



Canargo Cayman Limited
Royal Court
21st February 2018

JUDGMENT
13/2018

Seeking to place a company into liquidation on the ground of having failed to provide a member of the company with a set of accounts in accordance with the provisions of section 251 of The Companies (Guernsey) Law, 2008.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF CANARGO LIMITED

and

IN THE MATTER OF PARTS XV, XXII, AND XXIV OF THE COMPANIES (GUERNSEY) LAW, 2008

CANARGO CAYMAN LIMITED

Applicant

Hearing date: 6 February 2018

Judgment handed down: 21 February 2018

Before: Sir Richard Collas, Bailiff

and Jurats S M Jones, T J Ferbrache and D J Robilliard

Advocate for the Applicant: Advocate M C Newman

Introduction

1. This is believed to be the first application to the Royal Court seeking to place a company into liquidation on the ground of having failed to provide a member of the company with a set of accounts in accordance with the provisions of section 251 of The Companies (Guernsey) Law, 2008 as amended (“Companies Law”).

Background

2. The company concerned, Canargo Limited (the “Company”), was registered in Guernsey on 25 July 1997. The Applicant, Canargo Cayman Limited is the registered owner of 25% of the issued share capital of the Company. The Applicant is beneficially owned by Clifford Isaak (“Mr Isaak”). The other 75% of the share capital is held directly or indirectly by or on behalf of David John Ramsay (“Mr Ramsay”). Mr Ramsay is the sole director of the Company. Mr Isaak was a director until he was removed against his will at an extraordinary general meeting of the Company held on 18 November 2016. The Court was told that the present Application

is part of an ongoing dispute between Mr Ramsay and Mr Isaak. The primary business of the Company is as a participant in a joint venture agreement concerning oil and gas exploration in Georgia, the details of which are not material to the Application.

3. Advocate Newman appeared on behalf of the Applicant. The principal evidence before the Court was contained in an affidavit sworn on 27 November 2017 in Tbilisi by Ekaterine Aleksidze, an advocate registered with the Georgian Bar Association who was advising Mr Isaak. The Application first came before the Court on 5 December 2017 when Advocate Lyall of Mourant Ozannes appeared on the instructions of Mr Ramsay. He explained that he was instructed in Mr Ramsay's personal capacity and not by him as a director on behalf of the Company because this was effectively a member versus member dispute. He was instructed to oppose the Application and requested an adjournment to enable further evidence to be tabled. He acknowledged that there had been a failure to supply accounts of the company to Mr Isaak and therefore that there were grounds to seek the winding up of the Company however the Court had a discretion to exercise and before it did so he advised that the Court needed to be in possession of all the relevant evidence.
4. At the start, there were two other, alternative, grounds for winding up that were pleaded in the Application and Advocate Lyall indicated that those grounds would be contested by Mr Ramsay. One was the "just and equitable" ground under section 406(i) of the Companies Law. Following discussions between counsel, that ground was withdrawn under the terms of a Consent Order dated 22 December 2017.
5. The other ground was insolvency under section 406(e). At the hearing on 6 February, Advocate Newman candidly acknowledged that in the absence of any company accounts, it was difficult to establish the financial position of the Company. Ms Aleksidze had given some limited evidence of unpaid liabilities of the Company but he recognised that it would be difficult to establish that ground on the balance of probabilities. When the Jurats retired to consider their decision, they were able to decide the Application on the ground of failure to produce accounts and therefore they did not go on to consider the insolvency ground.
6. Before turning to the substantive issue, it is necessary to explain why the Application was heard on 6 February 2018. At the first court hearing on 5 December 2017, the Application was adjourned at the request of Advocate Lyall. Thereafter, directions agreed between the Advocates were set out in the Consent Order referred to above which was signed by the Deputy Bailiff on 22 December 2017. At that time it was anticipated that there would be a contested hearing which was set down for a hearing on 14 February 2018. The Consent Order included a direction requiring Mr Ramsay to "*file and serve any material in response to the Application....by 4:00pm on Wednesday, 17 January 2018*". The due date passed without any material being filed following which, on 22 January, the Applicant applied to bring forward the hearing of the Application to the Ordinary Court on 6 February in an application supported by an affidavit sworn by Advocate Sam Dingle of Ogier on 22 January. Exhibited to the Affidavit was an email exchange in which Mourant Ozannes advised that as at 10:36 on 18 January, they were no longer instructed in relation to the Application. I granted the application to bring forward the hearing date. Mr Ramsay was advised of the revised date but did not attend and was not represented at the hearing on 6 February.

