In The Supreme Court of Bermuda

WINDING UP JURISDICTION
(COMMERCIAL COURT)
2012 No. 258

IN THE MATTER OF PETROPLUS FINANCE 2 LTD

AND IN THE MATTER OF THE COMPANIES ACT, 1981

EX TEMPORE RULING
(in Chambers)

Date of hearing: November 18, 2014

Ms. Lesley Basden, Special Counsel for the Official Receiver, for the Provisional Liquidator

1. In this case the Official Receiver and Provisional Liquidator applies by Summons dated November 13, 2014 for directions from the Court pursuant to the first Meeting of Creditors which was held on or about October 3, 2014.

2. One matter of legal principle was quite properly drawn to the Court's attention in the First affirmation of Stephen Lowe. And that was that one very significant creditor which voted in favour of the key resolutions:

    (1) The appointment of Messrs. Michael Morrison and Charles Thresh as Joint Liquidators of the Company; and

    (2) The appointment of a Committee of Inspection comprising that substantial creditor, Wilmington Trust.

3. The difficulty with the second resolution, which was duly passed as an administrative matter, was the doubt surrounding whether or not a committee of inspection under Bermuda law can be constituted by a single creditor.

4. The position is not made explicit by our legislative scheme[1], but if one looks at the key statutory provisions, one can infer that Parliament envisaged that a committee, consistent with the natural and ordinary meaning of the word 'committee', would consist of more than one creditor. There are two statutory provisions which bear on this question in particular.

5. Firstly, section 181of the Companies Act 1981 provides as follows:

> "*(1)When a winding-up order has been made by the Court, it shall be the business of the separate meetings of the creditors and contributories summoned for the purpose of determining whether or not an application should be made to the Court for appointing a liquidator in place of the Official Receiver to determine further whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator and who are to be members of the committee if appointed.*
>
> *(2)The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matters aforesaid the Court shall decide the difference and make such order thereon as the Court may think fit.*"

6. The next statutory provision which is relevant is section 182. That too has language which suggests that a committee is assumed to consist of more than one member. One provision suffices to make this point. Subsection (3) provides as follows:

> "*(3) The committee may act by a majority of their members present at a meeting but shall not act unless a majority of the committee are present.*"

7. In preparing for the present hearing, I sought elucidation of this question by reference to any authority and in the short time available was only able to identify one potentially relevant authority. This was a decision of Master Lunn of the South Australia Supreme Court in *Jindal Transworld PVT Ltd-v-Scottsdale Homes No. 10 Pty Ltd. (No 2)* [2010] SASC 210. And he had before him a similar scenario where, at the first meeting, a resolution was passed for the appointment of one Mr. Narender Pal Singh Sethi. He set out the provisions of the statute which are substantially the same as section 181 of our Companies Act. This case was referenced in a *Mondaq* online article[2].

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[1] Curiously, section 218(1) mandates a maximum of five members for a committee of inspection for the purposes of a creditors' voluntary winding-up, without prescribing a minimum number.

[2] Philip Stern and Peggy Wong, in '*Australia: Committees of Inspection-Caution*' observed: " *We also query how a COI could be formed with one creditor….Practically speaking, there is no need for a COI if there is only one creditor, as that is the same thing as holding a meeting of creditors*."

8. I initially thought, based on a quick perusal of the commentary that this case actually supported the proposition that a single member could not constitute a committee of inspection. In fact, as Ms. Basden [who I supplied with a copy of the judgment at the beginning of the hearing] astutely pointed out the committee in the *Jindal* case was merely held to be improperly constituted on voting irregularities grounds. I nevertheless reach the same conclusion [that a committee must consist of more than one creditor] as a matter of statutory interpretation.

9. Counsel also suggested that section 235 of the Companies Act 1981 might have the effect of incorporating the bankruptcy rules relating to committees of inspection into the Companies Act. I have always considered section 235 to apply merely to the bankruptcy rules relating to proving debts[3]. That is an argument which I would not like to decide today.

10. Ms. Basden helpfully referred the Court to the elegant approach adopted by Hellman J on December 20, 2013 in the related case of *Re Petroplus Finance Ltd*., Commercial Court, Companies (Winding-Up) 2012: 259, when he made an Order in the following terms:

> "*8. The Official Receiver shall deal with the principal creditor, Deutsch Bank Trust Company Americas, on the footing that the principal creditor is a de facto Committee of Inspection.*"

11. In the present case I have decided to make a similar Order in respect of the Joint Liquidators appointed in respect of the present Company, but I do so subject to one important *caveat*. While as a practical matter the Joint Liquidators are clearly free to consult with the principal creditor in the present case in the same way and in relation to the same sort of matters that a committee of inspection would be consulted on, it seems to me that the position as a matter of strict law is materially different. Where the Companies Act, in particular section 175[4], specifies certain powers which the

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[3] Section 235 of the Act provides as follows:

"*In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.*"

[4] Section 175(1) provides: "*The liquidator in a winding-up by the Court shall have power, with the sanction either of the Court or of the committee of inspection—*

(a) to bring or defend any action or other legal proceeding in the name and on behalf of the company;
(b) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;
(c) to appoint an attorney to assist him in the performance of his duties;
(d) to pay any classes of creditors in full;

liquidators can only exercise with the approval of either the Court or the committee of inspection, in my judgment the fact that there is a *de facto* committee of inspection cannot clothe that *de facto* committee with authority to empower the liquidators in the same way that a duly constituted committee could. To direct that this should happen would, it seems to me, be effectively extending the operation of the statute beyond its intended scope. The approach of applying statutory provisions by analogy has been criticised by Lord Collins in the recent Judicial Committee of the Privy Council decision in *Singularis Holdings Ltd.-v-PricewaterhouseCoopers* [2014] UKPC 40, where an order that I made purportedly applying a statute by analogy was described as effectively "legislating from the Bench"[5].

12. And so for these reasons, at this stage, I refuse the 'application'[6] for Wilmington Trust to be appointed as a sole committee of inspection. I appreciate that Wilmington Trust is not present. The Order which has been proposed by counsel and which I intend to sign will give liberty to apply to enable any interested person in the liquidation to seek to contend that any other Order ought properly to be made.

Dated this 18th day of November 2014 _____

IAN RC KAWALEY CJ

(e) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof."

[5] Lord Collins stated at paragraph 64: "*In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.*" The majority of the Judicial Committee panel held that jurisdiction to make the order in question existed as a matter of common law.

[6] In fact counsel for the Official Receiver very properly conceded that as a matter of law effect could not be given to the resolution for the creation of a committee of inspection consisting of one member. The present Ruling in substance explains why the Court accepted that concession.