30-03-09

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Cause No. 276 of 2008
Civil Appeal No. 13 of 2008

BETWEEN:

CULROSS GLOBAL LIMITED

Proposed Applicant/Appellant

STRATEGIC TURNAROUND MASTER PARTNERSHIP , LIMITED

Proposed Respondent

Before: **The Right Hon. Sir John Chadwick, President**
The Hon. Mr. Justice Forte, Justice of Appeal
The Hon. Dr. Justice Conteh, Justice of Appeal

Appearances: Mr Ross McDonough and Mr Guy Manning of Campbells for the Proposed Applicant/Appellant, Culross Global Limited (the "Petitioner").

Mr Anthony Akiwumi of Stuarts Walker Hersant for the Proposed Respondent Company, Strategic Turnaround Master Partnership, Limited (the "Company").

Heard and Judgment delivered: 30th March 2009. Reasons released: 14th April, 2008.

Chadwick, P.

Reasons for Judgment

1. On 10 June 2008 Culross Global SPC Limited ("the Petitioner") presented a petition under section 94 of the Companies Law (2007 Revision) for the winding-up of Strategic Turnaround Master Partnership, Limited ("the Company"). On 18 June 2008 the Company issued an application to strike out that petition. On 28 November 2008 that application was dismissed by the Chief Justice. The Company sought leave to appeal. That application, and the appeal, were heard by a different constitution of this Court. Leave to appeal was granted, but the appeal dismissed, on 12 December 2008. By notice of motion dated and issued on 30 December 2008 the Petitioner – who, at first sight at least, had been

successful both before the Chief Justice and before the Court of Appeal – sought special leave, under section 3(2)(a) and (b) of the Cayman Islands (Appeals to the Privy Council) Order 1984 (SI 1984/1151) to appeal to Her Majesty in Council.

2. That motion came before this Court, *inter partes*, on 30 March 2009. At the conclusion of the oral hearing we refused the leave sought. We indicated that we would put our reasons in writing.

3. Section 3(1) of the 1984 Order provides – at paragraph (a) - that, subject to the provisions of the Order, an appeal shall lie as of right to Her Majesty in Council from final decisions in civil proceedings where the matter in dispute on the appeal is £300 or upwards. The decision from which the Petitioner seeks to appeal in the present case is not, of course, a "final decision" in the sense in which that expression is used in section 3(1)(a). Hence the need for special leave. Section 3(2) of the Order is in these terms:

> "3(2) Subject to the provisions of this Order, an appeal shall lie from decisions of the Court to Her Majesty in Council with the leave of the Court in the following cases:
>
> (a) decisions in any civil cases, where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and
>
> (b) such other cases as may be prescribed by any law for the time being in force in the Cayman Islands."

Although paragraph (b) is invoked by the Petitioner in its notice of motion, it placed no reliance on that paragraph in its oral or written submissions. Nor was it suggested that, if the question involved in the appeal did not meet the test of "great general or public importance", there was, nevertheless, some other reason why it "otherwise" ought to be submitted to the Privy Council.

4. As I have said the Petitioner was successful in resisting the order sought by the Company on the Company's appeal to this Court from the order of the Chief Justice: at first sight, the Petitioner was the successful party. From what, then, does it seek leave to appeal? In order to answer that question it is necessary to have in mind the terms of the order made by this Court on 12 December 2008: That order contains two material recitals:

> "Upon the Court holding that, on the proper construction of the Articles of Association of the Company and the Confidential Explanatory Memorandum, the Company had power to suspend the payment of redemption proceeds after the redemption Date but before payment of those proceeds, but that the question of whether that power was, as a matter of fact, properly or validly exercised will be a matter for the First Instance Court at the trial of the Petition
>
> . . .
>
> And Upon the Court indicating that leave should be granted to the Petitioner to amend its Petition so as to plead, in further detail, its basis for seeking a winding up order on the 'just and equitable' ground, in a form similar to the draft amended Petition laid before the Court of Appeal, but excluding the allegation that the Petitioner is an existing creditor, save on the basis that the exercise of the power of suspension of the payment of the redemption proceeds was invalidly exercised"

The operative part of the order follows those recitals and is in these terms:

> "It is ordered that:
>
> 1. The Company is granted leave to appeal
>
> 2. The Grand Court's order refusing to strike out the Petition is upheld
>
> 3. Petitioner to pay 50% of the Company's costs of the application to strike out here and below, to be taxed on a standard basis if not agreed, but not to be paid until disposal of the petition."

There can be no appeal from paragraph 1. Clearly the Petitioner has no interest in appealing from paragraph 2 (which allows its petition to proceed). It is not suggested that this Court should grant leave to appeal to the Privy Council from the costs order in paragraph 3.

