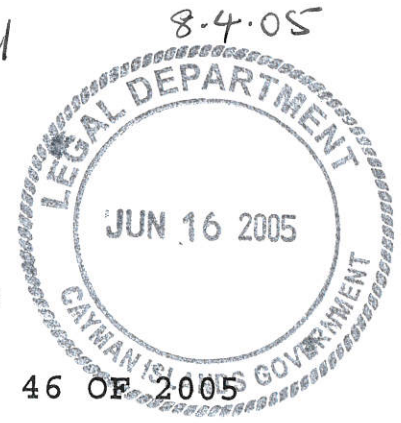


Civil

8.4.05



1 IN CHAMBERS  
2 IN THE GRAND COURT OF THE CAYMAN ISLANDS

3 CAUSE NO: 46 OF 2005  
4  
5

6 IN THE MATTER OF **ING SECURITIES (JAPAN) LIMITED**  
7

8 AND  
9

10 IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)  
11

12  
13 BEFORE: The Hon. Madam Justice Levers  
14

15 APPEARANCE:

16 Counsel for the Petitioner: Mr. Colin McKie of  
17 Maples and Calder  
18

19 Heard: 23<sup>rd</sup> March 2005  
20

21  

---

JUDGMENT

---



22 Levers J,  
23  
24

25 The Petitioner petitions the Grand Court of the  
26 Cayman Islands seeking an Order of this Court  
27 pursuant to section 16 of the Companies Law (2004

1 Revision) confirming a reduction of the capital of  
2 the Company.

3

4 **Background**

5

6 The evidence before me is that the Company was  
7 incorporated as Baring Far East Securities Limited  
8 on 26 February 1985, and registered on 27 February  
9 1985, as a company limited by shares.

10

11 For various reasons, the Company had changes of  
12 names culminating on the 2 April 2002, as ING  
13 Securities (Japan) Limited.

14

15 The registered office of the Company is situated  
16 and has been situated at Maples & Calder Corporate  
17 Services Limited, Ugland House, South Church  
18 Street, George Town, Grand Cayman, Cayman Islands  
19 since 7 February 2004. The principal place of

1 business of the Company is at The New Otani Garden  
2 Court, 4-1 Kioi-cho, Chiyoda-ku, Tokyo 102-0094,  
3 Japan.

4

5 The Company was established to carry on the  
6 business of stockbroking and/or dealing with  
7 securities on its behalf and on behalf of others,  
8 and carry out the other objects set out in the  
9 Memorandum of Association of the Company.

10

11 It was since incorporation principally engaged in  
12 the business of equity securities broking. Since  
13 30 July 2004, the Company has ceased all operating  
14 activities and is, therefore, now dormant.

15

16 By an Order of the Grand Court made on 3 June  
17 1999, a reduction of the capital of the Company  
18 was duly confirmed.

19

1 On 26 January 2000, the Company passed a Special  
2 Resolution by way of Written Resolution of the  
3 sole shareholder of the Company converting the  
4 authorized share capital of the Company from  
5 shares of £1 each to shares of JPY100 each at a  
6 rate of exchange of JPY174 to £1.

7

8 On 28 March 2003, the Company passed the following  
9 Ordinary Resolutions by way of Written Resolution  
10 of the sole shareholder of the Company:

11 (i) capitalising the reserve of  
12 JPY1,827,000,000 as set out in the  
13 balance sheet of the Company as at  
14 the date of the Special Resolution  
15 and applying the same to pay up in  
16 full 18,270,000 ordinary authorised  
17 but unissued shares of JPY100 each in  
18 the Company;

19 (ii) increasing the authorised share  
20 capital of the Company by the  
21 creation of 52,000,000 ordinary

1            shares of JPY100 each to rank pari  
2            passu in all respects with the then  
3            existing ordinary shares in the  
4            capital of the Company.

