Claim No: CFI 005/2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BEFORE H.E.﷿ JUSTICE OMAR AL MUHAIRI

BETWEEN

(1) MR RAFED ABDEL MOHSEN BADER AL KHORAFI

(2) MRS AMRAH ALI ABDEL LATIF AL HAMAD

(3) MRS ALIA MOHAMED SULAIMAN AL RIFAI

Petitioners

and

BANK SARASIN-ALPEN (ME) LIMITED

Respondent

ORDER WITH REASONS OF H.E. JUSTICE OMAR AL MUHAIRI

UPON the petition of Mr Rafed Abdel Mohsen Bader Al Khorafi, Mrs Amrah Ali Abdel Latif Al Hamad and Mrs Alia Mohamed Sulaiman Al Rifai ("the Petitioners") presented to the Court on 7 February 2014 ("the Petition");

AND UPON hearing Richard Hill QC for the Petitioners and David Allison QC for the Respondent opposing the petition;

AND UPON reading the Petition, Skeleton Arguments, supporting documents and evidence recorded on the Court file;

IT IS HEREBY ORDERED THAT:

1. Bank Sarasin-Alpen (ME) Limited registered in the DIFC under registration number 0029, with a registered office at Precinct Building 5, Level 4, DIFC, P.O.Box 121806, Dubai is wound up under the DIFC Insolvency Law No 3 of 2009.
2. Pursuant to Article 58(1) of the Insolvency Law, Mr Shahab Haider of Sajjad Haider Chartered Accountants LLP be appointed liquidator ("the Liquidator") of Bank Sarasin-Alpen (ME) Limited.
3. Permission is granted for the Liquidator to apply to the Court for the fixing of their remuneration.
4. The costs of the winding-up petition and of the application for the appointment of the Liquidator are paid as an expense of the liquidation.
5. There be no order as to costs in relation to the adjourned hearing before me on 14 March 2016.

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Issued by:

Natasha Bakirci

Assistant Registrar

Date of Issue: 2 May 2016

At: 4pm﷿

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SCHEDULE OF REASONS

Background

1. On 7 February 2016 the Petitioners filed Claim Form CFI-005-2016, petitioning for a winding up order with respect to Bank Sarasin-Alpen (ME) Limited ("the Respondent"). The Petitioners claim the Respondent is indebted to them in the sum of USD 35,028,474 pursuant to the Order of Deputy Chief Justice Sir John Chadwick ("DCJ Chadwick") dated 3 November 2015 in CFI 026/2009 (the "Quantum Order").
2. The Quantum Order represents part of the result of years of litigation originating from a 2009 case brought by the Petitioners against the Respondent in relation to investments structured by the Respondent and sold to the Petitioners. The Respondent was found guilty of mis-selling the investments to the Petitioners and the Respondent's appeal of the Liability Judgment (the "Liability Appeal") was recently dismissed by the Court of Appeal in a Judgment dated 3 March 2016.
3. In the Quantum Order the Respondent and Bank Sarasin & Co. Ltd (the "Second Defendant") were ordered to jointly and severally pay further damages to the Petitioners in the sum of USD 24,583,425 and the Respondent was ordered to pay additional damages of USD 35,028,474 (the "Additional Damages"/"Judgment Debt"). The Respondent was granted permission to appeal the Quantum Order on 9 November 2015 by Chief Justice Michael Hwang ("CJ Hwang") and this appeal is currently pending (the "Quantum Appeal"). The Respondent's application for a stay of the Quantum Order was dismissed by me on 18 January 2016 [re-issued on 21 January 2016] and the Respondent ordered to pay the Additional Damages into Court within 14 days ("My Order"), this was not complied with.
4. The Petitioners claim that the Respondent is insolvent and unable to pay its debts and requests that the Respondent be wound up pursuant to Regulation 5.2 of the DIFC Insolvency Regulations and Articles 50 (b) and 50 (e) of the DIFC Insolvency Law No. 3 of 2009, which states:

"50. Circumstances in which Company may be wound up by the Court

A Company may be wound up by the Court if:

(a)﷿﷿﷿﷿﷿﷿﷿ the Company has resolved that the Company be wound up by the Court;

(b) ﷿﷿﷿﷿﷿﷿ the Company is unable to pay its debts;

(c)﷿﷿﷿﷿﷿﷿﷿ at the time at which a moratorium for the Company under Article 9 comes to an end, no voluntary arrangement approved under Part 2 has effect in relation to the Company;

(d) ﷿﷿﷿﷿﷿﷿ the Court may make such an order pursuant to any provision of or under DIFC Law; or

(e) ﷿﷿﷿﷿﷿﷿ the Court is of the opinion that it is just and equitable that the Company should be wound up."