5. The question which the Petitioner wishes to raise before the Privy Council – in so far as that question is the subject of anything within the order itself – is whether this Court was correct to hold (as recorded in the first of the two recitals to which I have referred) that, on a proper construction of the articles of association of the Company and the Confidential Explanatory Memorandum, the Company had a power to suspend the payment of the redemption proceeds after the Redemption Date but before payment of those proceeds. The importance of that question – as between the parties – is that if, as a matter of construction, the Company did have such power, then (on the facts) the Petitioner cannot petition for the winding up of the Company as an existing creditor without alleging (and establishing) that, on the facts, the exercise of the power to suspend was invalid: as indicated in the second of those recitals.

6. The question to which I have just referred can be said to arise under the terms of the order. But the present application is put on the basis that the Petitioner seeks to obtain the decision of the Privy Council on questions which go well beyond – and are much wider than – any question which arises under the order itself. This appears from the skeleton argument submitted on its behalf in support of this application and from the draft grounds of appeal. Paragraph 3 of that skeleton argument is in these terms:

> "3 As set out in the draft grounds, the appeal raises the following short but important questions of principle:

(a) Do the directors of an investment fund have a power to suspend the payment of redemption proceeds to a redeeming investor after the date on which the fund's liability to pay those redemption proceeds to the investor has accrued?

(b) Does a common form power of directors to suspend redemptions of shares operate to suspend (i) only the redemption of shares in the fund, or (ii) the redemption of shares in the fund and the payment of redemption proceeds due to investor whose shares have already been redeemed?

(c) Can the terms of redemption of shares in an investment fund be prescribed in, or by reference to, a document other than the fund's articles of association, and if so which terms prevail in the event of inconsistency?

(d) Are a redeeming shareholder's shares redeemed so that it ceases to be a member of the fund (i) on the contractual redemption date applicable to its request to redeem its shares, or (ii) on the later date on which the fund has both removed the investor's name from the register of members and paid the redemption proceeds due to the investor?"

I do not doubt that these are general questions of great interest and importance to those engaged in what may broadly be described as the mutual fund industry. But, equally, I am in no doubt that they are not questions which arise – in the general terms in which they are posed – on any appeal from the order made by this Court on 12 December 2008.

7. I am willing to assume in favour of the Petitioner – but without any conviction that the assumption is correct – that, in principle, an appeal would lie against the decision of this Court, recorded in the recitals to the order of 12 December 2008, that, on a proper

construction of the articles of association of the Company and the Confidential Explanatory Memorandum, the Company had a power to suspend the payment of the redemption proceeds after the Redemption Date but before payment of those proceeds. On the basis of that assumption, the question for this Court on the present application is whether that decision raises (or involves) an issue of great general or public importance which ought to be determined by the Privy Council. In my view it does not.

8. In order to explain why I take that view it is necessary to say a little of the circumstances in which the issue of construction arises. For that purpose I borrow from the factual background described in the judgment of Justice Vos, Justice of Appeal, The Company is an exempted limited company incorporated under the Companies Law (2007 Revision). It is a regulated mutual fund pursuant to the Mutual Funds Law; and so registered with the Monetary Authority of the Cayman Islands under that Law. The assets of the Company are invested in Strategic Turnaround Equity Capital Partners L.P. (Cayman) ("the Master Fund"). Investors invest indirectly in the Master Fund by subscribing for shares in the Company. Those shares are, subject to rights of suspension, redeemable for cash at any time on the giving of a redemption notice. The Company may only accept investment from financially sophisticated investors who are investing a minimum of US$50,000.

9. In May 2007 the Petitioner subscribed for shares in the Company. The amount paid for those shares was US$1,840,000. On 31 October 2007, the Petitioner gave notice of its intention to redeem its shares. The redemption date was 31 March 2008. On 24 March 2008 the Company confirmed that payment of 90% of the cash sum due on redemption would be paid by the end of April. On 17 April 2008 the directors resolved that it was in the best interests of the

Company to suspend all redemptions. That resolution was confirmed by a further resolution on 22 April 2008. Shortly thereafter the Company gave notice to the Cayman Islands Monetary Authority and to its shareholders that redemptions had been suspended.

10. The cash sum payable on redemption was to be determined by reference to the net asset value ("NAV") at the redemption date. As at 31 March 2008 no NAV in respect of the Petitioner's shares had been calculated: the calculation of NAV as at the redemption date was not made until 14 May 2008. The Petitioner was then notified of the amount of the redemption proceeds (US$980,508.97). As I have said, the petition to wind up was presented within a few weeks thereafter. The petitioner claimed to be a creditor in respect of an existing debt. Whether that claim could be made good turned on the effect of the resolution, or resolutions, to suspend which had been passed in April: in particular, it turned on whether those resolutions (or either of them) had the effect of suspending the right to payment of the proceeds of redemption which – as the petitioner claimed – had accrued on 31 March 2008.

