1-04-11

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 246/2010

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF TIMES PROPERTY HOLDINGS LIMITED

Coram: The Hon. Mr. Justice Foster

Appearances: For the Petitioners – Mrs. S. Corbett and Mrs. F. MacAdam - Walkers

For the Respondent – Mr. J. Walton and Mr. R. Coe – Appleby

Heard: Thursday 10 March 2011

GRAND COURT CAYMAN ISLANDS

JUDGMENT

1. By their amended Petition dated 11 February 2011 the Petitioners seek an order that the Respondent, Times Property Holdings Limited ("the Company") be wound up pursuant to the provisions of the Companies Law (2010 Revision) ("the Law") on the ground that the Company is unable to pay its debts (see section 92(d) of the Law) and for the appointment of three members of the firm of KPMG as Joint Official Liquidators. The amended Petition is opposed by the Company principally on the grounds that, firstly, the alleged debts are disputed and, secondly, the dispute between the Petitioners and the Company is anyway the subject of ongoing arbitration proceedings in Hong Kong. The Company accordingly seeks dismissal of the amended Petition with costs.

Background

2. The Company is part of the Times Group of companies ("the Times Group"), which carry on various businesses in China, including Hong Kong. The Company, which is of course incorporated in the Cayman Islands, is a subsidiary of another company in the Times Group, Asiaciti Enterprises Ltd ("Asiaciti"), a company incorporated in the British Virgin Islands ("the BVI"). The Company carries on business principally in real property acquisition, holding and development in China.

3. It is not in dispute that the Company was a party to a Note Subscription and Rights Agreement ("the Subscription Agreement") dated 28 December 2007 and governed by Hong Kong law principally between Asiaciti on the one hand and the Petitioners (referred to as "Investors") on the other hand. Pursuant to the Subscription Agreement the Petitioners agreed to lend Asiaciti an aggregate amount of US$200,000,000 ("the Loan") in return for which Aisaciti agreed to issue and duly did issue various redeemable notes to the Petitioners in January 2008 ("the Notes"). Various other companies in the Times Group were also party to the Subscription Agreement.

4. The Subscription Agreement also provided that the Company, in consideration of the Petitioners agreeing to make the Loan to Asiaciti, unconditionally and irrevocably guaranteed Asiaciti's obligations under the Subscription Agreement and the relevant related transaction documents, including the Notes.

The basis for the Petitioners' contention that the Company is unable to pay its debts

5. The Petitioners rely on two events which they contend amount to defaults by the Company pursuant to the provisions of the Subscription Agreement and of the Notes as a result of which they say that the Company is and remains indebted to the Petitioners in respect of the Loan and accrued interest, now totalling in the region of US$445,000,000. This, they say, demonstrates the inability of the Company to pay its debts.

6. In summary, the first ground for the Petitioners' claim relates to the indirect acquisition by a relevant company in the Times Group of certain development property in the Panyu district of China, ("the Panyu Acquisition"). The Petitioners contend that contrary to the provisions of the Subscription Agreement, the Company did not obtain the written consent and approval of the Petitioners' representative to the Panyu Acquisition as it was required to do unless such expenditure was approved in the then current approved business plan and budget, which, they say, it was not.

7. On the basis of this alleged default by the Company the Petitioners, purporting to exercise their rights under the Subscription Agreement and the Notes by their designated representative, served notices of default on Asiaciti and the Company and thereafter served a redemption notice on Asiaciti, as principal debtor, in respect

of the whole loan and interest and subsequently served formal demands for payment by Asiaciti and also by the Company as guarantor. The Petitioners accordingly contend that since 28 October 2009 the Company has been in default of payment of the redemption price to the Petitioners and continues to be so.

8. The Company disputes the alleged breach of the Subscription Agreement in respect of the Panyu Acquisition for several reasons but principally because, it contends, that acquisition was in fact approved by or on behalf of the Petitioners in the business plan and budget approved at the time when the Subscription Agreement was negotiated and concluded. The Company also contends that in any event the Petitioners were aware of the Panyu Acquisition and by their conduct acquiesced in it. This ground of the amended Petition is accordingly disputed by the Company.

9. The second basis on which the Petitioners ground their amended Petition relates, in short, to a provision in the Subscription Agreement providing that the Petitioners are entitled to redeem the Notes if the Company has not completed an Initial Public Offering ("IPO") by 9 January 2011. There is no dispute that in fact the Company had not completed an IPO by that date and has not done so since. Accordingly in January 2011 the Petitioners' designated representative served a further redemption notice on Asiaciti requiring it to pay the full amount of the Loan and interest. It is the Petitioners' case that since January 2011 the Company has been obliged as gurantor pursuant to the Subscription Agreement to meet Asiaciti's said liability on this second basis also but has failed to do so.