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Respondent's opposition to the Petition

5. The Respondent seeks the dismissal of the Petition, or alternatively, seeks an adjournment of the Petition until the determination of the Quantum Appeal on the following grounds:

- The Additional Damages sum awarded in the Quantum Order is subject to a genuine and substantial dispute as permission to appeal it has been granted by CJ Hwang on the basis that it has a real prospect of success;
- The Additional Damages are not due and payable to the Petitioners as the Court ordered that it be paid into Court. Accordingly, it is wrong to contend that the Additional Damages sum is a judgment debt due and payable to the Petitioners;
- It is not just and equitable for the Respondent to be wound up;
- The Petition represents an abuse of process, pursued for the purpose of stifling an appeal and extracting direct payment from the Respondent in an attempt to circumvent the Court's Order of 18 January 2016 for payment of the Additional Damages into Court;
- The Court should, in all the circumstances, exercise its discretion against making a winding up order.

Discussion

6. The Petitioners seek to establish that the Respondent is unable to pay its debts and it is just and equitable for the Respondent to be wound up despite the grounds of opposition raised.
7. The Respondent's witness statement of Rita Catherine Jaballah (**"Jaballah"**) confirms its licence to carry on financial services in or from the DIFC has been withdrawn by the Dubai Financial Services Authority (the "**DFSA**") upon the Respondent's request. Jaballah also accepts that the Respondent has ceased to conduct business generally and is unable to satisfy the Additional Damages payment.
8. In *Amalgamated Properties of Rhodesia (1913) Ltd [1917] 2 Ch 115*, Sargant J established in similar circumstances, that there is a prima facie entitlement to a winding up order notwithstanding the existence of a pending appeal:

`the petitioners, as judgment creditors for this very large sum, are prima facie entitled ex debito justitiae to a winding up order, and it seems impossible to displace that prima facie position without the very strongest proof that the petition is being improperly made use of for some ulterior motive'

9. The Respondent disputes that the Petitioners qualify as Judgment Creditors and submits that as it was ordered for the Additional Damages to be paid into Court, this sum is not due and payable to the Petitioners. My Order was made in the following terms, at paragraphs 10 and 11:

"The main issues cited in favour of a stay were the risk that the Claimants may be unwilling or unable to repay the damages paid by the First Defendant, as well as the argument that there is a very strong appeal against the Liability Judgment.

As explained by the Claimants' Skeleton Argument, the Claimants have stated the First Defendant may pay the money due under the Quantum Order into the Court's escrow account."

10. To clarify, as the determination of the Liability Appeal was still pending and the Petitioners/Claimants were agreeable, the Respondent/First Defendant was ordered to pay the Additional Damages into Court rather than directly to the Petitioners, but there is no doubt that the Petitioners were to be the ultimate beneficiaries of that sum and remain the Judgment Creditors now.

11. Sargant J required the `very strongest proof that the petition is being made use of for some ulterior motive' before displacing the prima facie position of entitlement to a winding up order. As mentioned above, the Petitioners are the Judgment Creditors and as such there is no need for them to attempt to `circumvent' My Order as alleged in the Respondent's Skeleton Argument. The Respondent's submissions in this regard highlight its non-compliance with My Order in failing to pay the Additional Damages into Court and I am not satisfied that there is proof of the Petitioners having any motive behind the Petition other than to obtain payment of the Additional Damages sum.

12. Sargant J also addressed the implications of winding up when there is an appeal pending:

`I am not frightened by the suggestion that the effect of a winding up order would be to deprive the respondents in any real sense of any legitimate opportunity of appealing'

13. A winding up order would not deprive the Respondent of the opportunity of appealing the Quantum Order. A stifling argument has been forwarded by the Respondent, however, it has failed to put before the Court full and frank evidence as to its means, as required by Burnton LJ in *Mahan Air v Blue Sky One Limited [2011] EWCA Civ 544* and, therefore, the Respondent's argument that its appeal would be stifled must also fail.

14. Neuberger J provided guidance on winding up in cases where an appeal is pending in *James v Silver Fund Investment Company Ltd (unreported 15 Nov 2001):*

"In a case where a petitioner is seeking to wind up a company on the basis of a debt arising from a judgment of a court or tribunal which is under appeal, it seems to me that the Companies Court should be strongly influenced by the question of whether or not a stay has been granted, by the tribunal, or by the appellant tribunal concerned, on the execution of the judgment.

