British Virgin Islands:
BVI shareholder disputes:
Winding up on just and equitable grounds

Mondaq

HARNEYS

British Virgin Islands: BVI shareholder disputes: Winding up on just and equitable grounds

One of the remedies for an oppressed minority shareholder in the Court of the BVI is the just and equitable winding up jurisdiction. The Court may wind up a company where a member makes an application. The jurisdiction of the Court is broad and requires the Court to take into account all relevant factual circumstances that are available.

Although a Cayman Islands case, Justice Cresswell in *Fortune Nest Corporation* (FSD 88 of 2012 (PCJ), Unreported, Justice Cresswell, 5 February 2013) stated, citing English authority: *"The question whether it is just and equitable to wind the Company up must be answered on the facts which exist at the time of the hearing, although the Petitioner is confined to the heads of complaint set out in the Petition."* (In *Re Fildes Bros Ltd* [1970] 1 All ER 923.

In bringing such a claim, a minority shareholder is seeking a class remedy and not a private one as between the petitioner and the company (*Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*, BVIHCMAP2014/0025 BVIHCMAP2015/0003, 8 December 2015). These observations were delivered in the context of applications by creditors of the relevant company. In principle, however, there is no reason to consider that any different approach should be adopted in relation to applications made by members of the company; they are seeking a class remedy on behalf of all members of the company and its creditors.

A shareholder is not usually permitted to petition to wind up a company unless he or she has a tangible interest as a shareholder in the winding up of the company (*Re Rica Gold Washing Co Ltd* (1879) 11 Ch D 36. This is usually demonstrated by showing that there will be more than a negligible surplus for shareholders after payment of all of the company's creditors (and those facts should be expressly alleged in the petition and proved at the hearing) (*Re Martin Coulter Enterprises Ltd* [1988] BCLC 120). It may also be demonstrated by showing that the shareholder will achieve some advantage, or avoid or minimise some disadvantage, which would accrue to him by virtue of his membership of the company (*Re C. & M.B. Holdings Ltd* [2017] 1 BCC 457. But in any event, pursuant to section 167(2)(c) of the BVI Insolvency Act, it is expressly said that:- “The Court shall not refuse to appoint a liquidator of a company merely because where the applicant is a member, if the order were made, no assets of the company would be available for distribution among the members”.

The Act contains no guidance as to what constitutes just and equitable grounds for the purpose of appointing a liquidator. The just and equitable basis for the appointment of a liquidator and the winding up of a company is a wide (*Kong v Yan*, BVIHCMAP2017/0020, 17 January 2020) and broad one (*Fortune Bright Global Ltd v Central Shipping Co Ltd*, BVIHC(COM) 2015/0036, 29 April 2016, (Justice Leon). It must be generously construed to include a wide range of circumstances capable of invoking the court's jurisdiction. Equitable principles can only be stated in general terms, as they are to be applied to the varying and particular circumstances of each case. It would be impossible to conceive of the plethora of circumstances, and most undesirable to limit the categories, to which these equitable principles may be applied.

When deciding whether or not to make an order on a just and equitable basis, it is not a question of creating categories or headings under which cases must be brought if the clause is to apply; illustrations may be used, but the general words used in the section should remain general and should not be reduced to the sum of the particular instances (*Wang Zhongyong v Union Zone Management Limited* BVIHCMAP2013/0024 (12 January 2015, unreported) citing with approval *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360). Whilst categories giving rise to the application of the just and equitable principles have been recognized as emerging from the cases, such categories are by no means exhaustive of the circumstances in which these equitable principles are to be applied. Thus, when a petition is presented on the just and equitable ground, the court should itself evaluate the full factual matrix of each case (*Australian Securities and Investments Commission v Letten (No 10)* [2011] FCA 498. A petition seeing the winding up of a company on just and equitable grounds is not as simple and uncomplicated as an ordinary creditor's winding up petition (*In the Matter of China CVS (Cayman Islands) Holding Corp* (Unrep, CICA, 23 April 2020).