The Failure to supply company accounts

7. The remainder of this judgment is concerned only with the issue of the failure to supply company accounts to the Applicant as a member of the Company.
8. The obligation to deliver up a copy of the company accounts is set out in section 251 of the Companies Law which also provides for the consequences of not doing so:

“Delivery of accounts and reports to members and officers.

251. (1) *Every company must send a copy of –*

- (a) its accounts,*
- (b) its directors' report [(where one is required under section 248)], and*
- (c) its auditor's report (where one is required under Part XVI),*

to each member of the company within 12 months after the end of the financial year to which they relate.

(2) *Every company must send a copy of the most recent –*

- (a) accounts,*
- (b) directors' report [(where one is required under section 248)], and*
- (c) auditor's report (where one is required under Part XVI),*

to a member or officer of the company within 7 days after the date on which the member makes such a request, provided that he has not previously made such a request within that financial year.

(3) *The duty imposed upon an incorporated cell under this section lies with its incorporated cell company.*

(4) *A company which fails to comply with this section is guilty of an offence.*

(5) *If subsection (1) is not complied with, any member may, not less than 14 days after the date mentioned in that subsection, apply to the Court under this subsection.*

(6) *Upon hearing an application under subsection (5), the Court may –*

- (a) direct that the company be wound up,*
- (b) direct that the accounts or reports (as the case may be) be sent, or*
- (c) make such other order as it thinks fit.*

(7) *The Court may order that the costs of an application under subsection (5) be paid by any person who, in the opinion of the Court, is responsible for the default.*

(8) *The provisions of Part XXIII shall, subject to the provisions of subsections (5), (6) and (7), apply in relation to the winding up of a company pursuant to this section.”*

9. There is a further power to order that a company be wound up under section 406(h) of the Companies Law:

“406. *A company may be wound up by the Court if –....*

(h) the company has failed to send its members a copy of its accounts or reports in accordance with section 251(1), in which case the provisions of this Part shall apply in relation to the winding up of the company subject to the modifications set out in section 251(5), (6) and (7),”

10. The word “accounts” is defined in section 245 and again in section 532:

*“**“accounts”** means either individual accounts prepared in accordance with section 243 or consolidated accounts prepared in accordance with section 244”*

11. Section 243, as amended, provides:

*“**243.** (1) Subject to section 244, the directors of every company shall prepare accounts of that company for each of the company's financial years (**“individual accounts”**).*

(2) The accounts shall include –

- (a) a profit and loss account, and*
- (b) a balance sheet.*

(3) The accounts shall –

- (a) give (and state that they give) a true and fair view,*
- (b) be in accordance (and state that they are in accordance) with generally accepted accounting principles and state which principles have been adopted, and*
- (c) comply (and state that they comply) with any relevant enactment for the time being in force.*

(3A) Notwithstanding the provisions of subsection (3), where the company is a licensed insurer within the meaning of the Insurance Business (Bailiwick of Guernsey) Law, 2002 in respect of which the Commission has, by notice in writing served on it under section 35(6) of that Law, agreed to the preparation of its accounts in a form other than a form specified by the provisions of the said section 35 or any requirements thereunder, then the accounts of that company shall –

- (a) be prepared (and state that they are prepared) in accordance with that notice,*
- (b) subject to the terms of that notice, be in accordance (and state that they are in accordance) with generally accepted accounting principles, stating which principles have been adopted and which have not, and*
- (c) comply (and state that they comply) with any relevant enactment for the time being in force.*

(4) The accounts shall be approved by the board of directors and signed on their behalf by at least one of them.

