

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 231 OF 2018 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF PINNACLE GLOBAL PARTNERS FUND I LTD

IN OPEN COURT

Appearances: Ms. Jessica Williams, Mr Lachlan Greig and Mr James Eggleton of
Harneys for the Petitioners
Mr Andrew Woodcock and Mr Paul Keeble of Hampson & Company
for the Company

Before: The Hon. Justice Raj Parker

Heard: 15 January 2019

**Draft Judgment
Circulated:** 29 January 2019

**Judgment
Delivered:** 4 February 2019



HEADNOTE

Companies Winding Up Rules- Order 3-Order 1 r 4(1A)-remedying defect in Petition-GCR Order 2-filing of Petition before hearing date endorsed and assignment to a Judge-winding up of company -sections 92 (d) and 93 (a) and (c) Companies Law (2018 Revision)-exercise of discretion-genuine dispute founded on substantial grounds-evidence.

JUDGMENT

Introduction

1. Perlen Holdings Ltd (Perlen) and Nerthington Ltd (Nerthington) (together the Petitioners) apply by Petition to wind up Pinnacle Global Partners Fund I Ltd (Pinnacle or the Company). The Company is a Cayman Islands exempted company registered on 6 December 2013. It was registered by the Cayman Islands Monetary Authority as an active mutual fund, recognised on 6 March 2014, holding property assets directly and indirectly in Canada and the Turks and Caicos Islands, lumber and forestry assets in Brazil and a securities portfolio in Hong Kong.
2. At the hearing of the Winding Up Petition and a summons relating to compliance with the Companies Winding Up Rules 2018 (CWR) I granted the relief sought by the Petitioners. There now follows my reasons for that decision.
3. The Petitioners are creditors of the Company and present 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.
4. The Company argues against a winding up on the basis that the Petition is defective and invalid and that, in the alternative, the matter ought to be adjourned because there are numerous issues which must be considered by the court before any winding up order can be considered. The Company argues for directions as to evidence of Austrian law and the quantification of the alleged debt. However, the Company has not filed any evidence in opposition and the only evidence before the court is from the Petitioners.

Background

5. Pursuant to various agreements, the Petitioners lent significant sums of money to the Company.
6. On 6 April 2016 the Company and Nerthington entered into a Loan Agreement pursuant to which US\$ 4 million was lent to the Company. The Company breached the repayment terms of this agreement and, on 7 July 2017, it was sent a notice of default in respect of the interest payments that had been missed. A further notice of default was sent on 4 August 2017.
7. On 23 June 2016 the Company and Perlen entered into a Profit Participation Agreement pursuant to which US \$11 million was advanced to the Company. In breach of this agreement the Company failed to pay the agreed interest on the capital provided. On 4 August 2017 Perlen sent a notice of default to the Company in respect of the Company's failure to pay interest over the relevant periods.



8. On 22 March 2017, a further Profit Participation Agreement was entered into with the Company by Perlen pursuant to which an amount of US\$3.5 million was advanced to the Company. The Company failed to pay the agreed interest on the capital provided and, on 4 August 2017, it was sent a notice of default in respect of this agreement. On 27 November 2017, a further notice of default was sent.
9. The Petitioners and the Company entered into a “Repayment Agreement” on 29 December 2017. Pursuant to clause 1 of that agreement the Company acknowledged the amounts outstanding in relation to each of the agreements together with interest, all of which is fully set out at schedule 1 of the Repayment Agreement. The Company made three interest payments pursuant to this agreement to Perlen in June and August 2018 and has made no payments to Nerthington.
10. On 26 and 28 October 2018, the Petitioners each served a statutory demand on the Company pursuant to section 93 of the Companies Law. Perlen demanded payment of US\$ 15,556,400 and Nerthington US\$ 4,540,000. The Company did not make any payment to either of the Petitioners or make any attempt to compromise the debts. Indeed the Petitioners did not receive any communication from the Company disputing the amounts owed to the Petitioners until very recently. The position was, at 1 December 2018, that the Company owed Perlen US\$ 20,340,837.96 and Nerthington US\$ 6,014,400.

