In Court)

Date of hearing: 4th April 2014

Date of ruling: 23rd April 2014

Mr John Wasty and Mr Henry Tucker, Appleby (Bermuda) Limited, for the
Petitioner

Ms Nicole Tovey, Trott & Duncan, for the Company

Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Joint Provisional
Liquidators

1. On 1st April 2014 I issued a ruling in which I concluded:

68. I am in principle prepared to make a winding up order. However I should like to hear from the parties as to its terms. Eg whether the Joint Provisional Liquidators should be required to provide security and/or the

Petitioner to provide an undertaking in damages, given that the Company may succeed on the Annulment Application.

69. In view of the funding difficulties which the Joint Provisional Liquidators have faced to date, I should like to hear from them as to what provisions regarding their costs they suggest the order should include.

2. Pursuant to that ruling, when the matter came back before me on 4th April 2014 I made an order winding up the Company. After hearing from the parties, I resolved the matters raised above as follows.
3. I made no order that the Joint Provisional Liquidators should provide security for costs. Such an order would be unusual in this jurisdiction and, in the event, was not sought by any of the parties.
4. I made no order that the Petitioner should provide an undertaking in damages, not least because, in light of helpful written submissions from the Petitioner, I am satisfied that to do so would be wrong in principle.
 - (1) The court may where appropriate require a cross-undertaking in damages on an interim order. As Michael Briggs QC (as he then was), sitting as a Deputy Judge of the High Court, explained in Harley Street Capital Limited v Tchigirinski (No 1) [2005] EWCA 2471 (Ch) at para 16:

In my judgment, the underlying principle is that a cross-undertaking in damages, as the *quid pro quo* for the court making an interim order without having determined the facts or the claimant's entitlement to it, is given not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted.
 - (2) However an undertaking in damages will not be appropriate on a final order as its finality precludes the possibility that the court will later conclude that it ought not to have been made.
 - (3) Eg in Fenner v Wilson [1893] F 524, which was an action for alleged infringement of a patent, the court issued an injunction restraining the

plaintiff, until judgment in the action, from continuing the publication of newspaper advertisements threatening legal proceedings or liability in respect of any manufacture, use, sale, or purchase of the patented articles. The Registrar drew up the minutes of order, which contained an undertaking by the defendants as to damages, in case the court should be of the opinion that the plaintiff had sustained any, by reason of the order, which the defendants ought to pay. The defendants moved to vary the minutes by striking out the undertaking. Their application was upheld. Kekewich J held at 659 that although the order was interlocutory in that it was made between the issue of the writ and the hearing, it was final in that it disposed definitively of the issue of the publication of newspaper advertisements. Hence there should be no undertaking:

My decision, though subject to appeal, is not open to review at any time by me. Therefore it is impossible to say it is not a final order. Accordingly, the ordinary form of interlocutory injunction is not applicable, and there ought to be no undertaking here.

- (4) As was common ground, a winding up order is a final order as there is no jurisdiction to set it aside other than on appeal.
5. The Joint Provisional Liquidators were content with the present terms of their appointment. The winding up order therefore made no change to the existing provision for payment of their costs.

Dated the 23rd day of April, 2014

Hellman J