There is no reason to prevent a petitioning shareholder from relying on any circumstances of justice or equity which affect him in his relations with the company or other shareholders; it is not necessary that such circumstances affect him in his capacity as shareholder. It may be just and equitable to wind up a company in a number of different circumstances: A lack of probity, in the form of allegations of breaches of fiduciary duty, may form the basis for a just and equitable winding up. Legal misconduct and commercial immorality are “clear bases for just and equitable relief that make it “easy” for the courts in exercising their discretion. A company may be wound up on just and equitable grounds where there has been a justifiable loss of confidence in management by reason of fraud, serious misconduct and/or serious mismanagement of the affairs of the company by the directors and/or a majority shareholder (*Loch v John Blackwood Ltd* [1924] AC 783 (PC). A just and equitable petition may also be based on the irretrievable breakdown of a relationship of trust and confidence, in circumstances where equity recognizes that such a relationship is not encompassed in the company structure defined by the relevant companies act, in the BVI, the BVI Business Companies Act, and by the articles of association.

A just and equitable winding up may also be appropriate where there has been a breach of an agreement contained in the articles of association and/or any shareholders' agreement (*Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579, even where there is an entire agreement clause (*Union Zone*). There may be cases where it is unfair for those conducting the affairs of the company to rely on their strict legal powers; the unfairness may consist in a breach of the rules or using the rules in a manner which equity would regard as contrary to good faith (*Union Zone* citing with approval *O'Neill v Phillips* [1999] 1 WLR 1092).

A breakdown in the relationship between shareholders is not, in of itself, justification for winding up a company; more is needed such as a breach of some underlying agreement (express or implied) or some unauthorized change in the type of business or activity of the company (*Union Zone*). Where a company is set up for a specific and limited purpose and where the majority shareholder has completely subverted that purpose so that he retains the value of monies that were never intended to belong to him beneficially, it is just and equitable that the company be wound up.

The Court should undertake an objective analysis of the particular circumstances that exist between the parties. The need to conduct an investigation is also a freestanding ground for a just and equitable winding up order. In the Cayman Islands case of *Re ICP Strategic Income Fund* Unreported, 10 August 2010), Jones J QC held that: "*The need for an investigation into the affairs of a company can constituted a freestanding basis for making a winding up order on the just and equitable ground.*"

The Cayman Court of Appeal held at [113] in *Re Asia Private Credit Limited* 2020 (1) CILR 134 that *"…liquidation proceedings, whether solvent or insolvent, should be conducted in the interests of those persons who are financially interested in the liquidation process, here the petitioner which was the sole stakeholder in the liquidation."* In this case, the Applicant is the one who has the predominant financial interest in the Fund, such that its wishes (particularly with regard to a liquidation process) should be given greater weight compared to those who do not have a predominant financial interest in the Fund. Justice of Appeal Martin, delivering the judgment of the Court of Appeal in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* (2019) 1 CILR 481 stated: *"It is well settled, that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders..."* The Court of Appeal added: *"It is also well settled, however, that the petition will not succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. If it is clear at an early stage that the petition will fail on this ground, it may be struck out as an abuse of process."*

Lord Shaw, delivering the judgment of the Privy Council in *Loch* stressed that the justifiable loss of confidence in management must be grounded on the conduct of the directors with regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted. However, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, *"then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up"*.

The principles applicable to the appointment of provisional liquidators are succinctly summarised in *HMRC v Winnington Networks Ltd* [2014] EWHC 1259 (Ch). In particular, the applicant must show that it is 'likely' the application to appoint liquidators (here the Originating Application made under s.159 and 162(1) of the 2003 Act) will succeed. In this context this requires the applicant to demonstrate he has standing and also that a material part of the application is not capable of serious dispute (*Secretary of State for BIS v New Horizon Energy Limited* [2015] EWHC 2961 (Ch).

Conclusion

In conclusion, the just and equitable remedy is a powerful tool, in the right circumstances for oppressed shareholders. There is considerable potency in seeking to wind up a company where there is no chance of the company continuing. It brings finality to mismanagement and misconduct, and places and independent liquidator in charge of investigations, collection of assets and fair distributions.