Alleged defects

11. The Petition, dated 14 December 2018, was first served on the Company on 18 December 2018.
12. It is necessary to set out the relevant facts relating to the filing and service of the Petition because the Company argues that, by reason of non-compliance with the CWR, the Petition is a nullity.
13. These facts are set out in the first affidavit of James Eggleton dated 9 January 2019. Mr Eggleton is an associate at Harneys, the attorneys for the Petitioners. He explains that on 14 December 2018, Harneys sent an email to the Clerk of the Court attaching the Petition and supporting affidavits and requesting that the court assign the proceeding to a judge and for a hearing date to be fixed pursuant to CWR O.3 r 5(1) (see paragraph 5). By email on 18 December 2018, a member of the court registry staff advised Harneys that the Chief Justice had assigned this proceeding to me on 16 December 2018, and requested submission of the filing fee. On 18 December 2018, the sealed Petition and supporting affidavits were returned to Harneys, but without a hearing date endorsed on the Petition (see paragraph 11).
14. Having regard to the requirements of Order 3 Rule 5(3) of the CWR, which obliges a creditor to serve a winding up petition ‘immediately’, Harneys arranged for the Petition and supporting affidavits to be served on the Company that afternoon. The Companies Registry on that date, 18 December 2018, indicated that the registered office of the Company was at Maples Corporate Services Ltd. The documents were



served by hand at that office on that day. In fact, as advised to Harneys by phone and email from Maples & Calder later in the day, that firm no longer acted for the Company and Maples Corporate Services Ltd had resigned as registered office for the Company effective 13 December 2018.

15. The hearing date for the Petition was only fixed by the court on 19 December 2018 and the Petition was sent by the court to Harneys on that date with a hearing date of 15 January 2019 endorsed upon it. Because of the difficulty with service the Petitioners took additional steps to bring the Petition (with the hearing date endorsed upon it) to the attention of the Company. The facts relating to this are set out in the second affidavit of Travis Webster, a legal assistant at Harneys, dated 28 December 2018. He confirms that he first hand delivered the Petition (without the hearing date endorsed upon it) at the Company's registered office on 18 December 2018. Because of the communications from Maples & Calder, service was attempted again by hand and by email to that firm on 19 December 2018 and to the known current directors and a former director and legal adviser. This time, as I have noted above, the Petition had the hearing date endorsed upon it. The former director and legal advisor responded on 21 December 2018, but no response was received from the current directors. However, automatically generated email reports indicated that the emails were successfully sent to all the relevant email addresses save for three individual addresses which reported a delivery failure.
16. Nothing further was heard from the Company until receipt of a letter dated 3 January 2019 from Hampson & Co who appeared for the Company on this application.

Contentions of the parties

17. Ms Jessica Williams appeared for the Petitioners. She argued that there was no evidence from the Company to suggest that there were any substantial issues in relation to the outstanding debt or that it was disputed on any substantial grounds. There was ample evidence from the Petitioners, on the other hand, that the Company was unable to pay its debts. It had been well over a year since the Repayment Agreement was entered into and the Company had not responded at all to the statutory demands in the relevant time period. She described the Company's case as a last minute "put up job" (perhaps a phrase borrowed from no less a source than Lord Denning in *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572 at p 575). She described the arguments as to adjourning the matter so the debts could be properly investigated as wholly without merit in an attempt to belatedly derail the hearing. She described the arguments as to the alleged deficiencies in the Petition as poorly founded and a blatant attempt to obstruct the winding up proceeding.
18. Mr Andrew Woodcock appeared on behalf of the Company. He argued that the Petition was defective through non-compliance with the mandatory requirements of the CWR and is therefore a nullity and that the defect is irremediable.

19. In the alternative, he argued that for the court to be able to make any meaningful assessment of the issues raised in the argument by the Company, further directions



as to evidence needed to be made and considered before it could be determined, whether and if so, to what extent the Company is indebted to the Petitioners.

Decision

20. I will deal first with the argument that the Petition is invalid as a result of a failure to comply with the CWR.

21. CWR Order 3 r. 5 (2) provides as follows:

“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.”

22. Mr Woodcock did not pursue the argument that the Company had not been properly served with the Petition. For completeness, I should say that I am satisfied that the Petition was properly served in the manner described at paragraphs 5 to 12 of the second affidavit of Mr Webster.

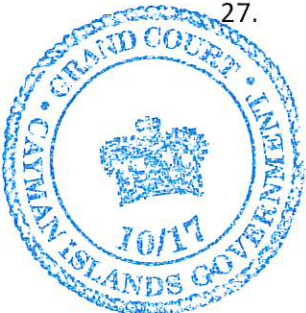
23. Mr Woodcock did however valiantly pursue an argument that the Petition was defective because no hearing date had been fixed and endorsed on it when filed and served on 18 December 2018.