5  
6    On 12 November 2004, the Company repurchased  
7    1,660,000 ordinary shares of JPY100 each from ING  
8    Baring Holding Nederland B.V. ("the Holding  
9    Company"). As at the date of this Petition, the  
10    Company's authorised share capital is  
11    JPY13,900,000,000 divided into 139,000,000 shares  
12    of par value of JPY100 each of which 135,239,559  
13    are issued and fully paid and held by the Holding  
14    Company and the remaining 3,760,441 of which are  
15    unissued.

16

17    The Articles of Association of the Company  
18    provide, inter alia, as follows:

19

20            *"28. The Company may by special*  
21            *resolution reduce the share*

1 capital and any capital  
2 redemption reserve in any manner  
3 authorised by law."  
4

5 By a Special Resolution by way of Written  
6 Resolution of the sole shareholder of the Company  
7 dated 4 February 2000, it was resolved:

8  
9 *“THAT conditional upon the confirmation by*  
10 *the Grand Court of the Cayman Islands and*  
11 *with effect from the date upon which this*  
12 *resolution takes effect pursuant to the*  
13 *Companies Law (2004 Revision) of the Cayman*  
14 *Islands (the “Effective Date”):*

15  
16 (a) *the issued and paid-up share capital*  
17 *of the Company be reduced by*  
18 *cancelling issued and paid-up share*  
19 *capital to the extent of JPY66 on each*  
20 *of the existing shares of JPY100 each*  
21 *in issue on the Effective Date (the*  
22 *“Capital Reduction”)* so that each  
23 *issued share in the Company on the*

1           Effective Date shall be treated as one  
2           fully paid-up ordinary share of JPY34  
3           each in the Company (the ``Adjusted  
4           Shares'') and any liability of the  
5           holders of the Adjusted Shares to make  
6           any further contribution to the  
7           capital of the Company on each such  
8           Adjusted Share shall be treated as  
9           satisfied;

10          (b) The credit arising from the Capital  
11          Reduction be set off against  
12          accumulated losses of the Company as  
13          at 29<sup>th</sup> September 2004;

14          (c) Conditional upon the Capital Reduction  
15          taking effect all of the authorised  
16          but unissued share capital of the  
17          Company, being 3,760,441 shares of  
18          JPY100 each, be cancelled;

19          (d) Conditional upon the Capital Reduction  
20          taking effect, clause 5 of the  
21          Memorandum of Association of the  
22          Company be amended by the deletion of  
23          its entirety and the substitution  
24          therefore with the following:

25

1           5. The capital of the Company  
2           is JPY4,598,145,006 divided  
3           into 135,239,559 shares of  
4           nominal or par value of JPY34  
5           each provided always that  
6           subject to the provisions of  
7           the Companies Law (2004  
8           Revision) as amended and the  
9           Articles of Association the  
10          Company shall have power to  
11          redeem any or all of such  
12          shares and to sub-divide or  
13          consolidate the said shares  
14          or any of them and to issue  
15          all or any part of its  
16          capital whether original,  
17          redeemed, increased, or  
18          reduced with or without any  
19          preference, priority or  
20          special privilege or subject  
21          to any postponement of rights  
22          or to any conditions or  
23          restrictions whatsoever and  
24          so that unless the conditions  
25          of issue shall otherwise

1           *expressly provide every issue*  
2           *of shares whether stated to*  
3           *be Ordinary, Preference or*  
4           *otherwise shall be subject to*  
5           *the powers on the part of the*  
6           *Company                    hereinbefore*  
7           *provided.*

8  
9           (e) *The Directors of the Company and Lars*  
10           *Kramer, Chief Financial Officer for*  
11           *Wholesale Asia of ING Bank, be and are*  
12           *now hereby authorised generally to do*  
13           *all things appropriate to effect and*  
14           *implement any of the foregoing."*

15  
16   As at September 2004, the Company had accumulated  
17   operating            losses            of            approximately  
18   US\$102,445,417.71. The evidence indicates that as  
19   the Company has now ceased all such operating  
20   activities, those losses are not recoverable and  
21   consequently part of the paid-up capital of the  
22   Company has been permanently lost and is no longer  
23   represented by its available assets.

