When can a company apply for its own winding up in the Cayman Islands?

Insights - 27/11/2015

When can a company apply for its own winding up in the Cayman Islands?

A recent decision of the Grand Court of the Cayman Islands has considered the ability of a company to apply for its own winding up. Construing s.94(1)(a) of the Companies Law (2013 Revision) (the "**Law**"), the Court upheld the pre-2011 view that while a company acts through its directors, those directors have no authority to present a winding up petition absent: (a) a resolution of the shareholders of the company resolving that the company present a winding up petition; or (b) an express provision in the articles of association of the company authorising the directors to present a winding up petition on behalf of the company - a general provision giving the directors all of the powers of management of the company is insufficient.

Facts

In the Matter of China Shanshui Cement Group Limited, unreported, 25 November 2015, Mangatal J. dismissed a winding up petition presented in the Grand Court of the Cayman Islands by the board of directors of China Shanshui Cement Group Limited (the "**Company**") on the basis of alleged cash flow insolvency (the "**Petition**"). Contemporaneously with the Petition, the board made an ex parte on notice application, purportedly on behalf of the Company, to appoint restructuring joint provisional liquidators (the "**JPLs**") under section 104(3) of the Law (the "**Application**").

The Petition and the Application were filed on 10 November 2015 without obtaining a resolution of the Company's shareholders. As per the requirements of the Stock Exchange of Hong Kong (the "**SEHK**"), the Company filed an announcement of the filing of the Applications with the SEHK. That announcement was made in Hong Kong on 11 November 2015, a matter of hours before the Application was listed for an *ex parte* hearing before the Court.

Following submissions made on behalf of, *inter alios*, two shareholders of the Company, who together held over 53% of the Company's shares, Tianrui (International) Holding Company Limited and China Shanshui Investment Company Limited (together, the "**Majority Shareholders**"), the Court ruled that the matter was not so urgent that interested shareholders and creditors of the Company should be deprived of proper notice and a period of time to consider their positions, including whether they wished to be heard on the Application. The Application was adjourned for an *inter partes* hearing on 18 November 2015, with subsequent hearings taking place on 19 and 23 November 2015, with increasing numbers of creditors being represented at each hearing.

The Majority Shareholders opposed the Application on numerous substantive grounds, but as a preliminary issue, sought determination of the question of whether the directors had standing to file the Petition (the existence of which underpinned the Application).

Decision

In her 34 page written judgment, Mangatal J. sets out a thorough analysis of the standing requirement to petition under s.94(1)(a) of the Law, both before and after the changes in the 2007 Companies (Amendment), Law came into effect.

Mangatal J. ruled that as s.94(1) of the Law derived from equivalent provisions contained in English company statutes, and as the 2007 Amendments did not make any change of substance to s.94(1) of the Law, then the traditional common law position - which was considered in detail by Brightman J (as he then was) in the English case of *Re Emmadart Ltd [1979] 1 Ch. 540*, and followed by Smellie J (as he then was) in the Cayman case of *Banco Economico SA v Allied Leasing and Finance Corporation [1998] CILR 102* - continued to apply in Cayman. In short, this means that directors of companies have no authority to present a winding up petition absent: (a) a resolution of the shareholders of the company resolving that the company present a winding up petition; or (b) an express provision in the articles of association of the company authorising the directors to present a winding up petition on behalf of the company.

In reaching that decision, Mangatal J. carefully analysed the decision *In The matter of China Milk Products Group Limited* [2011] 2 CILR 61. In that case, Jones J. concluded that, having regard to the overall amendments made to the Companies Law in 2007 and certain matters of policy, it was necessary to distinguish between solvent and insolvent companies when construing s.94(1)(a) of the Law to determine who could petition to wind up a company. Whereas Jones J. took the view that directors of a (cash flow) insolvent company or a company of doubtful insolvency had standing to petition to wind up in the name of the company *without* the sanction of the shareholders or an express provision in the articles of association, it was only directors of solvent companies who required an authorising shareholder resolution or an express provision in the articles of association in order to present a petition in the name of the company.

While accepting that Jones J.'s construction may well have allowed the Court to reach the best commercial result in the circumstances of China Milk, Mangatal J., was convinced that Jones J.'s construction of the statutory provisions was wrong and felt obliged to differ. Mangatal J. noted that the language of the relevant provision of the statute drew no distinction on solvency grounds and the existence of amendments to other provisions of the Law in 2007 did not assist in interpreting what are, in her view, the same clear and unambiguous words in s.94(1)(a). Accordingly, Mangatal J. held that the traditional common law position set out in *Emmadart* and applied in *Banco Economico* prevails in Cayman.

This decision marks a return to the pre-2011 position with regard to s.94(1)(a) and therefore is of general relevance to restructuring and insolvency practitioners. Furthermore, it will be of particular relevance to directors of all Cayman companies who are considering the possibility of presenting a petition to wind up a company and any related application to appoint joint provisional liquidators under s.104(3) of the Law. Directors must ensure that they obtain appropriate shareholder resolutions or are mandated under the relevant articles of the company irrespective of the solvency (or otherwise) of the company before presenting a winding up petition in the Cayman Islands on behalf of a company.

Ogier acted for Tianrui (International) Holding Company Limited, one of the successful applicants seeking determination of the preliminary issue.

Ulrich Payne and Oliver Payne of Ogier acted on behalf of Tianrui (International) Holding Company Limited.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

Meet the Author

Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: +852 3656 6044

Key Contacts

Rachael Reynolds KC

Global Senior Partner

Cayman Islands

E: rachael.reynolds@ogier.com

T: +1 345 815 1865

Oliver Payne □□□

Partner □□□

Hong Kong

E: oliver.payne@ogier.com

T: +852 3656 6044

Nathan Powell

Partner □□□

Hong Kong

E: nathan.powell@ogier.com

T: +852 3656 6054

Related Services

Dispute Resolution

Related Sectors

Restructuring and Insolvency