IN THE SUPREME COURT OF BERMUDA

(COMMERCIAL COURT)

COMPANIES (WINDING-UP)

2017: No. 35

IN THE MATTER OF Z-OBEE HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS

(in Chambers)

Winding-up-proceedings-provisional liquidation for restructuring purposes-application by joint provisional liquidators for validation order in relation to share transfers-governing principles-Companies Act 1981, section 166

Date of hearing: October 13, 2017
Date of Reasons: October 30, 2017

Mr Jayson Wood, Zuill & Co (Harneys), for the Petitioner

Background

1. On February 17, 2017 I granted the Company's application to appoint JPLs for restructuring purposes: *Re Z-OBee Holdings Limited* [2017] SC (Bda) 16 Com (21 February 2017).

2. By an Ex Parte Summons issued on October 9, 2017, supported by the Fourth Affirmation of So Man Chan, the JPLs sought the following substantive relief, namely an Order that:

> "
> *(1) The transfer of legal title to fully paid shares in the Company brought about by the delisting of the Company's shares currently listed on the Singapore Exchange shall not be void by virtue of section 166 of the Companies Act 1981 in the event of a winding up order being made in respect of the Company.*
>
> (2) *The JPLs be authorised to make such arrangements as they consider appropriate , and without further order from this Honourable Court, for the amendment of the Company's register of members…*"

3. I granted that relief on October 13, 2017 and now give reasons for that decision.

The commercial and practical reasons for the application

4. The core commercial and practical reasons for the application being made, on the eve of meetings and a potential sanction application for a scheme of arrangement may conveniently be taken from the following portions of counsel's Skeleton Argument:

> "*6. The shares of the Company are listed on the SEHK with a secondary listing on the SGX-ST. The shares listed on the SGX-ST (the* ***Singapore Shares****) are registered in the name of Central Depository Pte Limited (****CDP****) which is the depository account for the SGX-ST.*
>
> *7. Trading of the shares on the SGX-ST has been very low in the past and so the JPLs consider the cost to the Company of maintaining the secondary listing is not justified. For this reason, the Company proposes to delist the Singapore Shares and for legal ownership of those shares to be transferred by CDP to either a CCASS participant which will allow the shares to be listed and traded on the SEHK, or direct to the underlying beneficial owner (the* ***Listing Transfers****). The election will be in the hands of the underlying beneficial owners.*
>
> *8. The JPLs can see no adverse consequences that the Listing Transfers may cause for the holders of the Singapore Shares. There will be no change in the underlying beneficial ownership of the shares, no cost to be borne by the underlying beneficial owners in a transfer of their shares from CDP to a CCASS participant, and the shares can still be traded on the SEHK through brokers in Singapore…*
>
> *13 The potential problem, for the Company is that if the Listing Transfers occur and the post-sanction conditions are subsequently not satisfied…[and] the scheme fails, there will almost certainly be a winding up order made against the Company. The result will be that, absent a retrospective validation, the Listing Transfers will need to be unwound and the Singapore Shares transferred back to CDP. That unwinding, however, would be extremely complex (and perhaps impossible) if the Singapore Shares have been delisted since CDP is the depository account for shares listed on the SGX-ST .*
>
> *14. The JPLs are therefore keen to create certainty and extinguish at this stage any risk of the Listing Transfers being avoided by operation of s. 166 of the Companies Act, rather than gamble on a retrospective validation order being made at or following the making of a winding up order-in circumstances where it might be said there is no good excuse for the JPLs having not made the application earlier.*"

5. The case for responding to these concerns, the need to eliminate the costs of (a) maintaining dual listings of the Company's shares and (b) the risks of having to retrospectively unwind any share transfers which had been made without a prospective validation order, was clear and compelling.

Governing legal principles

6. Section 166 of the Companies Act 1981 provides as follows:

> "*(1) In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.*"

7. Mr Wood referred to my own judgment in *Re IPOC International Growth Fund & Ors* [2007] Bda LR 74 where I cited the following passage from the Caymanian case of *In re Fortuna Development Corporation* [2004-05] (Henderson J):

> "*5. Thus there are four elements which must be established before an applicant shall be entitled to a validation order. First, the proposed disposition must appear to be within the powers of the directors. There is no dispute about that here. Second, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company. There is no dispute here that the directors do have that belief. Third, it must appear that the directors in reaching that decision have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourth, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.*"

8. Counsel rightly pointed out that this test was formulated in relation to dispositions of assets and that, in the share transfer context, more "relaxed" principles should be applied. He supported this submission by reference to the decision of Smellie CJ, distinguishing the *In Re Fortuna* approach, in *In Re Bayou Offshore Master Fund Limited & Ors* [2007] CILR 434 where he opined as follows:

> "*8. Rather, the more apposite proposition, restated in the positive terms used in In re Onward Bldg. Socy. itself, would be that where no potential detriment to contributories or creditors could arise, a transfer of shares may be allowed after a winding-up order if there are strong grounds for so doing. Such reasons need not be conclusively categorized and would include circumstances where the transfer may be clearly beneficial even to a single contributory, acting entirely in good faith, in seeking to transfer his interests in the company to a purchaser, equally acting in good faith, and provided always that the proposed transfer would cause no detriment to the other contributories or to creditors.*

9 'Strong grounds' must be looked for in the context of the nature of the undertakings of the company itself and of the business environment in which it operates. Even though the company may be moribund or in distress, the nature of its undertakings and the environment in which it operates may be such as to make it both practicable and desirable that transactions of its shares should be allowed to continue, provided the pre-conditions identified above are met."

9. These legal findings were recorded in relation to section 156 the Caymanian Companies Law (2007 Revision), which is the counterpart to our own section 166(1). The same principles apply both before and after a winding-up order has been made.

Practice in relation to routine applications for validation orders

10. Mr Wood also commended the Caymanian practice of dealing with routine validation applications on the papers. In *In Re Bayou Offshore Master Fund Limited & Ors* [2007] CILR 434, Smellie CJ also opined as follows:

"*15…in order to save the costs of what are anticipated to be routine applications, any such application may be made in writing and may be considered administratively by a judge as set against the requirements of this ruling. Certainly, if all that is presented is the same kind of transparent,* bona fide *and arm's length transaction of the sort proposed here on behalf of Navasota and Anglo Irish Bank, there should be no difficulty.*"[1]

11. I see no reason why a similar practice should not be followed in Bermuda in relation to routine validation applications in relation to share transfer transactions which court-appointed liquidators advise are in the interests of the general body of unsecured creditors.

Conclusion

12. The evidential basis for the present application to my mind clearly provided "*strong grounds*" for validating the proposed transfers. The main *raison d'être* of every insolvency proceeding is to preserve value and maximize the return to unsecured creditors. The main commercial object of the proposed share transfers was to eliminate the actual costs of a dual listing and to eliminate the contingent costs of seeking to unwind the transfers if the pending scheme failed.

Dated this 30th day of October 2017 ______________________

IAN RC KAWALEY CJ

[1] This practice is now embodied in Order 19 rule 4 of the Caymanian Companies Winding Up Rules 2008.