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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 196 OF 2011 - PCJ

5-3-12

The Hon Sir Peter Cresswell
In Chambers on 24 January 2012

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

AND IN THE MATTER OF YA OFFSHORE GLOBAL INVESTMENTS LTD

APPEARANCES: Mr. Nigel Meeson QC of Conyers Dill & Pearman for the Petitioners

Mr. J. Ross McDonough of Campbells for the Company, YA Offshore Global Investments

JUDGMENT (Revised and approved)

By summons dated the 10th January 2012 YA Offshore Global Investments Limited ("the Company") seeks an order restraining the advertisement or other publication of the Petition and an order that the Petition be removed forthwith from the Register of Writs and other Originating Process.

The background to this matter is set out in the First Affidavit of Mr. David Gonzalez. According to that affidavit, on 16 December 2011 a winding-up petition ("the Petition") was presented against the Company on the just and equitable ground by Callisto Absolute Return Fund Limited ("Callisto"), a company said to be registered in the British Virgin Islands, and Mr. Mevrouw R.M Bonnerjee, an individual said to be a resident in the Netherlands. It was erroneously pleaded in the Petition that Callisto is the registered holder of 1,507.808 shares in the Company and that Mr. Bonnerjee is the registered holder of 25.7 shares in the Company. In fact, neither of the Petitioners is or ever has been the registered holder of any shares in the Company. It is common ground that the Petitioners had no standing to present the Petition. According to Mr. Gonzalez the 1,533.808 shares which the Petitioners asserted, incorrectly, were registered in their names would represent just 0.378% of the Company's issued shares. To put that into context, 1,533.808 shares in the Company would have a current value of

approximately US$314,000. The Company's current Net Asset Value is, according to Mr. Gonzalez, approximately US$83 million.

The Petition sought a winding-up order in respect of the Company on the ground that it would be just and equitable because "[t]here has been serious fraud, misconduct and/or oppression in regard to the affairs of the Company" and "[t]he business of the Company is not being run in accordance with the legitimate expectations of the shareholders, including the Petitioners, and it is no longer possible or desirable to achieve the objects for which the Company was formed". It contains some 23 pages of extremely serious allegations against the Company, Yorkville Advisors LLC ("Yorkville") the Investment Manager of the Company, and various individuals involved in the management of the Company.

The Petition was, according to Mr. Gonzalez, presented without any prior notice to the Company or Yorkville, and neither of the Petitioners (nor for that matter any investor in the Company) had ever previously raised or intimated any of the allegations contained in the Petition with or to the Company or Yorkville at any time, either orally or in correspondence. Those allegations therefore came, according to Mr. Gonzalez, entirely out of the blue. Each and every allegation is strenuously denied by the Company and Mr. Gonzalez contends that the allegations are entirely spurious and without foundation.

The Petition was not served on the Company. Upon becoming aware of its existence through a journalist, Campbells wrote to the attorneys for the Petitioners, Conyers, Dill & Pearman ("Conyers") on 29 December 2011. Campbells' letter enclosed a draft Summons by which the Company sought to apply to strike out the Petition on the grounds that (a) the Petitioners lacked standing and (b) the presentation of the Petition was an abuse of the process of the Court in circumstances where the Petitioners (or the registered holders of the shares, if any, in which the Petitioners may purport to have a beneficial interest) had one or more suitable alternative remedies available to them and were acting unreasonably in not having pursued any of those remedies.

The draft Summons also sought an Order that the Petitioners should not by any means advertise, or cause the advertisement of, the Petition, and Campbells' letter requested that Conyers provide an undertaking on behalf of the Petitioners that they would not advertise or publicise the existence or content of the Petition in any way.

Within approximately two hours of Campbells sending their letter, Conyers responded by email, attaching a draft consent order which provided that the Petitioners would consent to the dismissal of the Petition, with no order as to costs. Campbells replied informing Conyers that, in the circumstances, the Company did not agree that it was appropriate for there to be no order as to costs and, instead, asked Conyers to sign an amended draft order which provided that the Petitioners consented to the dismissal of the Petition and agreed to pay the Company's costs on the indemnity basis. This was signed and returned by Conyers approximately one hour later. A copy of the consent order, signed on behalf of the Company and the Petitioners, was filed at Court on 30 December 2011. The Company's costs have not, as yet, been paid by the Petitioners.

On 5 January 2012 Campbells sent an email to Conyers in the following terms.

