Boubyan Petrochemical Company (K.S.C.) v BPC Kuwait-UK Land Fund Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Liston, Ramsden, Clyde-Smith
Judgment Date:	20 September 2017
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Text

[2017] JRC 152

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Liston and Ramsden.

Between
Boubyan Petrochemical Company (K.S.C.)
Representor
and
BPC Kuwait-UK Land Fund Limited
First Respondent

and

Graeme Ross
Second Respondent

and

Johann Kurman
Third Respondent

and

Craig Stewart
Fourth Respondent

and

Rohit Walia
Fifth Respondent

and

Samir Hassan Al-Amiri
Sixth Respondent

and

Alpen Capital Corporation Limited
Seventh Respondent

and

Boubyan International Industries Holding Company
Eighth Respondent

and

Sons of Mubarak Al-Dabbous
Ninth Respondent

Advocate R. O. B. Gardner **for the Representor**.

Advocate J. D. Kelleher **for the Second, Third, Fourth, Fifth and Sixth Respondents**.

Authorities

Companies (Jersey) Law 1991.

Limited Partnerships (Jersey) Law 1994.

In Re I.M.S. Ltd [1996] JLR 294.

Dunlop on Jersey Company Law First Edition, 2011.

Tyman's Limited v Craven [1952] 2 QB 100 (C.A.).

Pickering v Davy [2017] EWCA Civ 30.

Companies — directions given by the Court on declaring the dissolution of a company void under the Companies (Jersey) Law 1991.

THE COMMISSIONER:

1 This judgment is concerned with the directions to be given by the Court on declaring the dissolution of the company void under Article 213 of the Companies (Jersey) Law 1991 ("the Companies Law").

2 The company concerned is Alpen Partners Limited ("Alpen"), which had acted as the General Partner in, and subsequently as Asset Manager of, a limited partnership known as Alpen Partners Land Fund UK L.P. established on 17 th December, 2007, under the Limited Partnerships (Jersey) Law 1994 ("the Fund").

3 The purpose of the Fund was to provide investors with exposure to land in the south-east of the United Kingdom. Its objective was to acquire strategically located parcels of land and then add value to that land by either reclassifying it or obtaining planning permission for redevelopment, before selling it on at a higher price than that at which it had obtained it.

4 The Fund made two acquisitions of land, the first on 8 th April, 2008, known as the Gardeners Property, for £6M when Alpen was the General Partner (it retired as General Partner on 30 th September, 2008,) and the second on 30 th December, 2008, known as the Tring Property, when Alpen was the Asset Manager, for £8.25M.

5 The term of the Fund expired on 31 st March, 2016, after two extensions of the original term, and is now in liquidation. The two properties have not yet been sold.

6 The representation is brought by one of the limited partners, Boubyan Petrochemical Company ("Boubyan"), which asserts that these two investments have been disastrous and will result in substantial losses for it and the other three limited partners who invested in the Fund.

7 Alpen was summarily wound up and dissolved on 23 rd September, 2016, and Boubyan seeks the setting aside of that dissolution, so that a claim can be brought against Alpen for breaches of its duties as both General Partner and Asset Manager. Alpen has no assets,

but Boubyan has been advised that Alpen in turn has claims against its directors, represented by Advocate Kelleher, for breaches of their duties to Alpen as directors.

8 The evidence filed and the submissions of counsel went into some detail as to the nature and merits of the claim against the directors, but we do not think it necessary or desirable for us to rehearse the same in this judgment.

9 It was not in dispute that the dissolution of Alpen should be declared void, (often but inaccurately referred to as the reinstatement of the company). Article 213 of the Companies Law is in these terms:-

> ***"(1) Where a company has been dissolved under this Law or the Désastre Law, the court may at any time within 10 years of the date of the dissolution, on an application made for the purpose by –***
>
> ***(a) a liquidator of the company; or***
>
> ***(b) any other person appearing to the court to be interested*** ,
>
> ***make an order, on such terms as the court thinks fit, declaring the dissolution to have been void and the court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved."***

10 No liquidator had been appointed on the summary winding up of Alpen, and it was dissolved on the basis of a statement of solvency made by the directors under Article 146(2) of the Companies Law that, having made full inquiry into the company's affairs, they were satisfied that it had no assets and no liabilities.

11 Boubyan applied on the basis that it was a person " ***interested***", the threshold for which is low, namely that Boubyan needs to show that its claim against Alpen is not " ***merely shadowy***" (see the judgment of the Court of Appeal *In Re I.M.S. Ltd* [1996] JLR 294).

