

Offshore Cases

Cayman Islands

Grand Court

In the matter of Pinnacle Global Partners Fund I Ltd. and in the Matter of the Companies Law (2108 Revision) (4 February 2019)

Winding-Up – Fund – Remedying defect in Petition

On 4 February 2019, in *In the Matter of Pinnacle Global Partners Fund I Ltd*, the Financial Services Division of the Grand Court of the Cayman Islands granted a winding-up order sought by two creditors of Pinnacle Global Partners Fund I Ltd (the “Company”) and confirmed the Court’s ability to cure irregularities in relation to the commencement of winding-up proceedings.

Background

Perlen Holdings Ltd and Nerthington Ltd (the “Petitioners”) applied by petition to wind-up the Company (the “Petition”) pursuant to Section 92(d) of the *Companies Law (2018 Revision)* (the “Companies Law”), which provides that a company may be wound up by the court if it is unable to pay its debts.

In October 2018, the Petitioners each served a statutory demand on the Company pursuant to Section 93 of the Companies Law for substantial sums (over US\$15.5 million and US\$4.5 million respectively). The Company did not make any payment to either of the Petitioners or make any attempt to compromise the debts.

The Company opposed the Petition on the basis that the Petition was a nullity, and alternatively, that the matter should be adjourned due to numerous issues which must be considered by the Court before any winding-up order can be considered.

Alleged Defects of the Petition

On 18 December 2018, the Petition was served on the registered office of the Company without the hearing date endorsed upon it. Companies Winding-up Rules (“CWR”) Order 3 r.5 (2) provides:

“A creditor’s petition shall not be filed unless and until the proceeding has been assigned to a Judge and a hearing date has been fixed and endorsed on the petition or stated in a notice of hearing filed simultaneously with the petition.”

However, the registered office communicated that it had resigned as registered office for the company effective 13 December 2019. Service was attempted again on 19

December 2019 to the known current directors and a former director and legal adviser, this time with the hearing date endorsed upon it.

The Company argued that the Petition was filed prematurely prior to the allocation of a judge to hear it and the setting of a hearing date and that the defect was so fundamental that it rendered the Petition a nullity, and further submitted that the Court has no jurisdiction to remedy the defect.

The Company relied on authority that preceded the incorporation of Order 2 of the Grand Court rules (“GCR”) into the current CWR.¹ In that authority, the Cayman Islands Court of Appeal made express reference to the fact that *Cayman Winding-Up Rules (2008)* did not incorporate the power conferred by Order 2 of the GCR to relieve a party from the consequences of failure to comply with the rules.² Nonetheless, the Court of Appeal was satisfied that none of the failures to comply with the requirements of the Winding-Up Rules were so fundamental as to be incurable, provided that justice could be done by an appropriate exercise of discretion. It was confirmed that a judge remains entitled to invoke the inherent jurisdiction of the Court to control its own processes, so as long as, in exercising that power is not contrary to the rules of the CWR.

The Company also attempted to draw an analogy from cases where the writ was not served in time, with no good explanation and where no order to extend validity was justified.³ However, the Court distinguished these cases from the present case. Here, there was a relatively minor technical breach which has been explained in evidence and has caused no consequential prejudice to any party.

The Court also referred to Order 2 of the GCR which is now expressly incorporated into CWR Order 1 r.4 (1A). GCR Order 2 r.1 (1) provides:

“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any

¹ *HSH Cayman I GP Limited and others -v- ABN Amro Bank N.V.* [2010 (1) CILR 114]

² *Ibid* p 119

³ *Harrison and Anor -v- Touche Ross (a firm)* [1995] C.L.C. 337.

proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.”

Accordingly, it was held that the Court does have the power to remedy procedural defects. It follows that in doing so, the Court needs to assess, so far as reasonable and proper to prevent injustice occurring, how to interpret any failure to comply. The Court held that, having regard to the evidence by the Petitioners and the absence of any prejudice to the Company, that the defect should be remedied. It was noted that the hearing date was brought to the attention of the Company the day after the first attempted service of the Petition.

Austrian Law issue

The Company in argument referred to the fact that various agreements relied on by the Petitioners were expressly subject to Austrian Law, and argued that Austrian law imposes obligations on the Petitioners which cannot be circumvented by commencing winding-up proceedings.

The Court noted that the Company's arguments were not supported by any evidence and that the Company did not raise any issues as to whether the sums claimed were due. The Court was satisfied on evidence that the Company never disputed the debt until the submissions were made. Despite demands, the Company failed to pay the debts, and it is a matter of inference that it was unable to do so.⁴ The Court was satisfied that the Company was unable to pay its debts and granted the winding-up order sought by the Petitioners.

Conclusion

This judgment should be welcomed by creditors and insolvency practitioners as a reminder that the Grand Court has the jurisdiction and discretion to cure any irregularities in relation to commencement of winding-up proceedings in order to vindicate parties' substantive rights. An opposition based solely on minor procedural defects will likely face an uphill battle.

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.

⁴ *Cornhill Insurance PLC -v- improvement Services Ltd and others [1986] 1 WLR 114*