10. However, the Company argues that because the Petitioners had already sought to redeem the Notes in reliance on the Panyu Acquisition as a matter of commercial reality an IPO has since then been simply no longer commercially feasible or viable. The Company accordingly contends that, as a matter of business efficacy, there is to be implied in the Subscription Agreement a condition that the requirement for the Company to complete an IPO by January 2011 must be subject to the Petitioners not having already prior to that date redeemed or purported to redeem the Notes. The Petitioners strongly resist that argument and contend that there is no basis for implying any such term in the Subscription Agreement and that accordingly, there is no basis for resisting their entitlement to payment of the Loan and interest by Asiaciti and by the Company.

The Hong Kong Arbitration

11. The Subscription Agreement provides firstly that it is to be governed by and construed exclusively in accordance with the laws of Hong Kong. Secondly, the Subscription Agreement provides that any dispute, controversy or claim arising out of the Subscription Agreement is to be resolved in the first instance by consultation between the parties to the dispute and, if the dispute is not resolved within 30 days, it is to be submitted to arbitration to be conducted in Hong Kong under the auspices of the Hong Kong International Arbitration Centre.

12. Following the dispute concerning the Panyu Acquisition, which remained unresolved after 30 days, the Company served arbitration notices on the Petitioners thereby commencing the Hong Kong arbitration process. The Petitioners duly served a response and the arbitral tribunal was convened in late December 2010 with three arbitrators, one appointed by Asiaciti, the Company and other entities in the Times Group, one appointed by the Petitioners and a third, as chairman, appointed by the Hong Kong International Arbitration Centre. All three are highly qualified and experienced arbitrators. Subsequently the dispute concerning the Petitioners' redemption notice based on the non-completion of an IPO was also referred to arbitration in accordance with the Subscription Agreement and it is accepted by all parties that all the areas of dispute including those raised in connection with the amended Petition have now been effectively referred and are subject to arbitration in Hong Kong. The uncontroverted evidence is that a directions hearing took place in the Hong Kong arbitration in February 2011 at which a hearing timetable was established and the substantive hearing directed to take place over 7 days commencing on 27 September 2011 at the Hong Kong International Arbitration Centre.

Other Related Proceedings

13. In November 2010 the Petitioners commenced winding up proceedings in respect of Asiaciti in the Commercial Court in the BVI. Those proceedings are opposed by the principals of Asiaciti who are also the principals of the Company. At a hearing in the BVI on 24 January 2011 the Petitioners were given leave to amend their

winding up application and, following compliance thereafter with directions for the exchange of evidence, the winding up application there is listed for hearing on 14 April 2011.

14. There are also 2 sets of proceedings in the High Court in Hong Kong. In the first the Petitioners seek to perfect certain security over the shares of two Hong Kong companies within the Times Group in purported exercise of their rights within the same transaction which is the subject of the proceedings before this Court. In a further action the same person who is the principal behind Asiaciti and the Company claims breach of contract against the Petitioners' designated representative, again in relation to the same transaction.

The Relevant Law

15. It is well established that the winding up jurisdiction of the Court may not be invoked by a purported creditor in respect of a debt which is disputed on bona fide and substantial grounds. The winding up jurisdiction is not for the purpose of deciding a disputed debt (see, for example, Mann v. Goldstein [1968] 2 AER 769, applied in this court in Quarry Products Limited v. Austin International Incorporated [2000] CILR 265). Invoking the process of the Court in relation to a debt which is known to be disputed on genuine and substantial grounds is generally considered to be an abuse of the process of the court (see, for example, Re A Company (No. 0012209 of 1991) [1992] All ER 797). The onus is on the company concerned to satisfy the Court that it has a prima facie case that the alleged debt is

not due or outstanding, which is sufficiently substantial that it ought to be tried in an action or by some other appropriate proceeding.