12 The issue between the parties was over the directions the Court should give " ***as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved."***

13 Advocate Gardner argued that the directors were hopelessly conflicted in that the allegations made by Boubyan against Alpen were in reality allegations made against them as the agents through which the company acted, a conflict which permeated all of their number to a greater or lesser degree. Boubyan therefore sought the following directions:-

> *"(1) The company, acting through its directors, convene a meeting of creditors of*

the company within 28 days of the hearing of this Representation;

(2) The company, acting through its directors, nominate Alan Roberts and Ben Rhodes of Grant Thornton to act as liquidators in a creditors' winding up;

(3) The company, acting through its directors, give notice of the meeting of the creditors of the Company by advertisement in the Jersey Gazette not less than 10 days before the day for which the meeting is called;

(4) Prior to the meeting the company, acting through its directors, shall furnish any creditor free of charge with such information concerning the affairs of the company as the creditor may reasonably request;

(5) The nominated liquidators shall attend at the creditors' meeting."

14 The summary winding up of Alpen had taken place in two stages:-

(i) The shareholders passed a special resolution on 8 th September, 2016, in these terms:-

"(1) That the Company be wound up summarily in accordance with Part 21 Chapter 2 of the Companies (Jersey) Law 1991.

(2) That the Directors of the Company be and are hereby authorised to discharge any liabilities of the Company and distribute the Company's assets in specie or otherwise among the members in accordance with the provisions of the Companies (Jersey) Law 1991 and the articles of association of the Company.

(3) That the directors of the Company be and are hereby authorised to file all necessary documents in respect of the liquidation."

That special resolution was filed with the Companies Registry.

(ii) On the same day, Alpen filed with the Companies Registry a statement by the directors in Form C60, saying that having made full inquiries into the company's affairs, they were satisfied that the company would be able to discharge its liabilities in full within 6 months.

(iii) On 23 rd September, 2016, the directors filed a statement of solvency on completion of a summary winding up under Form C61, that again having made full inquiry into the company's affairs, they were satisfied that the company had no assets and no liabilities. Pursuant to Article 150 of the Companies Law, Alpen was therefore dissolved on that date, as confirmed by the Companies Registry in its letter of 26 th September, 2016.

15 It is not being alleged by Boubyan that the statement of solvency filed by the directors was

false, in that they were aware of Boubyan's claim. There is no evidence that we have seen that such a claim had been formulated by Boubyan and notified to the directors at any time prior to Alpen's dissolution. However, on the dissolution being declared void, the directors would now be on notice of Boubyan's claim and would have to consider whether the summary winding up should become a creditors' winding up, an exercise which would require them to form an opinion pursuant to Article 151(1) of the Companies Law, which is in these terms:-

> ***"Effect of insolvency***
>
> > ***(1) This Article applies if, after the commencement of a summary winding up of a company –***
> >
> > > ***(a) a liquidator appointed in accordance with Article 149 forms the opinion; or***
> > >
> > > ***(b) no liquidator having been appointed in accordance with Article 149, the directors of the company form the opinion*** ,
> >
> > ***that the company has liabilities that it will be unable to discharge within 6 months of the commencement of the winding up or, if they fall due after that date, as they fall due."***

16 Boubyan does not have a liquidated claim against Alpen, but under Article 1 of the Companies Law, " ***liabilities***" is widely defined as including " ***any amount which may be necessary to be retained for the purpose of providing for any liability or loss which is either likely to be incurred or certain to be incurred, but uncertain as to amount or as to the date on which it will arise***." (Our emphasis).

17 Advocate Gardner submitted that Boubyan's claim clearly fell within this definition and that accordingly, the summary winding up should become a creditors' winding up, which under Article 151(3) of the Companies Law would oblige the directors to call a meeting of the creditors not less than 14 days nor more than 28 days thereafter. From the day of that meeting, the winding up would then become a creditors' winding up under Chapter 4 of the Companies Law (Article 151(11)).

18 Advocate Gardner argued that because the claim against Alpen was concerned in substance with the conduct of the directors, by purporting to deal with these matters, they are placing themselves in a position where the best interests of Alpen conflicted with their personal interests as potential defendants, contrary to their duties as directors (see Dunlop on Jersey Company Law First Edition, 2011 at 20.6.7). The Court, therefore, should give directions that effectively required the defendants to bring about a creditors' winding up and the appointment of Boubyan's nominated liquidators.

19 Advocate Gardner made the point that the shareholders no longer had any interest in Alpen, in that it was now defunct with no assets. Anything it received from a claim made against the directors would be passed on to its own creditors, and it was the creditors, he said, who were the only stakeholders in the company and to whom the directors' fiduciary duty should now be owed.

