

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

CAUSE NO: FSD 142 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF DFLM MANAGEMENT LTD

IN OPEN COURT

Appearances:

Mr Neil Timms QC and Mr Olivaire Watler, Attorney-at-Law,
for the Petitioner

Mr Jeremy Snead of Appleby, for the Respondent

Mr. Mark Goodman and Mr. Jeremy Durston of Campbells on
behalf of the Company

Before: The Hon. Justice Kawaley

Heard: 10 September 2018

Date of Decision: 10 September 2018

Reasons Circulated: 25 September 2018

Reasons Delivered: 26 September 2018



HEADNOTE

Member's just and equitable winding-up petition-summons for directions-company operating modest local restaurant-overriding objective-importance of parties proceeding in a proportionate manner commensurate with the financial position of all parties

REASONS FOR DECISION

Background

1. The Petitioner is the Administratrix of the estate of her late brother, who was the former husband of the Respondent. She complains that it is clear that she is entitled to stand in the shoes of the deceased and both be registered as a 50% shareholder and, inter alia, exercise rights which the deceased exercised in terms of active involvement in the running of the business. The Company and the Respondent, in part at least, disagree. The Petitioner claims just and equitable relief also on alternative grounds related to membership and control of the Company.
2. The Company accepts that the business (a local restaurant of comparatively modest size) was jointly run by the deceased and the Respondent and that the Company was operated as a quasi-partnership. The Respondent adopted a more coy position. Rather than simply grant the standard directions sought by the Petitioner as a matter of course, at the prompting of the Company's counsel I explored the viability of summarily determining what potentially might have been a threshold issue which would obviate the need for an elaborate and expensive contested hearing of the Petition. This was the question of whether or not a quasi-partnership survived the death of one of the quasi-partners.
3. Both the Company and the Respondent expressed concerns about the need to control costs, a concern which it was difficult to avoid suspecting the Petitioner was eager to tactically exploit. Nonetheless, at the end of a two hour hearing Mr Timms QC persuaded me that there were no potentially decisive issues which could be determined summarily at the outset and I accepted his submission that the Company had no active role to play in a dispute which was, properly characterised, a dispute between shareholders.

Directions ordered

4. The following directions were ordered:

“1. The Company be treated as the subject-matter of the proceeding and it shall not participate in the proceedings save for the purposes of discovery and inspection.

2. The proceeding be treated as an inter partes proceeding between the Petitioner as a member of the Company and the Respondent as a member of the Company as Respondent.

3. The Respondent be served with the Petition, such service deemed to have been effective as of 10th September, 2018 for the purposes of this Order.



4. *Lewin Parsons and Marilee Parsons be served forthwith with notice of these proceedings. If either of them wishes to be heard on the Petition they shall give notice of their intention to be heard.*
5. *The Petition shall not be advertised.*
6. *Evidence be given by affidavit and the Respondent and any other intervening parties shall serve any affidavit upon which they rely within 21 days of the date of this Order.*
7. *The Company shall not object to the disclosure by the Respondent of information or documents obtained in her capacity as director of the Company.*
8. *The Petitioner shall serve any affidavits in reply upon which she relies within 21 days thereafter.*
9. *A hearing for further directions including directions for discovery, inspection and cross-examination shall be listed as soon after 21 days thereafter as shall be convenient to the parties and to the Court.*
10. *Notwithstanding the presentation to the Court on 1st August 2018 of the Petition no payments made by the Company in the ordinary course of business shall be void pursuant to section 99 of the Companies Law (2018 Revision) (the “Law”), or any other provision of the Law or any other applicable law, in the event that an order for the winding-up of the Company is made.*
11. *The Company’s costs of the Petition (up to and including today’s hearing) may be paid out of its assets as an expense incurred in the ordinary course of its business within the meaning of paragraph 10 of this Order.*
12. *There shall be liberty to apply.*
13. *The costs of and incidental to this summons shall be reserved.”*

5. However I also strongly encouraged the parties to pursue a commercial settlement. No matter how intellectually enticing the interesting legal issues raised by the Petition may



be, the Court’s primary case management objective is, with the assistance of the parties, to ensure the achievement of the overriding objective.

6. I indicated that I would give reasons for my decision which I now, very briefly, provide. This is not with a view to elucidating any issues of legal principle or practice, but solely to place on record my strong conviction that this is a case which cannot justly be fully pursued to trial but, rather, is one which cries out for a pragmatic “win-win” out of court commercially-driven resolution.

The parties’ duty to assist the Court to achieve the overriding objective

7. The present case has the classic ingredients for the main protagonists to litigate emotionally and in an uncommercial manner. Most importantly, it is not a dispute which involves substantial sums of money. The Company is not an investment vehicle for sophisticated investors who can likely afford to write off any losses and who may be presumed to bring only cold commercial logic to the process of resolving commercial disputes. The Respondent and the Petitioner’s late brother were married and then divorced. They continued to run the Company together, assisted to some extent (it is said) by her parents. The Respondent is reportedly dependent on the business for her livelihood, and will likely be extremely anxious about the present dispute. Her expectations as to what her interests in it should be will also likely be influenced in part by her former marital relationship with the deceased. The Petitioner, on the other hand, doubtless wishes to do right by her late brother and achieve a fair recovery for his estate. Her view of a just outcome will likely be heavily influenced by those familial ties.
8. The global legal landscape is littered with examples of ‘family’ commercial or other legal disputes involving modest financial sums being run, on the instructions of the passionate protagonists themselves, in a manner which ends in a vale of tears. Recriminations are then raised about the failure of the legal system to administer effective justice. The overriding objective is designed to cure this mischief, but the tools it provides must be used in a nuanced manner designed to give effect to (rather than stifle) the parties’ right to have their day in court. This ancient right to be heard is not absolute; abusive or frivolous claims or defences may be struck-out. There is also an important differentiation of approach to be adopted depending on the nature of the claim. A case involving fundamental rights or liberties may bring into play a public interest in a public trial wholly detached from the merits or even costs. This is why protective costs orders have recently been deployed in some jurisdictions in public interest cases to guarantee the right of access to the court.



9. Commercial cases are in my judgment (or ought to be) fundamentally different. A just determination of a commercial case requires a commercially rational result. Paragraph 1 of the Preamble to the Grand Court Rules defines the overriding objective as including the objects of:

- dealing with matters in a just, expeditious and economical way; and
- dealing with matters in a way which is proportionate to the amount of money involved.

10. The Court is also required by paragraph 4 the Preamble to, *inter alia*:

- help the parties to settle all or part of the proceedings; and
- “*consider making orders of its own motion for the purpose of giving effect to the overriding objective of the rules*”.

Conclusion

11. It was for these reasons that I strongly encouraged the parties to pursue a sensible commercial resolution of this commercial dispute, and gave the limited directions (substantially in the terms of those sought by the Petitioner) which I hoped would facilitate such an outcome. It is to the case management powers considered above that I will turn, if needs be, when this matter next comes before the Court.



HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