> *"I write further to your email below and the confirmation therein that the Petition has not been advertised by your clients. That confirmation does not however deal with the position going forward. In that regard, and as set out in my email of 3 January, any advertisement or publication of the Petition is likely to cause significant and irreversible damage to a number of parties including, without limitation, the Company, the shareholders of the Company and the Investment Manager.*
>
> *In light of the same, the Company requires an irrevocable undertaking on behalf of your clients that neither they nor their servants, agents or employees will advertise or otherwise publicise the Petition at any time. I would be grateful if you could provide me with an undertaking in these terms by no later than close of business tomorrow and, in the meantime, the Company reserves all of its rights generally."*

No such undertaking was given and there was no response to the email. It was against this background that the Summons before the Court was issued.

Mr. Gonzalez's affidavit makes allegations as to malicious prosecution and collateral abuse of process in paragraphs 9 to 14. I refer to these paragraphs without repeating them. No evidence was filed in answer to Mr Gonzalez's affidavit. It follows that there is no evidence before the Court to refute the assertions in Mr Gonzalez's affidavit.

Mr. McDonough for the Company seeks two orders - an order that the Petitioners be restrained from advertising or otherwise publishing the Petition or notifying any other persons of the existence of the Petition and an order that the Petition and all annexes thereto be removed forthwith from the Register of Writs and other Originating Process.

Mr McDonough submits that the Company believes that the Petition was presented without reasonable or probable cause, and that this may have been done maliciously and/or for an improper motive. The serious and entirely unfounded allegations in the Petition would be damaging to the reputations of the Company, the Investment Manager and the individuals named in the Petition if they came to the attention of current or prospective investors in the Company. The Company asked the Petitioners on 29 December 2011 and on 5 January 2012, for undertakings that they would not in any way advertise or otherwise publicise the Petition. The Petitioners did not respond to either of these requests.

Mr. Meeson, Queen's Counsel for the Petitioners submits as follows.

The Petition was dismissed and these proceedings are at an end. In relation to the Petitioners the Court is functus.

All the cases as to advertisement of Petitions referred to by Mr. McDonough, concern pending petitions. This Petition has been dismissed and the Court record shows that dismissal. The Petitioners did not advertise the Petition or serve it on the Company. The request for an undertaking was ignored because there was no intention to advertise.

The problem here has nothing to do with the Petitioners. The problem is that everything that goes on the Register of Writs and other Originating Process appears on the internet. Mr Meeson said that there is an arrangement whereby Bloomberg has, by virtue of a subscription service or otherwise, automatic access to the full content of contributories' petitions where no direction has been given for advertisement. Mr Meeson also said that publication takes place on the internet of the full content of contributories' petitions, following a physical search by Offshore Alert. He added that Offshore Alert provide a PDF of the full petition and a summary and sometimes a commentary.

[So far as I have been able to ascertain, unrestricted search of the Register is permitted and those who search are allowed to take full copies of contributories' petitions (prior to any direction by the Court as to whether the petition should or should not be advertised). Thereafter such copies may appear on the internet.]

Mr. Meeson submitted that an order should be made removing the Petition from the Court file under the inherent jurisdiction in relation to the Court file **without** any notice to the Petitioners. Any order (he submitted) restraining advertisement should be on the back of any order directing that the Petition be removed from the Register of Writs, and should be addressed to the world at large. I do not accept Mr. Meeson's submission that the matter should be dealt with in this way. In my opinion, as a matter of general principle, any order in proceedings should be on notice to the other party, unless the application falls within the recognised circumstances in which ex parte orders are made.

The Companies Winding Up Rules Part 111:Contibutory's Petition O.3, r11 (2) (d) provide that upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate as to whether, and by what means, the petition should be advertised.

In Secretary of State for Trade and Industry v North West Holdings plc and another [1998] BCC 997 Chadwick LJ said:

> "*...Rule 4.23 applies to contributories' petitions. The regime under that rule differs from that under r.4.11. Rule 4.23(1) (c) gives to the court power to give such directions as to whether (and if so by what means) the petition is to be advertised. An order, in that context, that the petition shall not be advertised is plainly capable of being construed (and normally would be construed) as prohibiting advertisement or publication in any form.*"

In my judgment the Company is entitled to an order that the Petitioners be restrained from advertising or otherwise publishing the Petition or notifying any other persons of the existence of the Petition. I consider that the email of 5 January should have been replied to, and that in the absence of a response the Company was justified in issuing the summons and seeking relief.