20 In his view by seeking to retain office and procure funding for Alpen to defend Boubyan's claim against it, they were motivated by naked self-interest. That funding, Advocate Kelleher informed us, would come from Alpen's shareholders and the directors by way of loan, to be subordinated to the claims of Alpen's other creditors.

21 It was possible, said Advocate Gardner, that Alpen's claims against its directors would be time barred next year, and the directors may be seeking to defend Boubyan's claim long enough for the claims against them to become time barred.

22 There was some discussion as to whether, when the dissolution of a company is declared void, the directors at the time of the dissolution have to be reinstated, or at least agree to their continuing in office, so that one of the directions given by the Court should be to re-appoint Advocate Kelleher's clients, all of whom were willing to continue acting as directors. However, when the Court declares that the dissolution is void, it is declaring that it never took place, so that we think the better view is that those persons who were directors at the date of dissolution remain directors. The Court therefore proceeded on that basis.

23 Advocate Kelleher, for the directors, submitted that in seeking to impose the appointment of its nominated liquidators, Boubyan would obtain a litigation advantage that would place it in a better position than any other creditor with a claim against a company.

24 If Boubyan had given notice of its claim prior to Alpen's summary winding up, the directors would never have initiated the summary winding up process and would have defended the claims. Allowing Boubyan to proceed in this way gives rise, he said, to the following unfairness to Alpen and/or the directors:-

> (i) It deprives Alpen of the full opportunity to defend itself against Boubyan's claims via the normal judicial process, with a consequential knock-on effect of unfairness for the directors;
>
> (ii) It places Alpen immediately into an insolvency context, whereas the proper route for a creditor is to establish a liquidated claim against the company and absent satisfaction of that claim place the company *en désastre*, allowing the Viscount to pursue such further claims as she considers proper. Boubyan cannot place Alpen *en désastre* at this stage, because it does not have a liquidated claim;
>
> (iii) In the event of an unsuccessful claim by Alpen under the control of Boubyan's nominated liquidators against the directors, they will face difficulties (possibly

insurmountable) in recovering their costs from Alpen, the liquidator and/or Boubyan;

(iv) Alpen and the directors lose control in the pursuit of contribution proceedings against third parties (such as the Fund's property valuer and auditors) and the directors alone may not have the same right to make such claims; and

(v) The directors risk oppressive and unfair cross-examination by the liquidator under Article 183 of the Companies Law.

25 There is no local authority on the scope of the Court's powers under Article 213 of the Companies Law, but in the English Court of appeal decision of *Tyman's Limited v Craven* [1952] 2 QB 100 (C.A.) Sir Raymond Evershed M.R. said this in the context of the equivalent English law provisions (page 111):-

> ***"In my judgment, the final words of the subsection can properly and usefully be regarded as intended to give to the court, where justice requires and the general words would or might not themselves suffice, the power to put both company and third parties in the same position as they would have occupied in such cases if the dissolution of the company had not intervened.*** More generally the final words of the subsection seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, but ***rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the 'as-you-were position,' which, according to the ordinary sense of those general words, is prima facie their consequence."***

26 In the English Court of Appeal decision of *Pickering v Davy* [2017] EWCA Civ 30, Richards LJ pointed out that the discretion was not unlimited:-

> ***"39 The judge was right, in my view, to emphasise that the discretion conferred by section 1032(3) is not unlimited but must be exercised only for its stated purpose ("for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register") and, assuming a direction would meet that purpose, only if such direction "seems just"*** .

He went on to say, at paragraphs 42 and 43:-

> ***"42 At the time of the hearing before the judge, there had been little authoritative guidance on the circumstances in which a direction should be made in favour of a third party, as opposed to in favour of the company itself*** .
>
> ***43 In Tyman's Ltd v Craven at page 111, Sir Raymond Evershed MR accepted the submissions of counsel as to circumstances in which the power might be exercised, being that 'the company, as well as third parties, might well have abstained from taking those steps – a step in an***

> ***action, or the exercise of some contractual right – for which the proper time might in the meantime have expired' (emphasis added).*** He continued that the discretion was intended to 'give to the court, where justice requires and the general words [now section 1032(1)] would or might not themselves suffice, the power to put both the company, and third parties in the same position **as they would have occupied** in such cases if the dissolution of the company had not intervened" (emphasis added). Both the Master of the Rolls and Hodson LJ, citing Lord Sumner in *Morris v Harris* [1927] AC 252, ***said it was designed to achieve an "as you were" position.*** These were obiter comments but they suggest that attention should be directed to what might well in fact have been the position if the company had not been struck off."

