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UPDATE

Unfair prejudice claims - just and equitable winding up is a 'remedy of last resort'

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In the decision of *Kwok Kin Kwok*,[1] the Court of Appeal considered the remedies available to the BVI Court in unfair prejudice claims, in particular the question of whether and when it is appropriate to appoint a liquidator on 'just and equitable' grounds under the BVI Insolvency Act 2003.

Background

The respondent (**Madam Yao**) and the appellant (**Madam Kwok**) entered into a joint venture to build and operate a hotel in Xiamen in the People's Republic of China (the **Joint Venture** and the **PRC** respectively). The parties' interests in the Joint Venture were held via a BVI company, Crown Treasure Group Limited (**Crown Treasure**). During the relevant period, Madam Yao and Madam Kwok held the entire issued share capital of Crown Treasure, with the shares being held in equal proportions (50% each). Crown Treasure in turn owned 100% of the shares in a subsidiary BVI company, Strong Nation Investments Limited (**Strong Nation**), which held the entire issued share capital in Xiamen RVH (**XRVH**), a company incorporated in the PRC. XRVH was incorporated to hold the land which was to be developed, build the hotel and operate the project. At all material times, Madam Kwok was the sole director of Crown Treasure and Strong Nation.

Madam Yao brought a claim against Madam Kwok pursuant to section 184I of the BVI Business Companies Act 2004 (**section 184I** and **the BCA** respectively) alleging that she had been unfairly prejudiced by Madam Yao's management of Crown Treasure and its subsidiaries. Madam Kwok's conduct was alleged to be oppressive, unfairly discriminatory and unfairly prejudicial towards Madam Yao. In particular, Madam Yao alleged that Madam Kwok's actions diluted her interests in the Joint Venture and that she had been excluded from decision making in relation to the management and operation of the Joint Venture. Madam Yao also alleged that Madam Kwok had caused Crown Treasure and Strong Nation to enter into funding arrangements (including arrangements with a Mr Edmund Eng and his companies) which were not in the interests of Crown Treasure (or its subsidiaries) and which led to 20% of Strong Nation's shares in XRVH being transferred to a third party (one of Mr Eng's companies) - (the **Funding Arrangements**). Madam Yao argued that Madam Kwok's conduct was in breach of an agreement of understanding which imposed upon Madam Kwok a duty to notify and consult with Madam Yao in relation to the operation and management of the Joint Venture (the **Agreement**).

Madam Yao sought relief in respect of Madam Kwok's alleged conduct under section 184I of the BCA. In particular, Madam Yao asked the Court to order Madam Kwok to sell her shares in Crown Treasure to Madam Yao. Alternatively, Madam Yao sought orders appointing a liquidator to wind up Crown Treasure on the basis that it would be just and equitable to do so, pursuant to section 184I and section 162(1)(b) of the Insolvency Act 2003 (the **Act**). Madam Yao argued that it would be just and equitable to wind up Crown Treasure on grounds related to the Funding Arrangements, in particular a 40-year loan contract which

[1] *Kwok Kin Kwok et al v Yao Juan* BVIHCMAP2018/0042, judgment delivered 14 March 2019.

Madam Kwok had caused Crown Treasure to enter into with Strong Nation (the Loan) – without obtaining the prior consent of Madam Yao.

Madam Kwok denied the allegations regarding her conduct, the existence of the Agreement and that Madam Yao was entitled to participate in the management of Crown Treasure. Madam Kwok argued that she and Madam Yao were partners in the Joint Venture only to the extent of their respective financial investment in the project and that the terms that they had agreed entitled Madam Yao to be a 'passive investor' only and not to participate in the management of Crown Treasure. Madam Kwok also argued that the Loan had been entered into bona fides and for a 'proper purpose'.

At first instance, the BVI Commercial Court found in favour of Madam Yao, finding that (i) there was an agreement between the parties in terms alleged by Madam Yao; and (ii) in the circumstances it was just and equitable to wind up Crown Treasure. In particular, the trial judge held that, pursuant to the parties' agreement (as described by Madam Yao), Madam Kwok had a duty to notify and consult Madam Yao regarding the Loan and her failure to do so was unfair and prejudicial to Madam Yao. Consequently, the trial judge granted orders appointing joint liquidators of Crown Treasure.