(5) Notwithstanding the provisions of subsection (1), the directors of a protected cell company may prepare separate accounts in respect of each cell, and the core, of the company rather than accounts for the company as a whole; and those separate accounts must comply with the provisions of this section in all other respects.”

12. There are two separate obligations in sections 251(1) and 251(2). The former imposes a mandatory obligation to send accounts to members within twelve months of the end of the financial year. The latter imposes a duty to send the most recent accounts to a member within seven days of a request to do so unless he has made a similar request with the financial year. The Application alleges that there has been a failure on both counts.

13. Evidence of non-compliance was provided in the affidavit of Ekaterine Aleksidze sworn on 27 November 2017 and an affidavit sworn by Advocate Sam Dingle of Ogier on 22 January 2018. The former said that she had been advised by Mr Isaak that the Company had failed to send the Applicant a copy of the accounts for the period ended 31 December 2015, in breach of section 251(1). She also said that in a letter dated 24 April 2017 addressed to Mr Ramsay, Mr Isaak, acting on behalf of the Applicant, had requested financial information regarding the Company. Mr Isaak had informed Ms Aleksidze that no reply was received. In a later letter, dated 3 November 2017, he reminded Mr Ramsay of a member's rights under sections 251(1) and 251(2) and requested that documents and information be sent within 7 days of the request, again no response was received.
14. In Advocate Dingle's affidavit, he stated that the accounts for the period to 31 December 2016 had also become due and he exhibited an email from Mr Isaak advising that those accounts had not been supplied to the Applicant.
15. The Bailiff directed the Jurats that, in the absence of any direct evidence from Mr Isaak, the evidence before the Court was hearsay. However the evidence was admissible under the provisions of The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 and it was a matter for the Jurats to decide the weight to be attached to it. The Jurats accepted the evidence and in doing so took account of the opportunity that had been given to Mr Ramsay to file his own evidence in response to the Application, which he had failed to do notwithstanding that Advocate Lyall had appeared on his behalf at the first hearing to advise the Court that he would be filing evidence to counter the allegations.
16. An indication of the evidence that Mr Ramsay might have adduced was contained in a letter from Advocate Lyall to Advocate Newman dated 4 December in which he wrote:

"We are instructed that Mr Isaak is well aware of the reasons why accounts were not produced for the Company. Furthermore, we are instructed that the Company's relevant financial records are in fact held by the Kura Basin Operating Company LLC of which Mr Isaak is General Director. It is unfortunate that no mention is made of these matters in the material Mr Isaak has authorised to be submitted to the Court."
17. The letter is relevant for two reasons. First, it contains an admission that the accounts have not been provided. Second, if there were good and valid reasons for the failure to supply the accounts, those reasons would have to be taken into account in the exercise of its discretion. However, the Court was not told the reasons and was not in a position to speculate as to what they might be and the Court did not know whether there were any reasons which could be considered to be good and valid.
18. The Bailiff directed the Jurats that they had wide discretionary powers, both under section 251(6) and under section 406 where the expression is that the Court "may" order a winding up. The Jurats were concerned that to place the Company in compulsory liquidation was a draconian step. The Court was not aware of any other case where it had been asked to do so for the failure to provide accounts.
19. Where the directors of a company have failed to provide the members with the accounts, the Court will first consider whether to order that they be sent within a reasonable period of time as envisaged in section 252(6)(b). The decisive facts considered by the Jurats in the present case were that the request had been outstanding for some time; the proceedings were issued more than two months ago; the Company had had the opportunity to comply with its statutory obligations and had failed to do so notwithstanding that Mr Ramsay's Advocate said at the first hearing that the Court would be made aware of all the relevant factors; and there was no evidence before the Court to explain the Company's failures.

20. The Jurats had no reason to believe that accounts would be produced or that anything would be achieved if they were to allow the Company a further period within which to comply by issuing a direction in that regard under section 251(6). They recognised that the liquidators will have difficulties in discharging their duties in the absence of any accounts however that could not prevent the Court granting the application to wind up the Company.
21. Accordingly the Jurats granted the Application and ordered that the Company be wound up; that Benjamin Alexander Rhodes and Alan John Roberts of Grant Thornton be appointed with the powers requested in the Application.