16. I was referred by counsel to the Company to two cases from the BVI which I have found helpful in the circumstances of this case. In Sparkasse Bregenz Bank AG: Re Associated Capital Corporation, BVI Civil Appeal No.10 of 2002, (18 June 2003 - unreported) the BVI Court of Appeal dismissed a winding up petition having concluded that there was a genuine and substantial dispute about the debt and that under the terms of the contract between the parties a court in Austria had exclusive jurisdiction to resolve the dispute. Having reiterated the relevant law concerning disputed debts, Byron CJ addressed the question of the proper forum. He said:

> "*The agreement between the parties clearly mandated that the agreement is subject to the law of Austria and that the Court responsible for the bank's headquarters in Vienna has exclusive jurisdiction over any possible legal dispute arising out of the agreement. This provision is unambiguous. Austrian law would be relevant to resolve the questions that were raised by the parties. It is not necessary to rely on Austrian law to determine whether there was a dispute. One can conclude that a dispute exists without knowing how the dispute would be resolved. The learned trial judge concluded that there were disputes of both a factual and legal nature and it is not for this court to resolve those disputes. He concluded that the dispute between the parties should be settled in accordance with the terms of the agreement before it could be said that*

there was a debt which could ground a winding up order. The principles outlined above [relating to disputed debts] *clearly indicate that it was his duty to determine whether there is a genuine and substantial dispute as to whether there is a debt. None of the jurisprudence indicates that it was his duty to resolve the dispute. I reject the contention that the failure to lead Austrian law was an error or impacted on the burden of proof. The questions that the judge was required to answer, and those that he did answer, did not require any knowledge of Austrian law. If he had attempted to resolve the dispute he would have been improperly encroaching on, and usurping, a jurisdiction which the parties had conferred on the Austrian Court.*

There is authority for the proposition that a winding up order should not be made where the company is claiming that it has a genuine and substantial dispute with the creditor to the extent or in excess of the alleged debt and that dispute is to be determined by another court or tribunal. This was so even when the creditor had established its debt to the extent that it was entitled to levy execution, and the company's claim was by way of a cross-claim which had not as yet been adjudicated. This gives effect to the rationale that a winding up order could sound the death knell of a company and it would be unlikely that a liquidator would prosecute the company's claims with the diligence and efficiency of the directors. I think that the learned judge was correct to conclude that a

possible legal dispute between the parties as to the existence of the debt should be resolved in the correct forum as a condition precedent to commencing the winding up proceedings in these Courts" [and he referred to Seawind Tankers Corp v. Bayoil SA (1999) 1 BCLC 62].

17. In Pioneer Freight Futures Company Limited v. World Link Shipping Ltd. Samoa – BVIHCV 135/2009 and 152/2009 per Bannister J (1 July 2009, unreported), the company concerned had applied to set aside two statutory demands. It was held that the principles laid down by the BVI Court of Appeal in the Sparkasse case (ibid) apply equally to an application to set aside a statutory demand in light of the fact that the relevant local legislation provided, inter alia, that the Court should set aside a statutory demand if satisfied that "there is a substantial dispute as to whether the debt is owing or due". The principal ratio for the decision in that case, as I understand it, turned upon the fact that the relevant agreement between the parties was expressly governed by English law and contained an exclusive jurisdiction clause whereby the High Court in England had exclusive jurisdiction with respect to the agreement. Having considered the English case of AWB Geneva SA v. North American Steamships [2007] EWCA Civ.739 the learned judge said:

> "*Ms. Robey* [counsel for the Respondent seeking to uphold the statutory demands] *points out correctly that I have a duty under* [the relevant section of the BVI Act] *to decided whether the points taken on behalf of Pioneer* [the Applicant seeking to set aside the statutory demands] *satisfy me that there is a substantial dispute as to* [the Respondent's] *claim to be entitled to immediate payment. She says that the exclusive jurisdiction clause cannot operate to*

relieve me of that duty, so that I am bound by the Act to decide whether the defence raised by [the Applicant] *is one of substance. The difficulty that she faces is that if I were to decide that it is not, I would in effect be deciding in this jurisdiction that* [the Applicant] *has no defence to* [the Respondent's] *claim for payment. That seems to me to be indistinguishable from making a judicial determination as to the parties' rights under the contract.*

I think that the fallacy in Ms. Robey's argument on this point is that it assumes that the only matter in dispute is the strength of [the Applicant's] *argument on the construction of the Master Agreement. In truth* [the Applicant's] *position is more than that.* [The Applicant] *is saying (a) that it wishes to deploy its construction point, (b) that it is contractually entitled to deploy the point in the High Court in London and (c) that it is not for the BVI court to deprive it of that right. Understood in this way, it seems to me that* [the Applicant], *whatever I might think privately of its point of construction, does indeed raise a dispute of substance.*"

For these principal reasons the learned judge set aside the statutory demands.