Madam Kwok appealed, arguing *inter alia* that the appointment of joint liquidators was an unreasonable and unjustified exercise of the Court's discretion which was unsupported by the evidence before the Court and that the Loan did not amount to oppressive, unfairly discriminatory or unfairly prejudicial to Madam Yao, such that it could not be relied upon as a basis to seek a winding up order on just and equitable grounds.

Proportionality of the remedy awarded

The proportionality of the remedy granted at first instance was considered on appeal.[2] The appellant, Madam Kwok, argued that 'the remedy granted [at first instance] was an unreasonable and unjustified exercise of the judge's discretion, that is, it was disproportionate'.[3]

Under section 184I(1), a member of a company can apply to the BVI Court for an order seeking relief from oppressive, unfairly discriminatory, or unfairly prejudicial conduct towards them in their capacity as a member. The Court is permitted by section 184I(2)(f) to make an order appointing a liquidator under section 159(1) of the Act on the basis that it is just and equitable to do so.

When disposing of an unfair prejudice claim, the Court has a wide discretion to do what it considers fair and equitable in all the circumstances of the case. Indeed, the Court is empowered by section 184I to grant such orders '*as it thinks fit*', including but not limited to, the remedies listed in sub-section 184I(2) (one of which is the appointment of a liquidator, as discussed above) and '*the Court is not bound by the relief sought by the [claimant]*'.[4]

Of course, and as highlighted by the Court of Appeal, if a specific remedy is requested by the claimant then that will be taken into consideration when the Court is considering what remedy it should grant.[5]

However, the relief granted must be '*based on conduct alleged to constitute unfair prejudice and contained in the pleaded case*'.

At first instance, the trial judge held that the Agreement (as described by Madam Yao) had been breached by Madam Kwok. The Court of Appeal, however, held that the obligation to notify and consult was restricted to the introduction of a new investor and that Madam Kwok was not constrained by a general requirement to notify and consult with Madam Yao. In light of the Court of Appeal's findings, the 'Agreement' was found to apply in a narrow context and only one of the grounds for bringing the unfair prejudice claim was confirmed. Although section 184I provides the BVI Court with a wide discretion when considering the appropriate remedy, the Court of Appeal held that, in these circumstances, the trial judge

[2] As was Madan Yao's application to adduce fresh evidence which is not discussed in this update.

[3] Paragraph 84.

[4] Paragraph 61 of the Judgement, citing *Re Neath Rugby Ltd (No 2); Hawkes v Cuddy and others (No 2)* [2009] 2 BCLC 427; *Fulham Football Club (1987) Ltd v Richards* [2001] EWCA Civ 855.

[5] Paragraph 62.

had exceeded the wide range of reasonableness available when exercising this discretion; he went too far when he appointed the joint liquidators. The Court of Appeal determined that the trial judge had used his own idea of general fairness, as opposed to relying on the evidence, in determining the appropriate remedy. The appointment of a liquidator was considered by the Court of Appeal to be a remedy of last resort and the remedy granted at first instance was found to be disproportionate and unreasonable.

In light of its findings, the Court of Appeal allowed the appeal and set aside the order for the winding up of Crown Treasure.

The Court of Appeal then exercised its own discretion to determine the appropriate remedy. The Court of Appeal noted that the main objective of a remedy in an unfair prejudice claim was to grant the *minimum* remedy necessary to rectify the misconduct and to prevent the unfair prejudice from occurring again in the future. The Court of Appeal held that the remedy granted should be in proportion to the prejudice established by the claimant and not a means of punishing the wrongdoer.[6]

Instead, the Court of Appeal ordered Madam Kwok to notify, consult with and obtain the consent of Madam Yao in relation to the proposed introduction of a new investor.

Conclusion

The remedies available to the BVI Court in respect of unfair prejudice claims are many and varied and include the power to order a just and equitable winding up. However, the decision by the Court of Appeal in *Kwok Kin Kwok* serves as a timely reminder that the remedies granted must be limited to the minimum required to cure past unfairly prejudicial conduct and/or to prevent such conduct from reoccurring in the future. Thus the cases in which a just and equitable winding up is merited will be few and far between and, rather than seeking 'a remedy of last resort', parties may be better served seeking to resolve their differences by other means (e.g. a share buy-out, re-drafting the company's constitution or a mediated settlement).

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[6] *F. Ming Inc. et al v Ming Sui Hung, Ronald et al* BVIHCMAP2016/0039 (delivered 30th June 2017, unreported) at paragraph 83.

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