24. The complaint made is 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 this defect was so fundamental that it rendered the Petition a nullity. Moreover, Mr Woodcock submitted that I had no discretion to remedy it.

25. The Company has not made an application to set aside this proceeding or taken any steps within it. Neither has it served any evidence. It relies on argument alone to the effect that the jurisdiction of the Court has not been engaged due to the fundamental defect in the Petition.

26. Mr Woodcock relied in particular on some passages in an authority that preceded the incorporation of Order 2 of the GCR's into the current edition of the CWR's: *HSH Cayman I GP Limited and others v ABN Amro Bank N.V.* [2010 (1) CILR 114]. That case concerned whether the court had, in the absence of any power granted in the rules, an inherent jurisdiction to cure certain failures and whether and how it should exercise its jurisdiction. Chadwick P giving the judgment of the Court of Appeal in the Cayman Islands, made express reference to the fact that the 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 - see at page 119.

27. The position has now changed. In any event in that case, on the basis that a defect should not readily be treated as fundamental so as to render the proceedings a nullity, the Court of Appeal was satisfied that none of the failures to comply with the requirements of the Winding Up Rules was so fundamental as to be incurable,



provided that justice could be done by an appropriate exercise of discretion - see paragraph 40. It was confirmed that a judge remains entitled to invoke the inherent jurisdiction of the court to control its own processes, so long as, in exercising that power there is no variation of the scheme for the winding up of companies laid down by the CWR.

28. Mr Woodcock also attempted to draw an analogy from cases where a writ was not served in time with no good explanation and where no order to extend validity was justified - see *Harrison and Anor v Touche Ross (a firm)* [1995] C.L.C. 377. In that case, Sir Thomas Bingham MR made it clear that it was not open to the Court to treat a writ as issued months before or after the date when it was in fact issued. The time of issue not only affected the substantive rights of the parties to the action but may also affect the rights of third parties.
29. Those types of cases are in a completely different category to the present case where there is a relatively minor technical breach which has been explained in evidence and has caused no consequential prejudice to any party. Where there are substantive rights attaching to procedural rules which have not been complied with and which fundamentally affect whether claims may be brought at all, the position is obviously different.
30. In any case, the regime set out in Order 2 of the GCR deals with the effects of non-compliance with the CWR and is now expressly incorporated into the CWR pursuant to CWR Order 1 rule 4 (1A).
31. Order 2 rule 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 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, formal 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.'
32. This provision abolishes the distinction that once existed between a failure that renders the proceeding a nullity and a failure that merely renders the proceeding irregular. It is therefore the case that the Court does have the power to remedy procedural defects. It follows that the Court needs to assess in the exercise of its discretion, so far as reasonable and proper to prevent injustice occurring, how to interpret any failure to comply - see *Talent Business Investments Limited v. China Yinmore Sugar Company Limited* [2015 (2) CILR 113] at paragraphs 19- 25.
33. The question of prejudice as a result of the failure is a high factor in the exercise of the court's discretion when considering the interests of justice as to the effect of any failure to comply with the rules - see *Metroinvest Ansalt and Others v. Commercial Union Assurance Co. Ltd.* [1985] 1 W.L.R. 513 per Slade LJ at p523.



34. A judge and a hearing date are obviously practical matters which need to be set up in advance of a Petition being filed and served which CWR O.3 r5 (2) and (3) seek to regulate.
35. I have concluded that the only defect that arises in this case is the failure to endorse a hearing date on the Petition which was filed and attempted to be served on 18 December 2018. The proceeding had been assigned to me on 16 December 2018. There is no requirement in the CWR that the name of the Judge has to appear on the Petition when served. No doubt it makes good sense for it to appear in the ordinary course, but it is not a defect in breach of the CWR if it does not, as long as the matter has been assigned to a Judge and a hearing date fixed. In this case the hearing date was not fixed until a day after the Petition was served.
36. I reject the submission that the Court has no discretion to allow the 'hearing date defect' to be remedied in this case. The matter is now to be determined as I have said in accordance with GCR Order 2.
37. Having regard to the evidence adduced by the Petitioners and the absence of any prejudice to the Company it seems to me clear in the interests of justice that the 'hearing date defect' should be remedied. The hearing date was brought to the attention of the Company a day after the first attempted service of the Petition and confirmed again the day after that.
38. I am also satisfied that there is good reason why the Petitioners were unable to file and serve the Petition with a hearing date endorsed upon it in the usual way. The sealed Petition returned to Harneys at the time by the Court on 18 December 2018 did not have a hearing date endorsed because the date was not fixed until the next day, 19 December 2018.
39. The Company's registered office holder had resigned and the records at the Companies Registry had not been amended by the Company which meant that the Petition with a hearing date endorsed had to be emailed to the Company's former attorney and its directors on 20 December 2018. That satisfactorily explains any short delay in service.
40. For these reasons I therefore granted the relief relating to any non-compliance with the CWR.
41. I turn next to the substantive application that the Company be wound up on the basis that it is unable to pay its debts.
42. The Company in argument raised issues relating to Austrian law, security and arbitration, as to why a winding up order should not be made. It refers to the fact that the various agreements relied upon by the Petitioners are expressly stated to be subject to Austrian law. They also provide for arbitration as a mechanism of dispute resolution. The Company argues that Austrian law imposes obligations on the Petitioners which cannot be circumvented by commencing winding up proceedings.



