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Industry Information

Judgment on declaratory relief in Cayman Islands insolvent liquidation proceedings

July 2022

Overview

A recent decision of Kawaley J sitting in the Grand Court of the Cayman Islands (the “Grand Court”) has provided helpful clarification on what he described as a “legally significant” and “important jurisdictional point”. The question was one of the Grand Court’s jurisdiction to grant declaratory relief in official liquidation proceedings in circumstances where there is no express provision in the Companies Act (as amended) (the “Companies Act”) or the Companies Winding Up Rules (as amended) (the “CWR”) giving the Grand Court jurisdiction to make declarations in insolvent liquidation proceedings. Kawaley J held that it does have the jurisdiction to do so whether that be pursuant to the Grand Court Act, impliedly under the Companies Act jurisdiction to control the exercise of a liquidator’s powers, pursuant to its inherent jurisdiction to fill a lacuna in the existing procedural framework, or to make good its own prior order in the liquidation proceedings.

Facts

The Cayman Islands parent company (the “Company”) has subsidiaries incorporated across the globe. It was initially placed into provisional liquidation in order to effect a restructuring which later continued on an insolvent basis when the Company was placed into official liquidation and joint official liquidators (“JOLs”) were appointed. This decision arose because the JOLs required their powers in the official liquidation to be formally confirmed by the Grand Court in order to obtain regulatory approval in a jurisdiction which is unfamiliar with Cayman Islands insolvency law to make good a commercial agreement connected to a disposition of the Company’s assets.

The order appointing the JOLs (the “JOL Order”) provided broad sanction for the JOLs to exercise all of the powers available pursuant to Schedule 3, Part I of the Companies Act without further sanction from the Grand Court. However, for good order, the JOLs made an application to the Grand Court in December 2021 (the “Sanction Application”) requesting that they be granted sanction pursuant to section 110(2)(a) of the Companies Act and paragraph 8 of Schedule 3, Part I to execute a Share Purchase Agreement for and on behalf of the Company in November 2021 (the “SPA”) to dispose of the shares it held in one of its subsidiaries (the “Target”). The Court duly sanctioned the Company’s execution of the SPA in December 2021 as well as authorising “the taking of such additional steps and the execution of such additional documents by the JOLs as are necessary or desirable in order to discharge any obligations in connection therewith” (the “SPA Sanction Order”).



One of the commercial limbs of the disposal of the Target's shares was the Company's acquisition of the shares held by the Target in a foreign company (the "Foreign Shares" and "Foreign Company" respectively) pursuant to the terms of the SPA. Given the broad authorisation given to the JOLs by the SPA Sanction Order, the Company's acquisition of the Foreign Shares had already been approved by the Grand Court. However, confirmation of the JOLs' power to authorise the Company's acquisition of the Foreign Shares was a regulatory requirement of the jurisdiction of the Foreign Company.

As a result, the JOLs made an application to the Court seeking, amongst other things, a declaration that they were authorised to acquire the Foreign Shares "*pursuant to the terms of a [share] purchase agreement... to be entered into by the Company and [the Target] ... and to take such additional steps and the execution of such additional documents by the JOLs as are necessary or desirable in order to effect the transfer of the Foreign Shares*" (the "Declaration Application").

The Law

The Grand Court noted that the legal content of the declarations sought in the Declaration Application was entirely uncontroversial as a matter of Cayman Islands' law. Indeed, the Grand Court agreed with counsel's submissions that the JOLs clearly had the requisite authority to cause the Company to acquire the Foreign Shares by virtue of the SPA Sanction Order and acknowledged that the need for the declaration was to respond to a quirk of the foreign regulatory landscape.

The Court noted counsel's submission that there was no express provision conferring the Court with jurisdiction to grant declaratory relief in a winding-up context in either the CWR or the Grand Court Civil Rules ("GCR") (and that Order 15, Rule 16 of the GCR did not apply to winding-up proceedings). The Court went on to make reference to the direct judicial support in *HSH Cayman I GP Limited et al* [2010 (1) CILR 114] that the Court's inherent jurisdiction may properly be invoked to fill gaps in the CWR as opposed to overriding their express provisions.

In terms of the power to grant declaratory relief generally, the Court referred to *Insurco Intl Ltd v Gowan Company* [1994 CILR 210] where it was noted that such power is seemingly as wide as that of the English Courts. The Court held that, although these observations were not made in a winding-up context, it was clear they would apply with equal force in such a scenario – primarily because such relief was not inconsistent with the scheme of either the Companies Act or the CWR.

Moreover, the Court went on to note that it has an express general statutory power to grant declaratory relief under section 11(2) of the Grand Court Act (2015 Revision) (the "Grand Court Act") which, by its wording, is not limited to any particular category of proceedings and so accordingly has been found to apply to liquidation proceedings.

In reaching his decision, Kawaley J also referred to section 110(3) of the Companies Act which provides that the exercise by liquidators of the powers conferred by Part V is subject to the control of the Court, noting that it is trite law that every statutory provision must be read insofar as is possible in a way which is consistent not just with the purpose of the statute as a whole, but as ascertained by reference to the wider statutory context. In support of this proposition, Kawaley J observed that although the parameters of the Grand Court's jurisdiction to supervise official liquidators is expressed in somewhat compressed terms, its extent can be more clearly discerned by the powers expressly conferred to entertain applications by voluntary liquidators. In this regard, Kawaley J referred to the Grand Court's jurisdiction pursuant to section 129(2) of the Companies Act, pursuant to which the Grand Court can, when invited to do so, "determine any question" in relation to a voluntary liquidation. Kawaley J said that it would lead to absurd results if section 129(2) of the Companies Act was interpreted as conferring a broader jurisdiction to grant relief to voluntary liquidators seeking *ad hoc* assistance from the Court than it could grant to official liquidators appointed specifically for benefitting from ongoing supervision from the Grand Court.

The Grand Court concluded that the declarations sought in the Declaration Application fell within the broad ambit of section 11(2) of the Grand Court Act, which empowers the Court "*to make binding declarations of right in any matter*". If this analysis was incorrect, in the alternative, Kawaley J would have in any event granted the Declaration Application pursuant to the Court's jurisdiction to control the exercise of the JOLs' powers under section 110(3) of the Companies Act. In the further alternative, it was held that the Court possessed the inherent jurisdiction to grant the declarations under section 11(1) of the Grand Court Act with a view to filling a lacuna in Cayman law or for the purposes of making good its own order (i.e. by implementing the SPA Sanction Order).



Conclusion

The Declaration Application proceeded on the basis that the Grand Court must have jurisdiction to grant declaratory relief in official liquidations under the supervision of the Grand Court notwithstanding there was no express power in either the Companies Act or the CWR. His Lordship's attention was drawn to section 11(2) of the Grand Court Act which Kawaley J has also helpfully clarified applies to liquidation proceedings. The Declaration Application was an unusual application in that it requested the Grand Court's indulgence to confirm the JOLs' authority to do something they were already authorised to do and, as such, it was – by definition – not a sanction application. In doing so, Kawaley J maintained the jurisdiction's reputation for pragmatism and for providing officeholders with practical judicial assistance (within the bounds of Cayman Islands law) to support the efficient winding down of an international group of companies.

Walkers acted as counsel for Messrs David Griffin and Andrew Morrison of FTI Cayman and Ms Lisa Rickelton of FTI Consulting LLP in their capacity as JOLs of the Company.

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