11. The Petitioner, by its custodian's nominee Banco Nominees (Isle of Man) Limited, had signed a subscription agreement dated 31 October 2006. That agreement provided that shares for which the Petitioner subscribed would be held subject to the terms and conditions of a Confidential Explanatory Memorandum ("CEM") and the memorandum and articles of the Company for the time being. Article 17 of the articles of association provided that shares should be issued on the terms referred to in the CEM unless otherwise determined by the directors. Article 31 provided for the redemption price to be the NAV calculated on the Redemption Date: or, in the case that a suspension had been declared, at the

redemption price calculated on the valuation day next following the end of the suspension. On page 19 of the CEM there was a paragraph which provided, under the heading "Suspension of Redemptions", that:

> "The Board of Directors may declare a suspension of the determination of the Net Asset Value or subscription or redemption of shares *or the payment of redemption proceeds* for the whole or any part of any period when:
> (i) . . .
> (ii) There exists any state of affairs which constitute a state of emergency or period of extreme volatility or illiquidity as a result of which (a) disposal of a substantial part of the investments of the Fund would not be reasonably practicable and might seriously prejudice the Shareholders or the Fund or (b) it is not reasonably practicable for the Fund to determine fairly the value of the assets."

[emphasis added].

The resolution to suspend of 22 April 2008 sought to rely on (a) and (b) of sub-paragraph (ii) of that paragraph.

12. Justice Vos (with whose judgment the other members of the Court agreed) identified what he described as the Third Issue in these terms: "Did the Company have the power under the Articles and/or any other associated documentation to suspend either (a) the effective redemption (held to have occurred by the Chief Justice on 31st March 2008) or.(b) the payment of the redemption proceeds (if any) due to the Petitioner?" His conclusion – which differed from that of the Chief Justice on this point – was that the Company did have power "under the Articles as explained in the CEM" to suspend both the effective redemption on 31 March 2008 and the payment of the redemption proceeds due to the Petitioner. His reason for that conclusion is expressed at paragraph 60:

> "Looked at purely as a matter of construction, . . . the Articles specifically incorporate the terms of the CEM as

> regards redemption, since, as I have said, the terms as to redemption are an important part of the terms on which the shares are issued, and article 17 expressly refers to the terms referred to in the CEM on the basis of which the shares are issued. Of course, those terms are subject to the Articles. But, as I have already indicated, nothing in the Articles is inconsistent with the power of suspension, including the power to suspend the making of redemption payments, as described in the CEM".

13. The question for the Court on this application is not whether the decision reached on 12 December 2008 was correct. The question for the Court, as I have said, is whether that decision raises (or involves) an issue of great general or public importance which ought to be determined by the Privy Council. But, in that context, it is necessary to keep in mind that the decision of the Court on 12 December 2008 was a decision on the effect, as a matter of construction, of the articles of association of this company read with the confidential memorandum under the terms of which the Petitioner's shares were issued and the terms of which as to the issue of shares those articles purported to incorporate.

14. We were taken by counsel for the Company, in his written submissions in opposition to the grant of leave to appeal, to observations made by the Court of Appeal of Hong Kong when considering whether leave to appeal should be granted in *Kao, Lee & Yip v Edwards* [1993] HKEC 131. In addressing the submission that the question involved in the appeal was of "great general or public importance" - the test applicable under the equivalent Rule in the Hong Kong (Appeal to the Privy Council) Order of 1909 – Mr Justice Litton, Justice of Appeal, (delivering the judgment of the Court) said this:

> "The appellants say that the question of law in issue, namely the enforceability of the restrictive covenant, is of

> general interest to the legal profession in Hong Kong; 'salaried partnership agreements' are in widespread use and the enforceability of the restrictive covenant is of general public importance. In our judgment, this argument is unsound. All that the court is concerned with is the enforceability of a clause in a particular private agreement. There is no evidence before us that this is, in any way, a 'standard clause' or that, in other 'salaried partnership' agreements concerning solicitors, restrictions of the same scope and duration have been devised. There is no suggestion that the Council of the Law Society, the governing body of the solicitors' branch of the legal profession, is interested in the result of this case.
>
> In our judgment, the matter involved in the appeal is a private one as between the parties and is not of great general or public importance."

If I may respectfully say so, those observations give valuable guidance as to the approach which the Court should adopt on an application of this nature.