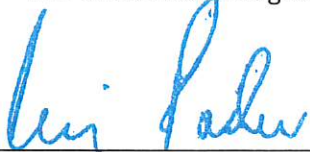
43. Also, on a proper construction of the agreements under Austrian law, the Company is entitled to a stay of the present proceeding, until such time as arbitration proceedings have been determined under ICC Rules in Vienna. It is fair to say that these points have been taken at the very last moment. They are not supported by any evidence from the Company and in my view do not raise any issues as to whether the sums claimed were due at all.
44. I have had no difficulty in determining that these are not genuine points founded on substantial grounds so as to call into question the debts owing - see *Re a Company (No. 006685 of 1996)* [1997] 1 BCLC 639. If there were genuine principles of Austrian law which imposed obligations on the Petitioners which could not be circumvented by commencing winding up proceedings as was submitted, it is incumbent on the Company to have provided such evidence. Similarly in relation to the arguments relating to security, as is well established, there is no express bar to a secured creditor issuing winding up proceedings-see *Lafayette Electronics Europe Ltd, Re* [2006] EWHC 1006 (Ch). If Austrian law did, as was submitted, require the Petitioners to exercise a particular security procedure under the Repayment Agreement and Profit Participation Agreement it was incumbent upon the Company to provide such evidence. No evidence was provided.
45. Although it was asserted in Mr Woodcock's written submissions that, until the resolution of an arbitration, it could not be said whether, and if so, to what extent the Company is indebted to the Petitioners, I am satisfied on the evidence that the Company has never disputed the debt until these submissions were received. Indeed, as recently as 3 January 2019, the Company indicated in correspondence from its lawyers Hampson's that it expected to be in a position to very shortly deliver a formal proposal for the full repayment of principal and interest. The existence of arbitration clauses in the agreements relied on by the Company are nothing to the point as to whether the Company owes an undisputed debt. No evidence as to the basis of why and how the debt is disputed has been provided. The argument that Austrian law would operate so as to stay the Cayman Winding Up proceedings is likewise not supported by any evidence.
46. The Company in this case did not comply with two statutory demands that satisfied the requirements of section 93 (a) of the Companies Law in the time and manner prescribed by that section.
47. The Company has not raised any points which show that there is any genuine dispute that it is under an obligation to pay a specific sum. Despite demands, it has failed to do so, and it is a matter of inference that it is unable to do so - see *Cornhill Insurance PLC v Improvement Services Ltd and others* [1986] 1 WLR 114 where Harman J approved a passage from the judgment of Ungood-Thomas J in *Mann and Another v. Goldstein and Another* [1968] 1 WLR 1091:

"When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to



be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay. So, to persist in the non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt”.

48. I remind myself that a winding up order is a discretionary remedy. However an unpaid petitioning creditor of an undisputed debt who has been out of its money for some time can expect the court to make a winding up order in the absence of some good reason as to why such an order should not be made - see explanation of the authorities on 'disputed debt': *In the matter of HITS Africa Ltd* FSD 96/2013 (unreported) 29 January 2014 Quin J.
49. In this case substantial sums are owed and have been owed for some considerable time. I am satisfied that the Company is unable to pay its debts pursuant to section 93(a) of the Companies Law upon non-satisfaction of the statutory demands.
50. I am also satisfied that a reasonable inference from the Company's failure to pay for over a year since the Repayment Agreement (except for US\$159,002.04 interest payments to Perlen) and from the recent correspondence from its lawyers, is that it is unable to pay its debts.
51. For these reasons I grant the Winding Up Order sought.



THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

