Carey Olsen acts for successful petitioner in failed strike out attempt by Cayman mutual fund

Service area / Dispute Resolution and Litigation

Legal jurisdictions / Cayman Islands

Date / August 2021

The Grand Court of the Cayman Islands recently found that a director of a Cayman mutual fund had manufactured the existence of an agreement about the standing of a petitioning shareholder, in an attempt to resist winding up. Carey Olsen acted for the successful petitioner in the winding up.

The decision handed down by the Honourable Justice Raj Parker on 28 July 2021 is part of an ongoing complicated and bitterly contested dispute between a shareholder of Rasia and its director. On 1 May 2020, the petitioner, Red Wolf Resources Ltd, presented a winding up petition on the just and equitable grounds to wind up Rasia, a Cayman Islands company which operates as a mutual fund. Rasia is one of the companies managed by Mr Joseph Borkowski who is also its director. On 8 July 2020, Rasia filed a summons seeking to strike out the petition. One of the grounds relied upon was that the petitioner is no longer a shareholder and therefore had no standing to proceed with the petition.

Over the course of a 7-day trial, the Court heard diametrically conflicting evidence from key witnesses including Mr Craig Ransley, the director of the petitioner, and Mr Borkowski, both of whom the Judge described to be "*pugnacious and firm*" in their evidence.

The main question for the Court was whether the petitioner is the beneficial owner of 78% of Rasia's share capital, which was issued as a result of various subscriptions-in-kind including shares in Kirkham International Pte Limited ("**Kirkham**"). Rasia claimed that since the petition was filed, the petitioner had ceased to be a shareholder and no longer had standing to petition for the winding up. This was on the basis that Rasia had cancelled the shares pursuant to a purported Transaction Agreement which provided that the petitioner's subscriptions were conditional on there being a takeover of Kirkham by an Australian public company Terracom Ltd. A central issue in the proceedings was therefore the existence of the purported Transaction Agreement. This was not a case of a dry examination of the legal principles but a difficult fact-finding exercise based on the account of witnesses in the absence of clear documentary evidence. In the course of closing submissions, counsel for Rasia also acknowledged that "*the case is about a pretty big scam on one side or other and it is not something where recollections are dimmed... one side must know that what it is doing is fundamentally dishonest*".

The Court concluded that the Transaction Agreement was inherently implausible and was an invention of Mr Borkowski conceived in order to try to demonstrate a contractual right to unwind the petitioner's shareholding. In reaching its decision, the Court applied the principles in *Natwest Markets Plc v Bilta (UK) Ltd (in liquidation) and Ors* [2021] EWCA Civ 680 and considered the overall plausibility of the evidence, the consistency or inconsistency of the behavior of the witness and other individuals with the witness's version of events, the supporting or adverse inferences to be drawn from other documents and the Judge's assessment of the witness's credibility, including his impression of how they performed in the witness box, especially when their version of events was

challenged in cross-examination. Adverse findings were ultimately made against the credibility of Mr Borkowski, including the fact that his evidence was untruthful and demonstrably so.

The Carey Olsen team comprised of Partner, James Noble and Senior Associate, Amelia Tan from the Singapore office and Partner, Peter Sherwood and Associate, Nigel Smith from the Cayman Islands office.

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