Analysis and Comment

18. I find the approach adopted in these BVI cases in circumstances which are similar to those in the present proceedings to be persuasive. Where, as here, parties have expressly agreed that any dispute between them arising out of the relevant contract is to be determined in a particular forum by a particular tribunal, it is not obvious to me why they should not be held to that agreement. In the present case the parties have clearly and unequivocally agreed that any dispute concerning or arising out of the Subscription Agreement, which has not been resolved through negotiation within 30 days, is to be

resolved by arbitration in Hong Kong. Furthermore, that arbitration process, with the active participation of each of the parties in dispute, has already commenced and is now well underway with the substantive hearing set to take place in only 6 months' time. The arbitration proceedings will obviously determine whether the grounds on which the Company disputes its alleged indebtedness to the Petitioners are successfully made out or not. By analogy with the comments in the Pioneer Freight case in the BVI Commercial Court which I have cited above, the Company is saying (a) that it wishes to deploy its arguments relating to the Panyu Acquisition and the IPO in opposition to the Petitioners' claims, (b) that it is contractually entitled to deploy these arguments in the arbitration in Hong Kong and that (c) it is not for this Court to deprive it of this right.

19. Counsel for the Petitioners argued persuasively that the Company has no substantial grounds for disputing the indebtedness to the Petitioners pursuant to the Subscription Agreement which the Petitioners claim. She took me in considerable detail, not only through the relevant terms of the Subscription Agreement, but also the detailed evidence in the four affidavits of Ms. Ellen Ng sworn on behalf of the Petitioners. Counsel for the Company, in seeking to demonstrate that the Company's dispute of the debt is indeed bona fide and on substantial grounds, also undertook a detailed analysis of the two affidavits sworn on behalf of the Company by its Hong Kong lawyer and the two affidavits sworn by the principal of the Company. I do not consider it necessary for me to rehearse or comment in detail on those analyses in this judgment. Although the volume of evidence filed and the time taken at the hearing in analysing and commenting on the issues between the parties is obviously not conclusive of the matter, it was, in my opinion, indicative of the fact that there are in my concluded view substantial issues between the parties to be determined. In my view there is no evidence from which it may be inferred that the Company's dispute of its alleged indebtedness to the Petitioners

is not bona fide. Furthermore, although, as I have said, the analysis of the documents and the evidence by counsel for the Petitioners was persuasive, the fact remains that there are factual disputes as well as legal disputes between the parties which, in my view, are not appropriate for resolution on the basis of affidavit evidence without cross-examination, even if that had been practically possible and appropriate at the hearing of the amended Petition. Moreover, it did seem to me that there are issues arising in the dispute, such as, for example, the argument about implication of the term in the Subscription Agreement for which the Company contends, on which the law of Hong Kong may well be different from the law of the Cayman Islands.

Conclusions

20. In my opinion, the parties having agreed that any dispute arising out of or relating to the Subscription Agreement should be resolved by arbitration in Hong Kong, which arbitration is now taking place and which will result in a determination of the dispute between the parties, it is not appropriate for this Court, even if minded to do so, to deprive the Company of putting its case and pre-judging the issue by seeking to determine that the Company's dispute of the alleged indebtedness has no real substance. It seems to me that that question is for the arbitral tribunal in Hong Kong, with the agreement of the parties. In any event, if I am wrong in that approach, I do not anyway feel able to conclude that the Company's arguments are of so little substance that they have no reasonable prospect of success. It is my opinion that the Company's dispute of the alleged indebtedness is bona fide and on sufficiently substantial grounds that they should be tried in the appropriate forum, which is the Hong Kong arbitration. As the Hon. Chief Justice said in the Sparkasse case (ibid), a winding up order could sound the death knell of the Company and it seems to me that I should err on the side of caution in circumstances where the very issues on which the amended winding-up Petition is

grounded are already to be the subject of determination in another tribunal to which the parties have explicitly agreed. In all the circumstances I therefore decline to make a winding up order at this time.

Dismissal or Stay

21. Although the issue of a petition in respect of a disputed debt may be considered an abuse of process which will result in dismissal of the petition that is, in my view, not inevitable and will depend upon the circumstances. The Company has applied for dismissal of the amended Petition. It seems to me to me that in the circumstances here, however, where the issues in dispute will be resolved by the arbitration in Hong Kong within the next 6 months or so, that it would be more appropriate to stay the amended Petition pending the resolution of the arbitration and I so order.

GRAND COURT CAYMAN ISLANDS

Dated 1 April 2011

Hon. Mr. Justice Angus Foster
Judge of the Grand Court