1

2 The purpose of the proposed reduction of the  
3 capital is to enable the Company to bring it's  
4 paid-up share capital more into line with its net  
5 assets.

6

7 The proposed reduction of capital does not involve  
8 either the diminution of any liability in respect  
9 of unpaid capital or the payment to any  
10 shareholder of any paid-up capital. The reasons  
11 for the proposed reduction of capital in this  
12 application are relevant and important. It is  
13 suggested that as a result of a proposed tax  
14 regime to be brought into effect in Japan, by  
15 reducing the amount of the share capital by means  
16 of the proposed capital reduction, the Company can  
17 substantially reduce its capital tax liability for  
18 the year ending 25 March 2005.

19

1 The Company's Activities

2

3 The Company established the Tokyo Branch to  
4 conduct securities business in Japan in May 1986  
5 under licenses granted and registered by the  
6 Ministry of Finance and subsequently, the  
7 Financial Services Agency of Japan. On 31 July  
8 2004, the Company transferred its equity brokerage  
9 business to Macquarie Bank Limited ("MBL")  
10 pursuant to a Sale and Purchase Agreement dated 8  
11 March 2004 entered into between ING Bank N.V. and  
12 MBL. Under that Sale and Purchase Agreement, MBL  
13 assumed the liabilities of the Company's equity  
14 brokerage business as a going concern. The  
15 evidence shows that the Company has no ongoing  
16 liability to MBL under the said Sale and Purchase  
17 Agreement, since any potential liability would be  
18 met by the Company's ultimate parent, ING Bank  
19 N.V., the signatory to the said Sale and Purchase

1 Agreement. Thereafter, the Company surrendered  
2 the relevant securities and business licenses to  
3 the regulatory authorities in Japan and ceased to  
4 conduct any business activity in Japan or  
5 elsewhere. The securities business carried on by  
6 the Company in Japan as the Tokyo Branch, and  
7 which was sold to MBL, was the sole business  
8 carried on by the Company.

9

10 On 25 February 1995, Nick Leeson, a trader  
11 employed by Barings Futures Singapore Pte Limited  
12 ("BFS") was arrested for securities fraud in  
13 Singapore. BFS was a sister company of the  
14 Company and both entities were part of the Barings  
15 Group of companies. Leeson had been trading  
16 Nikkei 225 Futures Contracts in the Tokyo, Osaka  
17 and Singapore futures market, so-called "arbitrage  
18 trading", through an account with the Tokyo Branch  
19 of the Company.

1  
2 The Company not only processed trade offers from  
3 BFS but also deposited the margin calls necessary  
4 for future trading on behalf of BFS, which meant  
5 that the Company was advancing money to the Tokyo  
6 and Osaka futures exchanges on behalf of BFS. In  
7 addition, the Company, for the purposes of hedging  
8 position risk, held a short position in the  
9 Singapore futures market through BFS which had a  
10 marked-to-market valuation of approximately JPY 20  
11 billion profit at that time. Upon the discovery  
12 of the huge loss incurred by BFS as a result of  
13 Leeson's unauthorized trading activity, BFS was  
14 declared insolvent and subsequently went into  
15 liquidation on March 11, 1995. As a consequence,  
16 the Company's receivable due from BFS for the  
17 margins deposits made on behalf of BFS (over JPY  
18 46 million) and the unrealized profit on the short  
19 position in the Singapore futures market (over JPY

1 20 billion) turned out to be uncollectible and had  
2 to be written off. The write off resulted in the  
3 Company having a significant negative retained  
4 earnings status which required it to file a  
5 suspension of business report to the Japanese  
6 Ministry of Finance. The Company was temporarily  
7 put under special liquidation status (the Japanese  
8 equivalent procedure to a temporary insolvency  
9 process) under the supervision of Tokyo District  
10 Court on March 3, 1995. There were no concurrent  
11 proceedings (such as provisional liquidation) in  
12 the Cayman Islands.

