

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD NO: 105 OF 2019 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

**IN THE MATTER OF PACIFIC FERTILITY INSTITUTES HOLDING COMPANY
LIMITED**

IN COURT

Appearances: Mr Spencer Vickers and Mr Ben Hobden of Conyers Dill & Pearman on behalf of INNOMED Group Limited (the “Petitioner”)

Mr Paul Smith and Mr James Eggleton of Harneys on behalf of Pacific Fertility Institutes Holding Limited (“PFI BVI”) (struck-off the register of companies at the date of the hearing), a Shareholder of the Company

The Company did not appear

Before: The Hon. Justice Kawaley

Heard: 21 June 2019

**Judgment
Delivered:** 17 July 2019

HEADNOTE

Application to appoint joint provisional liquidators-whether adjournment should be granted-petition for winding-up on the just and equitable ground-deadlock-misconduct in the management of the Company-loss of trust and confidence-loss of substratum-whether grounds for appointment made out-whether security should be ordered



EX TEMPORE JUDGMENT

Introductory

1. In this matter the Petitioner has presented a winding-up Petition on the just and equitable ground as one of two shareholders of a company which is the holding company of a company based in Hong Kong. The Petitioner has issued a Summons for Directions returnable for today but also, more significantly, an application to appoint Joint Provisional Liquidators (“JPLs”).

The Petition

2. The basis of the Petition can best be summarised by quoting from the Petition itself which sets out in summary form the Petitioner’s case, which is then verified by two Affirmations sworn by Xu Zhong Ping, who has been referred to as ‘Chairman Xu’. The Petition avers as follows:

“3. The grounds upon which the Petitioner claims to be entitled to a winding up order on a just and equitable basis are as follows:

- a. *There is a deadlock amongst the board of the Company:*
 - i. *Leon Li, was recently disqualified as acting as a director of the Company due to being convicted of certain arrestable offences.*
 - ii. *The two current directors of the Company are as follows:*
- b. *Raymond Xu, who is suspected by the Petitioner of assisting Leon Li with misappropriation of the Company Group’s assets.*
- c. *Xu Zhong Ping, who is also a director of the Petitioner.*
 - i. *Xu Zhong Ping has proposed that the board pass resolutions which would have the effect of removing Leon Li, and/or his associates, from positions of authority in relation to the Company and its subsidiaries. Raymond Xu has declined to pass these resolutions. Accordingly, there is a deadlock amongst the board of the Company.*
- d. *There is a deadlock amongst the shareholders of the Company:*
 - i. *The Petitioner is a registered shareholder of 50% of the shares of the Company.*



- ii. *Pacific Fertility Institutes Holding Limited (“PFI BVI”), which is owned and controlled by Leon Li, is a registered shareholder of 50% of the shares of the Company and, under the Articles of the Company is entitled to be appointed as Chairperson of a meeting of the shareholders with a casting vote.*
 - iii. *The Petitioner wishes to remove Raymond Xu as director of the Company. However, PFI BVI has indicated it is opposed to the removal of Raymond Xu as director. Accordingly, there is a deadlock as the Petitioner cannot change the directors of the Company without PFI BVI’s consent.*
- e. *The Petitioner believes that the Company’s substratum has wholly failed for the following reasons:*
- i. *The failure of the Company to maintain a registered office in the Cayman Islands.*
 - ii. *Given the arrest of Leon Li, who the Petitioner understood was the key person responsible for establishing the business of the Company and the day to day running of the business of the Company, it appears impossible for the business of the Company to continue.*
 - iii. *Two major “customers” of the business have confirmed that those customers are in fact owned and controlled by Leon Li. Leon Li stopped providing finance to these entities which has forced these entities to close down their operations. It is therefore unclear whether, without these two major customers, there is a business to continue.*
 - iv. *In addition, or alternatively, the Petitioner now believes that the Company was in fact a corporate vehicle deployed by Leon Li to commit fraud against China Environmental Technology Holdings Limited, a Hong Kong listed company, which wholly owns the Petitioner.*
- f. *The Petitioner believes that there has been misconduct by management of the Company:*
- i. *The Petitioner believes that Leon Li has misappropriated assets of the Company.*
 - ii. *The Petitioner believes that Raymond Xu may have assisted in the misappropriation of assets by Leon Li.*



iii. Accordingly, the Petitioner has lost all faith and confidence in the management of the Company.

iv. There has been a failure to appoint directors chosen by the Petitioner to the Company's subsidiaries as agreed between the Petitioner and PFI BVI in a sale and purchase agreement dated 30 December 2016.

4. Due to the misconduct by Leon Li and Raymond Xu, the financial and operation status of the Company and its subsidiaries is unknown to the Petitioner. Notwithstanding the uncertainty as to the precise financial position of the Company, on the information the Petitioner has, the Petitioner believes the Company is solvent.