27 The parties differed on what was meant by the words " ***as you were***" – i.e. the position in which Alpen and the third parties would have occupied had the dissolution not intervened.

28 Advocate Gardner considered that Alpen should be placed back to a point of time within the 15-day window from the commencement of the summary winding up on 8 th September, 2016, and the dissolution on the 23 rd September, 2016, but rather than leave the directors to take up the cudgels from that point, he said the Court should direct them to convert the summary winding up into a creditors' winding up and to appoint Boubyan's nominated liquidators.

29 Advocate Kelleher says this position is artificial and contrived. The reason Alpen was put into a summary winding up was because, at the time, Boubyan had not intimated that it had any legal claims against Alpen. The summary winding up was commenced in ignorance of Boubyan's intended claims. It had clearly known about the matters under complaint before then and should not now be advantaged because it delayed bringing its intention to bring claims. The " ***just***" position for Alpen and the parties would be for them to be placed back into their positions immediately prior to the commencement of the summary winding up process. Boubyan can avail itself of its right to bring proceedings against Alpen and, if successful, to enforce its judgment. Putting the parties back to this point in time would mean declaring void the special resolution of the shareholders of the 8 th September, 2016.

30 As to the conflict of interest of the directors, Advocate Kelleher submitted that Boubyan's position " *put the cart before the horse*" to the extent that it proceeds on the basis that the claims made by Boubyan are proven, and Alpen is therefore insolvent. The allegations made against the directors and Alpen were essentially the same and the interests of Alpen and the directors were therefore aligned, at least until such time as Boubyan's claims are vindicated by a judgment of the Court. Any conflict of the position of the directors would be dealt with appropriately and on advice.

31 In Advocate Kelleher's view, the liquidators nominated by Boubyan would not be free of the risk of conflict of interest either because they would be funded by Boubyan and one of their

first tasks would be to determine at the proof of debt stage the claims of Boubyan.

32 Advocate Kelleher said there was always potential in a claim made against a company for the directors involved in the conduct now complained of to find themselves in a position of conflict. In those circumstances, he said it was for the directors to ensure they conduct themselves properly in accordance with their duties. The potential for conflict is not a justifiable basis for a creditor to circumvent the route available to it to enforce a claim, not least where Jersey law has very clearly and purposefully restricted the rights of a creditor to force the winding up of a company.

33 As to the latter point, it is the case that under the Companies Law, creditors have no power to initiate a summary or creditors' winding up and no standing to apply for a winding up on just and equitable grounds under Article 155.

Decision

34 Unlike the position with trusts, the Court has no inherent supervisory role over companies or its directors, its powers deriving exclusively from the provisions of the Companies Law. A supervisory jurisdiction under the Companies Law does arise on the winding up of a company, but under Article 186A, it is the company that can apply for questions to be determined under a summary winding up and the liquidator or a creditor in a creditors' winding up; Alpen is not in a creditors' winding up, as yet, and Boubyan therefore is not able to invoke that jurisdiction.

35 The powers the Court is exercising are those contained in Article 213 which enable the Court to declare the dissolution void, and the dissolution in this case took place on 23 rd September, 2016. The effect of declaring the dissolution void is that the company, which was then in a summary winding up, is deemed to have continued in existence as if it has not been dissolved. We see no basis and doubt our jurisdiction to go back further than the dissolution itself and to declare void a special resolution passed by the shareholders on the 8 th September, 2016.

36 Apart from confirming the position of the directors, there are no directions we think we can give to place the company and all other persons in the same position as nearly as may be as if the company had not been dissolved. For example, no issues as to limitation arise and nothing has happened over the intervening period to the disadvantage of the company and all other persons, other than the notification of Boubyan's claim. The company remains in summary winding up and has the same directors, but they now have notice of Boubyan's claim and must deal with it appropriately and in accordance with their fiduciary duties.

37 What Advocate Gardner presses us to do is to give directions to the directors as to how they should act in the future by directing them as to what opinion they should form in

relation to Boubyan's claim and thereafter to nominate persons put forward by Boubyan as liquidators. The directions extend even to the nominated liquidators. This goes well beyond placing the company and all other persons in the same position as if the company had not been dissolved; it is to supervise the ongoing conduct of the directors.

38 In conclusion, we will declare the dissolution of Alpen void but, for the reasons set out above, decline to give the directions sought by Boubyan. For the avoidance of any doubt, we will confirm firstly that the directors who were in office at the date of dissolution remain directors of Alpen and secondly that Alpen remains in a summary winding up.