13

14 On March 9, 1995, the Baring Group as a whole was  
15 purchased by ING Group for the nominal sum of GBP  
16 1.00 and GBP 600 million in debt. The Company  
17 received a capital injection of JPY 10 billion in  
18 the form of equity and ING Group guaranteed the  
19 repayment of the margin deposits provided by the

1 Company to BFS. On the same day, the management  
2 of the Company together with representatives from  
3 ING Group met with major creditors. The meeting  
4 was successful in securing the consent from all  
5 the major creditors of the Company to finalize the  
6 special liquidation procedures. Thereafter, the  
7 Tokyo District Court sanctioned the cessation of  
8 the special liquidation procedures and the  
9 Ministry of Finance also gave approval to the  
10 Company to recommence operations after ING Group  
11 had agreed to buy the assets and liabilities of  
12 the business.

13

14 The Company recommenced operations on March 10,  
15 1995, and it was able to repay a loan of JPY 48  
16 billion from its major bank lenders in full and  
17 return outstanding stock borrowings on March 15,  
18 1995. On the same day, the Company returned all  
19 the outstanding unsettled monies, realized

1 profit/loss and margins to its Japanese clients  
2 with 6% delinquent (i.e. overdue) interest. At  
3 that time, the Company had no foreign clients  
4 except for Baring Securities London which  
5 completed the settlement of all outstanding  
6 transactions in Japanese stocks with its foreign  
7 clients.

8

9 The evidence shows that after the Leeson incident,  
10 the Company gradually settled back into conducting  
11 its securities business activities as a member of  
12 the ING Barings Group of securities entities.  
13 Subsequently, the "Barings" name was dropped and  
14 the Company became known as ING Securities (Japan)  
15 Limited. In February 2004, ING Group announced  
16 that it had sold its Asian cash equities business  
17 to the Macquarie entity on 31 July 2004 after which  
18 it decided to cease operations. The Company has  
19 sent a notice of cessation of business to all its

1 previous clients and placed a public notice in the  
2 National Gazette in Japan regarding the cessation  
3 of trading on 30 July 2004.

4

5 As stated previously the proposed reduction of  
6 capital does not involve either diminution of  
7 value in respect of unpaid share capital or the  
8 payment to any shareholder of any paid up share  
9 capital. It is therefore unlikely that the  
10 Company has any outstanding liability. There is  
11 one potential liability that had to be dealt with  
12 which arises because the Company is a member of  
13 the Japanese Securities Welfare Pension Fund. In  
14 November 2004, ING was advised by the Director  
15 General of the fund that the Company's liability  
16 to the fund will be terminated when the fund is  
17 dissolved by resolution of the members.

18

1 In the circumstances it appears the Company will  
2 have no liability to the Fund once it is  
3 dissolved. And even if there is any potential  
4 liability owed, the Company will be able to meet  
5 any obligation out of the net assets of the  
6 Company that will remain after the reduction of  
7 capital is effected.

8

9 The Petitioner in seeking relief submits that the  
10 Directors are satisfied that the amount of the  
11 losses which is supposed to be set off against the  
12 capital of the Company are permanent and that  
13 therefore the Company's capital ought to be  
14 reduced by an appropriate amount and that it is  
15 for the benefit of the Company that the relief  
16 sought by the Petition ought to be granted.

17

18 Counsel Mr. Colin Mckie for the Petitioner quite  
19 properly submitted that full and frank disclosure

1 was necessary for the purposes of this Petition  
2 and he brought the Court's attention to the case  
3 of in Re The Wallasey Brick & Land Company, WLR  
4 (10 -2--1984) page. 20.

