

Cayman Grand Court confirms test for standing in contributory winding up proceedings

Insights - 22/05/2023

In the Matter of Global Cord Blood Corporation (FSD 108 of 2022, 31 March 2023), Kawaley J confirmed and clarified the legal test that applies when a third party seeks to be heard on a winding up petition. The case is a reminder that, generally speaking, only legal shareholders of a company are entitled to be joined to petition proceedings or present a contributory's petition.

The third party in this case was alleged to be acting in concert with certain parties associated with the company (and opposed to the interests of the petitioner and the shareholders). The third party had entered into a contract with various people and companies who, through a corporate chain, ultimately held an interest in the petitioner. The contract obligated those entities to act in accordance with the third party's instructions with respect to the petitioner's shareholding in Global Cord Blood Corporation. Neither the company nor the petitioner were parties to the contract.

The petitioner had presented a contributory's winding-up petition against the company on the just and equitable basis. The third party objected to the presentation of the winding-up petition and sought to intervene in the petition proceedings on the basis that there had been a breach of a contractual obligation to act in accordance with the instructions of the third party, that the petitioner ought not to have presented the petition without the consent of the third party (which would not have been given), and that the petition proceedings should therefore be struck out.

The petitioner disputed the standing of the third party to intervene in the proceedings. For the reasons summarised below, the court agreed that the third party had no standing to intervene.

Decision – confirmation of two-stage test for standing in contributory winding up proceedings

The court confirmed that there is a two-stage test with respect to a party's standing to intervene in just and equitable winding up petition proceedings presented by a shareholder of a company

1. The party seeking to be joined must be a shareholder. Sections 92 and 95(3) of the Companies Act require a shareholder to present the petition and the wider legislative scheme made it relatively clear that it was only ever intended that shareholders could be party to such proceedings. This is consistent with existing authority in the Cayman Islands; see *BAF Latam Credit Fund* (Unreported, 16 March 2021, Parker J) as to the principles underpinning presentation and substitution of shareholder petitioners, and *Chia Hsing Wang v Credit Suisse AG* (Unreported, 27 September 2021, Doyle J) for an alternative approach where a beneficial owner of shares, who did not himself have standing to petition, appointed equitable receivers over his shares registered in the name of a custodian, which conferred standing on the receivers to present a contributory's petition in his stead

1. The party seeking to be joined must also have a sufficient interest. Sufficient interest in this context is considered by reference to the interests of the wider stakeholders as a whole

Kawaley J also considered an argument by the third party that, regardless of whether that party was a shareholder, that the court could exercise its inherent jurisdiction to allow a party with sufficient interest to be heard.

The court's view was that while it had a broad inherent jurisdiction with respect to procedural matters, that it would only exercise that jurisdiction if doing so was consistent with the wider statutory scheme and, in this instance, it would not be for the reasons he had already given.

He also went on to say that even if that were not the case, then the court would only exercise its inherent jurisdiction if (a) that party had a sufficient interest in the proceedings and (b) the extent to which their joinder would assist with fair disposal of the proceedings.

The court found that the third party was not a contributory and therefore that it had no standing to intervene in the proceedings. It also went on to find (although it was not necessary for purposes of disposing of the application) that the third party had an insufficient interest to be joined in any event.

Lastly, the judge was not persuaded that section 95(2) of the Companies Act was of any assistance to the third party. That section provides that a contributory will lack standing to present a winding up petition if it has entered into a contract not to present a winding up petition. However, the judge considered that the contract was not sufficiently clear to preclude the petitioner's right to present a winding up petition; rather it only said that the petitioner must act in accordance with the petitioner's instructions, and particularly in circumstances where neither the petitioner nor the company were parties to the contract. This approach accords with the requirement laid down by Mangatal J in *Rhone Holdings LP* (Unreported, 16 September

2015), that the contract must expressly provide that the parties have agreed that one party may restrain the other from presenting a winding up petition.

Conclusion

The case is a reminder that generally speaking only legal shareholders of a company are entitled to be joined to petition proceedings or present a contributory's petition. If a non-shareholder is to be joined, then that party must plainly have a sufficient interest in the proceedings in order to persuade the Court that it does in fact have standing.

In addition, for those drafting contracts, it is important to note that a general power to direct how a company exercises its shareholder rights in a company is not sufficient to prevent that entity from presenting a winding up petition and where appropriate, express language ought to be used.

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