

BERMUDA SUPREME COURT

IN THE MATTER OF Z-OBEE HOLDINGS LIMITED AND IN THE MATTER OF THE COMPANIES ACT 1981 - REASONS

[2017] SC (Bda) 79 Civ (3 October 2017)

WINDING-UP PROCEEDINGS – PROVISIONAL LIQUIDATION FOR RESTRUCTURING PURPOSES – APPLICATION BY JOINT PROVISIONAL LIQUIDATORS FOR VALIDATION ORDER IN RELATION TO SHARE TRANSFERS – GOVERNING PRINCIPLES – *COMPANIES ACT 1981, SECTION 166*

Background

In February 2017, the Court granted the company's application to appoint Joint Provisional Liquidators ("JPLs") for restructuring purposes.

On 9 October, 2017 the JPLs applied for a validation order that:

1. The transfer of legal title to fully paid shares in the company, brought about by the delisting of the company's shares on the Singapore Stock Exchange, shall not be void by virtue of section 166 of the *Companies Act, 1981* in the event of a winding-up order being made in respect of the company.
2. The JPLs be authorized to make such arrangements as they consider appropriate, and without further order from the Court, for the amendment of the company's register of members.

The Court granted the validation order on 13 October 2017. These are the reasons for that decision.

The commercial and practical reasons for the application

The application for the validation order was made, prior to a potential sanction application for a scheme of arrangement, for the following reasons:

- The shares of the company are listed on the Hong Kong Stock Exchange and the Singapore Stock Exchange. Trading of shares on the Singapore exchange has been very low and the JPLs considered the cost of maintaining the secondary listing unjustified. They proposed the company delist the Singapore shares and transfer them, either to a party which will allow the shares to be listed on the Hong Kong exchange or direct to the beneficial owners. The JPLs could see no

adverse consequences for the holders of the Singapore shares from this transfer.

- The potential problem was that, in the event that restructuring fails and a winding-up order is made against the company, under Section 166 of the *Companies Act 1981*, the listing transfers would need to be unwound, which would be extremely complex and perhaps impossible.
- Section 166 provides that: '*In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.*'
- The JPLs wished to extinguish the risk and potential costs of the listing transfers being voided, and so sought the validation order. The Court found these reasons clear and compelling.

Governing legal principles

In *Re IPOC International Growth Fund & Ors* [2007] Bda LR 74, Kawaley CJ, cited four elements which must be established before an applicant shall be entitled to a validation order (which were taken from the Caymanian case of *Re Fortuna Development Corporation* [2004-05]):

1. The proposed disposition must appear to be within the powers of the directors.
2. The evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company.

3. It must appear that the directors in reaching that decision have acted in good faith.
4. The reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.

This test was formulated in relation to dispositions of assets. Counsel for the petitioner suggested that in the share transfer context less stringent principles should be applied, referencing the decision of Smellie CJ in *Re Bayou Offshore Master Fund Limited & Ors* [2007] CILR 434, which stated that “*where no potential detriment to contributories or creditors could arise, a transfer of shares may be allowed after a winding-up order if there are strong grounds for so doing... ‘Strong grounds’ must be looked for in the context of the nature of the undertakings of the company itself and of the business environment in which it operates. Even though the company may be moribund or in distress, the nature of its undertakings and the environment in which it operates may be such as to make it both practicable and desirable that transactions of its shares should be allowed to continue*”.

Routine applications for validation orders may be on the papers

Counsel for the petitioner commended the Cayman practice of dealing with routine validation applications on the papers (through an application in writing considered administratively by a judge), to save costs and court time. Kawaley CJ stated: “I see no reason why a similar practice should not be followed in Bermuda in relation to routine validation applications in relation to share transfer transactions which court-appointed liquidators advise are in the interests of the general body of unsecured creditors.”

Conclusion

The Court found that the application clearly provided ‘*strong grounds*’ for validating the proposed share transfers. Kawaley CJ summed up: “The main *raison d’être* of every insolvency proceeding is to preserve value and maximize the return to unsecured creditors. The main commercial object of the proposed share transfers was to eliminate the actual costs of a dual listing and to eliminate the contingent costs of seeking to unwind the transfers if the pending scheme failed.”

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.