IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 31 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF POLARCUS LIMITED (IN OFFICIAL LIQUIDATION)

Appearances: Walkers on behalf of the Joint Official Liquidators

Before: The Hon. Justice Kawaley (in Chambers)

Heard: On the papers

Date of Decision: 23 June 2022

Draft Reasons circulated: 28 June, 2022

Reasons Delivered: 6 July 2022

HEADNOTE

Application for declarations as to the legal authority of company in liquidation to enter into an acquisition transaction-jurisdiction of Grand Court to grant declaratory relief in winding-up proceedings-Grand Court Act (2015 Revision), sections 11(2), 19(3)-Companies Act (2022 Revision) sections 110(1), 155(1)(a)- Companies (Winding Up) Rules 2018, Grand Court Rules Order 15 rule 16

REASONS FOR DECISION

Introductory

1. By a letter application dated May 25, 2022, the Joint Official Liquidators ("JOLs") sought the following relief:

> "*a declaration from this Honourable Court that, as a matter of Cayman Islands law, the Company, acting by the JOLs, is authorised:*
>
> > *a) to acquire 75 quotas (the "PEL Quotas") in Polarcus Egypt Limited ("PEL") from Polarcus DMCC pursuant to the terms of a quota purchase agreement (the 'QPA') to be entered into by the Company and Polarcus DMCC (the 'PEL Transfer') 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 PEL Quotas; and*
> >
> > *b) to authorise the JOLs to incorporate a special purpose vehicle ('SPV') in the Cayman Islands for the principal purpose of acquiring the PEL Quotas, (together, the 'Declarations').*"

2. The legal content of the Declarations sought was entirely uncontroversial in Cayman Islands legal terms. The need for the JOLs' powers to be confirmed only arose because the acquisition limb of a larger transaction involving the disposition of assets required regulatory approval from a jurisdiction unfamiliar with the local insolvency law regime.

3. More legally significant was a point which did not appear to have been directly addressed by local authority and which counsel properly raised. Did this Court, in the absence of any express provision in the Companies (Winding Up) Rules 2018 in this respect, possess the jurisdiction to grant declaratory relief within a winding-up proceeding? Counsel persuaded me that the answer was very definitively yes despite the absence of direct authority on an important jurisdictional point.

4. These are the reasons for my decision on June 22, 2022 to grant the Declarations which the JOLs sought.

The authority question

5. Messrs. David Griffin and Andrew Morrison of FTI Consulting Cayman Islands) and Ms Lisa Rickleton of FTI Consulting LLP (in London) were appointed as JOLs of the Company on June 21, 2021. They initially were appointed as joint provisional liquidators on February 8, 2021, and commenced a restructuring of the Company's business which was continued on an insolvent basis after a winding-up order was made.

6. Section 110 of the Companies Act (2022 Revision) provides, so far as is relevant to the authority question, as follows:

> "**Function and powers of official liquidators**
>
> *110. (1) It is the function of an official liquidator —*
>
> *(a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and*
>
> *(b) to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.*
>
> *(2) The official liquidator may —*
>
> *(a) with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and*
>
> (b) *with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3.*"

7. To "*collect, realise and distribute the assets of the company*" is necessarily, and especially in the context of companies (such as the Company) conducting complex business on a multi-jurisdictional basis, a very broad and fluid function indeed. When the JOLs were

appointed, they were expressly authorised to exercise any of the Schedule 3 Part 1 powers without further sanction of the Court. The liquidators powers, defined in Schedule 3, and derived from the Companies Act 1948 (UK), are correspondingly broad as well and include carrying on the Company's business so far as may be necessary and broad powers to compromise claims which may be asserted against the Company by creditors and claims the Company may have against its debtors.

8. The JOLs' counsel rightly submitted that the acquisition of the PEL Quotas by the JOLs on behalf of the Company is ancillary to a sale and purchase agreement which this Court has already been approved. The relevant acquisition was simply now proposed to be direct as opposed to indirect. Paragraph 1 of the Order dated December 14, 2021 (the "Sanction Order") which I made herein:

> (a) described the transaction as "… *a disposal of the Company's assets pursuant to section 110(2)(a) and Schedule 3, Part I, paragraph 8 of the Companies Act (2021 Revision) (the 'Act'))*"; and
>
> (b) also authorised "*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.*"

9. So, the JOLs clearly had the requisite authority to cause the Company to acquire the PEL Quotas as part of the same broad transaction they were authorised to enter into by the Sanction Order.