15. The Petitioner sought to persuade us that the documentation in the present case was, indeed, in standard or common form. It relied on the affidavit of Mr Nigel Blanshard, a director of Culross Global Management Limited, the Petitioner's Investment Advisor. I have no reason to doubt Mr Blanshard's assertion that he has significant experience in operating and investing in mutual funds such as the Company. He states that:

> "The provisions in the articles of association of [the Company] relating to the redemptions of shares are, in my personal experience, very similar to the equivalent provisions in the articles of association of many other Cayman Islands investment funds, and indeed of investment funds incorporated in other jurisdictions such as the British Virgin Islands, Bermuda, the Channel Islands and Luxembourg."

And he goes on to observe that the Court's findings in the present case:

> ". . . directly contradict my personal understanding, and my understanding of the general understanding within the investment funds industry (in the Cayman Islands and other jurisdictions), of the intention and effect of similarly (or identically) drafted redemption provisions in the articles of association of investment funds . . ."

Mr Blanshard expresses the view that the Court's judgment and the issues to be raised in the appeal are of central and fundamental importance to the mutual funds industry, including persons who operate and invest in (or were planning to operate and invest in) Cayman Islands mutual funds.

16. It is of significance in the context of the issue of construction actually decided by the Court in the present case – which, as I have said, is the only issue which (even on the view most favourable to the Petitioner) could properly be the subject of an appeal to the Privy Council – that Mr Blanshard makes no express reference to the provision in article 17 of the articles of association of the Company (that shares shall be issued on the terms of the CEM) and no reference at all to the CEM itself (in which there is the important provision enabling, or purporting to enable, the directors to declare a suspension of the payment of the redemption proceeds). His evidence provides no assistance on the question whether those provisions – which are central to this Court's determination to the issue of construction in this case – are provisions commonly found in documentation used in the mutual fund industry.

17. The Petitioner relied, also, on the affidavit of Mr John Lawless, a member of the Executive Committee of the Cayman Islands Fund Administrators Association: the industry association representing administrators licensed by the Cayman Islands Monetary Authority. He states that the Executive Committee of Association

believes that the judgment ". . . could have unintended consequences which, in their opinion, have potentially broad implications for the global funds industry" and that "it would be extremely beneficial to the fund administration industry and consequently the fund management industry if the issues giving rise to their concerns were addressed and clarified by the Privy Council". He confirms Mr Blanshard's view that the provisions in the Company's articles of association relating to the redemptions of shares are very similar to equivalent provisions in the articles of many other Cayman Islands investment funds and in the articles of funds incorporated elsewhere. But, like Mr Blanshard, he says nothing on the question whether it is common to find a provision as to the suspension of the payment of redemption proceeds - such as that in the CEM in this case - incorporated by reference in the articles.

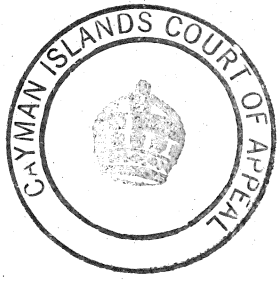
18. As I have said, I do not doubt that the general questions set out in the Petitioner's skeleton argument – and reflected in the affidavits of Mr Blanshard and Mr Lawless - are of great interest and importance to those engaged in the mutual fund industry in the Cayman Islands. But I am not persuaded that an appeal to the Privy Council in this matter – in which the question actually before the Grand Court and the Court of Appeal was whether the petition to wind up the Company should be struck out – would provide a suitable vehicle for the determination of those questions. And I am not persuaded that the only issue which could (perhaps) properly be the subject of such an appeal - the true construction of the documents in this case – can be said to involve a question of great general or public importance for the purposes of section 3(2)(a) of the 1984 Order.

19. I should add, first, that refusal of leave to appeal by this Court does not, of course, preclude the Petitioner from petitioning the Privy Council to admit its appeal (section 22 of the Order); but, on any such petition, the Privy Council would, I think, wish to be informed of the reasons why leave was refused. Second, it is difficult to think that an opportunity could not be found to raise the issues which are causing concern within the industry in proceedings in which they would be determined by a final judgment: so enabling the unsuccessful party to appeal to the Privy Council as a matter of right in reliance on section 3(1) of the 1984 Order. Indeed, that position might be reached in the present proceedings following the hearing of the winding up petition. But it has not been reached at this stage in these proceedings.

Chadwick, P.

Justice Forte, Justice of Appeal:

20. I agree that the application for leave to appeal to the Privy Council should be refused.



Forte, J.A.

Justice Dr Conteh, Justice of Appeal

21. I also agree that the application for leave to appeal should be refused.

Conteh, J.A.