If a stay has been applied for and refused, then it would seem to me that there was a powerful argument for taking one of two courses, either allowing the petition to proceed or taking the course the Court of Appeal thought appropriate in Amalgamated Properties [1917] 2Ch 1115, namely, to stay the petition on condition that the company concerned either pays the total amount in question into court, or provides security for the amount involved."

15. In the present case, the Respondent's application for a stay of execution of the Quantum Order was dismissed on terms that the Additional Sums be paid into Court within 14 days, which the Respondent failed to do. Therefore, it would seem that the options for this Court are either to allow the petition to proceed or provide the Respondent with another opportunity to pay the Additional Sums into Court as security for a stay of the Petition.

16. Neuberger J goes on to state that:

"to stay or dismiss a petition on terms which require security or payment into court is normally inappropriate. That is because the normal issue on a contested petition based on a debt is whether or not there is a bona fide dispute as to the existence of the debt. The Companies Court has to take a view. Either there is no bona fide ground for contesting, in which case the petition can proceed, or there is a bona fide dispute, in which case the petition is inappropriate and should be dismissed.

Of course, what course the court takes in a particular case in relation to a petition, where a stay has been granted or refused, must depend on the precise facts of the particular case."

17. Accordingly, to stay or dismiss the petition on terms requiring security is normally inappropriate and this Court should take a view as to whether there is a bona fide dispute as to the existence of the debt. The precise facts of this particular case are that liability has been fully established and all appeals in relation to liability exhausted by the Respondent. It is only the Quantum Appeal that remains pending; therefore, I am not of the opinion that there can be a bona fide dispute as to the existence of the debt, only the value of it. On this basis I am inclined to allow the Petition to proceed.

18. In *re A & BC Chewing Gum [1975] 1 WLR 579*, Plowman J confirmed that as a matter of practice, a stay is never granted and stated:

"If the business is being carried on at a profit, creditors of the business, after the date of the winding up order, would be paid in priority to the unsecured creditors at the date of the order as part of the expenses of the winding up. Then, if the appeal is allowed, the business is handed back as a going concern, it has not suffered any loss. Of course, if the business can only be carried on at a loss- it should not be carried on at all.

Those, I think, are really the reasons why, in practice, a stay is not granted - a profitable business can be carried on as it was before and handed back as a going concern if the appeal is allowed. If it is not allowed then, of course, cadit quaestio."

19. In the present case the Respondent has ceased trading and accepted that it is unable to satisfy the Judgment Debt. Therefore, the Respondent is unable to pay its debts as they fall due and on this ground alone, the Court would be justified in making a winding up order. Plowman J took the view that if the business can only be carried on at a loss, it should not be carried on at all, I agree that these are the circumstances in which winding up is appropriate. He also determined that even if the appeal was allowed following winding up of the company, the business could be `handed back' after the creditors had been paid. Although the Respondent in the present case is not carrying on a profitable business, the same principle can apply, in that, if the value of the debt decreases following determination of the Quantum Appeal, the difference could simply be `handed back' to the Respondent.

20. I am satisfied that it is just and equitable to make a winding up order both in the public interest and perhaps more particularly in the interest of the DIFC. In reality, it is impossible for the Respondent to continue in business as its licence has been withdrawn by the DFSA and it is unable to meet the Judgment debt owed to the Petitioners, even if it claims to be able to satisfy its debts owed to `all other creditors'. The purpose of appointing liquidators is to recover the assets under the management of the Respondent and this should also be a source of comfort to these other creditors too.

21. To my mind there are no countervailing considerations which would call for the refusal of the application for a winding up order and to grant a stay of the Petition pending the outcome of the Quantum Appeal is inappropriate in the circumstances, as discussed above.

22. In my judgment, the making of the winding up order will not in any way prejudice claims for recovery and distribution of the Respondent's assets. To the contrary it is much in the interest of all creditors. So for the above mentioned reasons I grant the winding up order in relation to the Respondent.

Costs

23. I have considered the submissions from both parties on the costs of the adjourned hearing before me on 14 March 2016. The Court permitted the Petitioners to appear via video link for the hearing which, due to technical difficulty with the video conference system was unsuccessful. Attempts were made to have an audio conference but this was very unclear and I did not have confidence in this method to hear all submissions in full, accordingly the hearing was adjourned to 31 March 2016. The reason for the adjournment was not related to any of the parties and I am satisfied that the technical difficulties with the video link on 14 March 2016 were beyond the Petitioners' control. Therefore, there shall be no order regarding costs in relation to this particular hearing. All other costs of the winding up petition shall be paid as an expense of the liquidation.