The jurisdiction question

10. The JOLs' counsel submitted that this Court clearly had the inherent jurisdiction to grant declaratory relief in the winding-up context even though no such power was conferred by the Companies Winding-Up Rules 2018 ("CWR") and the provisions of Grand Court Rules ("GCR") Order 15 rule 16 did not apply to winding-up proceedings. There is direct judicial support for the proposition that the Court's inherent jurisdiction may properly be invoked to fill gaps in the CWR, as opposed to overriding the express provisions of the CWR which counsel cited *HSH Cayman I GP Limited et al* [2010 (1) CILR 114] (Cayman Islands Court of Appeal). Sir John Chadwick P at paragraph 27 opined as follows:

"(3) In the absence of a power to relieve from the consequences of failure to comply with the Winding Up Rules either in the Rules themselves; or incorporated in the Rules by reference to the Grand Court Rules; or made applicable to winding up by the Grand Court Rules; or exercisable pursuant to s.18 (2) of the Grand Court Law, the judge was entitled to invoke the inherent jurisdiction of the court to control its own process. But, in exercising that power, he was not entitled to vary the scheme for the winding up of companies in this jurisdiction laid down by the Winding Up Rules." [Emphasis added]

11. The power considered in that case was the power to grant relief from non-compliance with the CWR. As regards the power to grant declaratory relief generally, counsel referred to *Insurco Intl Ltd v Gowan Company* [1994 CILR 210] where the Court of Appeal (Kerr JA, at page 230) approved Schofield J's finding that:

"*The jurisdiction of the Grand Court to grant declarations is, it seems, as wide as that of the English courts…*"

12. Although those observations were not made in the winding-up context, in my judgment it is clear that they apply with equal force in the winding-up context. This is in part because although the CWR do not expressly confer a power to grant declaratory relief, such relief cannot be said to be inconsistent with the scheme of either the Companies Act or the Rules made under it. More fundamentally still, it must be remembered that this Court has an express general statutory power to grant declaratory relief conferred by the following provisions of the Grand Court Act (2015 Revision) which by its terms is not limited to any particular category of proceedings:

"*11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by-*

(a) Her Majesty's High Court of Justice; and

(b) the Divisional Courts of that Court,

as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.

(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not." [Emphasis added]

13. This statutory power promulgated through primary legislation might potentially have been elaborated upon by the CWR but not taken away altogether. There is no basis in the Companies Act nor any other primary legislation of which I am aware that might be said to have subsequently repealed section 11(2) of the Grand Court Act as it applies to winding-up proceedings, either expressly or by implication. On the contrary, the scheme of Part V of the Companies Act requires the Court to make two main categories of declaratory order in the context of official liquidations which are supervised by the Court:

(a) declarations as to the powers of liquidators; and

(b) declarations as to the rights of creditors and/or contributories in relation to a winding-up proceeding.

14. As regards the scope and exercise of the powers of official liquidators, section 110 of the Companies Act provides:

"*(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and subject to subsection (5), any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a 'sanction application').*" [Emphasis added]

15. 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 as ascertained by reference to the wider statutory context. Although the parameters of the 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. The following jurisdiction in my mind clearly implies that the Court can, if specifically invited to do so, give directions in relation to a voluntary liquidation to the same extent as it can in the context of a liquidation under the Court's ongoing supervision and that the Court's powers when dealing with such applications are very broad. Section 129 of the Companies Act provides:

> "***Reference of questions to Court***
>
> *129. (1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.*
>
> *(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just.*
>
> *(3) The voluntary liquidator shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in that person's records relating to the company.*" [Emphasis added]

16. It would lead to absurd results if section 129(2) was construed 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 for the specific purpose of benefitting from continuing Court supervision. Official liquidators, creditors and/or contributories are entitled to have the Court determine whether the proposed exercise of a liquidator's powers is legally permissible or not. Most applications for directions made by official liquidators are made *ex parte*, as occurred in the present case. Sometimes the Court is asked to declare that the power to enter a transaction exists. On other occasions the Court may be asked to declare, as between the Company and the stakeholder, what the correct legal position is in relation to, for instance, the terms upon which a distribution are made. A few examples will suffice to support this conclusion.

17. Sometimes the applicant does not actually seek "declaratory" relief in terms, but seeks directions which are in substance declarations as to the rights of the company and its

creditors or contributories. For instance in *Re Ascot Fund*, FSD 3/2019 (IKJ), Judgment dated January 11, 2021 the liquidators sought "directions" in relation to the proposed basis of a distribution. Facts were agreed and the issues in dispute were argued by counsel for the joint official liquidators and counsel for a representative party. In substance, this was an *inter partes* determination of the rights of the parties and the Court granted declaratory relief in relation to the disputed legal issues. On the other hand in *Re Direct Lending Income Feeder Fund, Ltd*, FSD 108/2019 (NSJ), Judgment dated May 9, 2022, the joint official liquidators filed a summons seeking "*declarations relating to the claims of investors in DLIFF*". Segal J regarded that application as a sanction application which affected the rights of creditors and contributories against the company in relation to which the service and notice provisions of CWR Order 11 rules 1 to 3 applied. As regards the statutory basis for dealing with such applications, Segal J held (at paragraph 10) in the course of giving initial directions as follows:

> "*(e) while there is no explicit power to seek directions, as there is in the UK Insolvency Act 1986 (see section 112(1) which states that 'The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court"), an application for an order seeking sanction for the exercise of (and permission to exercise) their powers is, as a matter of practice, referred to as an application for directions in this jurisdiction.*"

18. One of the most well established contexts in which declarations as to the powers of official liquidators are granted on an *ex parte* basis to facilitate their powers being recognised abroad is this Court jurisdiction to issue letters of request. There is no express power to issue a letter of request to a foreign court generally; only in the limited context of liquidators obtaining evidence from a "*relevant person*" abroad: Companies Act, section 107(b). Letters of request in aid of liquidators applying for recognition abroad critically contain declarations as to what their powers under Cayman Islands law are. Whatever the jurisdictional basis for issuing letters of request may be, this Court's jurisdiction to grant such declarations as to official liquidators' powers, on an *ex parte* basis, has seemingly never been doubted and certainly has never successfully challenged. In *Re Nortel Networks SA et al* [2009] EWHC 206 (Ch), Patten J (as he then was) held in a short judgment (at

paragraph 9): "*The High Court has an inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances and the only issue which I have to decide is whether I should exercise this jurisdiction in this particular case.*" The Cayman Islands jurisdiction is perhaps inherent on the basis that the Court in issuing a letter of request is typically implementing the winding-up order, which will typically empower the official liquidators to seek such assistance from foreign courts as may be required. On the other hand the power may be inherent because it is necessary to fill a gap in the legislative scheme, which empowers liquidators to collect and gather in the company's assets without expressly adverting to the instance of the need to take such steps overseas. Whatever the technical position may be, generations of Cayman Islands judges (and the judges of assisting foreign courts) have clearly not doubted this species of declaratory relief can be granted in the winding-up context.

19. The present application was clearly not a sanction application, but rather an application in aid of implementing this Court's Sanction Order which could properly be made on an *ex parte* basis. In my judgment the declaration sought fell within the broad ambit of section 11(2) of the Grand Court Act which empowers this Court "*to make binding declarations of right in any matter*". An *ex parte* order declaring that the JOLs have the power to consummate a particular transaction is, once made, a binding declaration of the JOLs' rights. Alternatively, if this analysis is wrong, I would have granted the Declaration sought in any event on the basis that this Court was clearly empowered by to grant such relief by way of directions and as part of the Court's jurisdiction to control the exercise of the JOLs' powers under section 110 (3) of the Companies Act. In the further alternative if there were to have been no express or implied statutory basis at all for this Court granting declaratory relief in relation to the scope of a liquidator's powers (as counsel very conservatively but assumed and cogently justified) I had no doubt that this Court possessed the inherent jurisdiction to do so (derived ultimately from section 11 (1) of the Grand Court Act) with a view to either:

(a) filling a *lacuna* in the Companies Act, and/or the CWR; or

(b) for the purposes of facilitating the implementation of its earlier Sanction Order.

20. A helpful illustration of declaratory relief in relation to office holders explicitly being granted under this Court's inherent jurisdiction to fill a gap in the law is provided by *Re Premier Assurance Group SPC Limited (in controllership)*[2020 (2) CILR 864]. The legal context was analogous to the insolvency context, because although it dealt with controllers appointed under the Insurance Act, the declarations were needed to enable the controllers

to seek recognition abroad under Chapter 15 of the US Bankruptcy Code. Anthony Smellie CJ opined as follows:

> "*48 I accept that the court has an inherent jurisdiction to confirm the powers of controllers vested under s.24(2)(h) of the Insurance Law, notwithstanding the repeal of the former provision in the earlier revision which expressly called for this court's sanction of the powers, like that which still remains in s.18 of the BTCL. In Bennion on Statutory Interpretation, 7th ed. (2017) (First Supplement, 2019), the commentators state, para. 25.4, at 660–661, that:*
>
> > *'The court's inherent jurisdiction may in appropriate circumstances be used to supplement a statutory scheme so as to fill a gap or avoid injustice. So, for example, it is well established that the High Court may exercise its inherent wardship jurisdiction to fill an unintended statutory lacuna… The general approach of the courts is summarised in the following passage by Baker J in Health Service Executive of Ireland v Z: '[16] It is well established that the High Court may in appropriate circumstances use its inherent jurisdiction to supplement a statutory scheme…'"*

21. The inherent jurisdiction to manage the Court's processes and to supervise the implementation of orders once they have been made may be illustrated by reference to the "*inherent jurisdiction to police and control…undertakings…* This court undoubtedly possesses the inherent jurisdiction to both ensure the efficacy of its orders and to review the appropriateness of the terms of an interim order from time to time…": *Fortunate Drift Limited-v-Canterbury Securities Limited* [2019 (2) CILR 779] (Kawaley J, at paragraphs 30, 55).

Conclusion

22. For these reasons, on June 23, 2022 I found that the JOLs had authority to consummate in a modified way the transaction previously approved by the Sanction Order and that this Court possessed the jurisdiction to grant a declaration to this effect .

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