I refer to the decision of Roger Kaye, QC sitting as a Deputy Judge of the High Court in Re a Company (No. 2015 of 1996) [1997] 2 BCLC 1.The Court held that the following principles applied where there was an abuse of the rules relating to the advertisement of a petition under section 459 of the Companies Act 1985. First, where the court has not yet made (whether before, on or after the return date in the petition) any direction as to advertisement of the petition, it constituted a breach of the spirit of the rules, as well as being a *prima facie* abuse of the process of the Companies Court, to bring to the attention of any person not already a party to the proceedings, the fact that the petition existed. Second, where such an abuse was established on the facts, the court had a discretion to make what order it thought was fair and just in all circumstances of the case. In this context, the court would consider the need to discourage such misconduct, and what, if any, useful purpose would be served by striking out the petition, whether the court's disapproval of misconduct could be marked in some other way, at what stage in the proceedings the offending conduct had occurred, and whether there had been any other publicity or notification of the existence of the proceedings by other persons, and so forth. Third, as a general rule, the court would be ready to strike out the petition where the breach amounted to a serious abuse (as, for example, where the notification was for some improper purpose, such as to put pressure on the company), or where, in particular, it was shown that damage or prejudice to the company had occurred in consequence. Although on the facts of Re a Company there had been breaches of the rules relating to advertisement by the petitioner, they were not serious and were innocent and did not justify the striking out of the petition.

The circumstances of the present case are somewhat different. It is true that in the present case the Petition is already in the public domain on the internet. But in circumstances where the Petitioners lack any standing to issue the Petition in the first place and where, following the dismissal by consent, the email of 5 January asking for an irrevocable undertaking that the Petitioners, their servants, agents or employees would not advertise or otherwise publicise the Petition was simply ignored, it is in my opinion appropriate to make the first order sought. It should be noted that the order is not confined to advertising the Petition -see the words "or otherwise publishing the Petition or notifying any other parties of the existence of the Petition".

As to the second order sought (an order that the Petition and all annexes thereto be removed forthwith from the Register of Writs and other Originating Process), I refer to the decision of

Lawrence Collins J, as he then was, in Re a Company (Nos 16 and 17 of 2005) [2005] All ER (D) 126. Regrettably it has not been possible to provide me with a copy of the full judgment of Lawrence Collins J and all I have is the report in the Digest. According to the Digest, on the applicant's applications for an order to restrain advertisement and other forms of publication of the petitions and for an order removing the petitions from the court file, the court granted the applicants the relief sought in circumstances where the presentation of the petitions had been an abuse of process. It was held that a winding-up petition was wholly inappropriate in relation to a disputed debt, and where there was any form of running account between the parties a petitioner could not rely on an undoubted debt if there was a *bona fide* counterclaim. The correspondence between the parties showed that the petitions has been brought abusively, substantiated by the fact that on the face of it, there had been numerous cheques which had not been met. It followed that the petitions had been brought for technical reasons to avoid payment. Even if the company had a valid claim against the applicants, it was not one for determination or the taking of accounts in the context of a winding-up Petition. Accordingly, the court granted the applicants the relief sought.

Again the circumstances were very different from the present case, but it is to be noted that in Re a Company, Collins J ordered the removal of the petitions from the court file where the presentation of the petitions had been an abuse of process.

I refer in addition to Butterworths Practical Insolvency, Issue 7, June 2003, para [9] and following under the heading - C Remedies available to the company, 1 Restraining Presentation of a Petition. At paragraph 47 it is said "The application should seek not only the restraint of advertisement of the petition but also the removal of the petition from the file of proceedings; this will ensure that any search of the central register will not show any petition pending against the company. [There is then a footnote referring to the central index of pending petitions maintained in the Thomas Moore Building at the Royal Courts of Justice. This index is now maintained at the Rolls Building]. A supporting affidavit or witness statement should be filed, setting out the facts relied on, as well as explaining why an application to restrain presentation was not made (which may have been simply because the company received no statutory demand or other notice that the alleged creditor intended to present a petition)."

It is clear from the decision in Re a Company (Nos 16 and 17 of 2005), supported by the passage referred to from Butterworths Practical Insolvency, that there is jurisdiction to order the removal of the Petition and all annexes thereto from the Register of Writs and other Originating Process.

In my opinion such an Order is justified in the present case. I do not accept Mr. Meeson's submission that the matter should have been approached in the way that he suggested (without any notice to the Petitioners). It is, in my view, elementary that any application in this connection, should be on notice to the Petitioners. Further I do not accept the submission that the Court has jurisdiction in the present circumstances to direct orders to the world at large.

The relief sought will be granted and I order accordingly.

DATED this 5 day of March 2012

Cresswell J

The Honourable Justice Cresswell
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS

1

[1] *When revising this judgment I checked the relevant practice in London and was given the following information by the Operational Manager of the Companies Court.*

A Central Index of Petitions is maintained by the Companies Court. A person wishing to search the Central Index can ring the search line or go to the Rolls Building and carry out a personal search. A search would show whether a petition has been presented, who the petitioner was, the number of the petition and the hearing date. Such a search would not tell you whether the petition was on the grounds that it was just and equitable to wind up the company.

A party to the proceedings can inspect the Court file.

A person who is not a party to the proceedings would need the leave of the Registrar to inspect the file. If the Registrar gave permission to inspect the file, he would allow a copy of the petition to be taken, but would not allow publication of the petition on the internet.