5. In the circumstances, it is just and equitable that the Company should be wound up.”

3. That Petition is verified by the First Affirmation of Xu Zhong Ping and he supports those main averments.
4. The application was opposed in an indirect sense by counsel, Mr Smith, appearing on behalf of PFI (BVI), the other joint venture partner, which was unable to appear formally because it is currently struck off the register in the British Virgin Islands.

Adjournment application

5. Mr Smith invited the Court to adjourn the present application to appoint JPLs on the grounds that no proper notice had been given in accordance with the Rules and alternatively on the grounds that there was no demonstrated case of urgency for the application being heard today.
6. I rejected that application for the following brief reasons. Firstly, it seemed to me that the very way in which the other joint venture partner was unable to properly appear before the Court helped to justify and support the application which was being made and the need for independent management to be promptly appointed. And secondly because it seemed to me that looking at the nature of the application and the background in a fair way, the Petitioner appears to me to have been acting in a reasonably prompt way. Had the Petitioner acted more hastily, the Petitioner might well have been accused of failing to properly consider whether or not the present application was in fact necessary.



Merits of application for the appointment of joint provisional liquidators

7. The law that is engaged in this case was addressed quite fully by Mr Vickers. And the starting point is section 104 of the Companies Law. Section 104 crucially provides in subsection (2) as follows:

“(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that-

(a) there is a prima-facie case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to-

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors.”

8. Those grounds, it seems to me, are supported to the requisite extent by the evidence put before the Court. I appreciate that that evidence is not presently contradicted, but it is difficult to think of clearer prima facie grounds for making a winding-up Order in what is a quasi-partnership case; where the essential complaint that is made is that one joint venture partner suspects the other joint venture partners of dishonesty. And this is not a merely vacuous complaint.

9. It is a complaint which is founded at least in part on the fact that Mr Li, the ‘main man’ behind the other joint venture partner, has been recently convicted and is therefore arguably disqualified from serving as a director. And also the fact that it is averred that Mr Li has been at least questioned by the Police in connection with the suspected misappropriation of funds.

10. Reference was made in terms of illustrating the sort of factors which may amount to loss of substratum and concerns about dissipation of assets to local cases including Segal J’s decision in *Asia Strategic Capital Fund, LP*, FSD 42 of 2015 (NAS), Judgment dated April 30, 2015 (unreported). And also, on loss of substratum, reference



was made to the well-known judgment of Jones J in *Re Belmont Asset Based Lending Limited* [2010 (1) CILR 83].

11. The loss of substratum ground is, it seems to me, less cogent than the general ground that there has been a loss of confidence in the management of the Company. The other deadlock argument does seem to me to be somewhat less cogent as well than the loss of confidence ground. I say that because Mr Smith diligently pointed out that the Court should be cautious about the weight to be placed on the evidence relating to non-cooperation by the other side in relation to convening meetings. It does seem to me on balance that the deadlock argument is a serious one because it is not unreasonable for a party who is aggrieved about suspected dishonesty to in effect decide that they do not really want to have anything to do with the party whom they believe has defrauded them.

12. And so in my view the grounds for appointing provisional liquidators have clearly been made out in this case. There is a *prima facie* case for winding-up and that does not mean that the Court would today make a winding-up Order. And there is clearly a risk of dissipation of assets because it appears that it is reasonable for the Court to be concerned that Mr Li might, directly or indirectly, be engaged with misconduct in connection with the Company's affairs. Most colourfully, he is described in a South China Morning Post article of the 18th of November 2018 as follows: "*Man who escaped Hong Kong police through toilet ceiling is second-biggest shareholder in China Environmental Technology Holdings, sources say*". The Petitioner avers that his true identity was not known and Mr Li's conviction apparently relates to identity misrepresentation issues.

The terms upon which JPLs should be appointed

13. The question has been raised, again by Mr Smith, about whether, if the Court is minded to appoint JPLs, security should be required to support the undertaking of the Petitioner in respect of any damage that might be caused by the appointment of JPLs. That submission was made very skilfully by reference to unaudited accounts of the Petitioner which certainly suggest that the Petitioner does not have substantial liquid assets.

14. On balance, it seems to me, it would be wrong at this stage to impose security obligations on the Petitioner because as things stand today the entity which seeks the protection of an undertaking does not legally exist. I accept that it would be unrealistic for the Court to assume that this state of affairs will necessarily continue but it appears to me that the question of security can be revisited at a later stage in these proceedings when there may or may not be some reason to doubt the propriety of the appointment of JPLs; and the Court would also be better placed to assess the damage which might be caused to the British Virgin Islands company which is currently struck-off.



Conclusion

15. And so for those reasons I appoint the joint provisional liquidators proposed by the Petitioner (Michael Penner of Deloitte & Touche Cayman Islands and Tan Wei Cheong of Deloitte & Touche LLP Singapore). I will hear counsel on the terms of the Order and also on the Summons for Directions which I have not yet been addressed on.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