5

6 In that case the Court refused to confirm a  
7 proposed reduction of capital under the English  
8 Companies Act where it appeared that the company  
9 had for the last five years ceased to carry on  
10 trade and another real object of the Petition was  
11 to enable the whole of the available assets to be  
12 distributed among the shareholders by the  
13 machinery of reducing the capital. In that case  
14 Kekewich, J., seems to state that in any petition  
15 an averment that the relevant Company is carrying  
16 on business was necessary in order to obtain the  
17 sanction of the Court to a reduction of the  
18 capital.

1 Perhaps a good starting point is section 16 of the  
2 Companies Law:

3

4        "The Court is satisfied with respect to every  
5 creditor of the company who under section 15  
6 is entitled to object to the reduction, that  
7 either his consent to the reduction has been  
8 obtained or his debt or claim has been  
9 discharged or has determined, or has been  
10 secured, may make an order confirming the  
11 reduction on such terms and conditions as it  
12 thinks fit.

13

14        (1) Where the Court makes any such order, it  
15            may -

16

17            (a) if for any special reason it  
18                thinks proper so to do,  
19                direct that the company  
20                shall, during such period,  
21                commencing on or at any time  
22                after the date of the order,  
23                as is specified in the order,  
24                add to its name as the last  
25                word thereof the words "and  
26                reduced"; and

27

28            (b) require the company to  
29                publish as the Court directs  
30                the reasons for reduction or  
31                such other information in  
32                regard thereto as the Court  
33                may think expedient with a  
34                view to giving proper  
35                information to the public,

1 and, if the court thinks fit,  
2 the causes which led to the  
3 reduction.  
4

5 (2) Where a company is ordered to add its name  
6 the words "and reduced", those words  
7 shall, until the expiration of the period  
8 specified in the order, be deemed to be  
9 part of the name of the company."  
10

11 It seems to me therefore that the Court has the  
12 power to confirm the reduction and make an order  
13 doing so in appropriate cases. That being said,  
14 it would appear if I was to be bound by the case  
15 of Re Wallasey Brick & Land Company Ltd. referred  
16 to above that this application would not be  
17 permissible. However, the case of Re Great  
18 Universal Stores, Ltd and others [1961] All ER at  
19 page 252 is instructive. Roxburgh, J, in that  
20 case said, looking at the report in Re Wallasely  
21 Brick & Land Company Ltd.:

22  
23 "I am not all sure that Kekewich,  
24 J., intended to say anything of  
25 that sort. The court always has

1 the discretion as regards  
2 reduction of capital and it may  
3 be that all that he was saying  
4 was that he, in the exercise of  
5 his discretion, refused to  
6 sanction a reduction in that  
7 particular case. If so, that has  
8 no relevance to any other case  
9 whatsoever. If however, he  
10 intended to go further than that,  
11 it seems to me that any such view  
12 is now completely out-dated and  
13 has been, indeed, ever since the  
14 decision of the House of Lords in  
15 *British and American Trustees and*  
16 *Financial Corporation v Couper*  
17 1984 AC at page 399 which was  
18 given within a few months of the  
19 decision of Kekewich, J., namely  
20 on 16<sup>th</sup> April 1984. There is  
21 really no ground for suggesting  
22 that such averment is a sine qua  
23 non of the success of a petition.  
24 The facts in the particular case  
25 are entirely different and the  
26 only reason why I have dealt with  
27 this is because of the  
28 possibility that that sort of  
29 view should still be lingering in  
30 the text-books or somewhere  
31 else''.

32  
33 Roxburgh, J., granted and confirmed the reduction  
34 of capital in the case.

35

1 The case of Re Jupiter House Investments Cambridge  
2 Limited is equally instructive. (1 WLR 1984 at  
3 page 975), where it was held confirming the  
4 reduction that where loss of capital was sought to  
5 be proved, that loss meant-in the context of  
6 section 66 (1) (b) of the Act of 1948 - permanent  
7 loss and not a temporary fall in the value of some  
8 capital assets; but that where the loss could not  
9 be proved to be permanent but the Company had  
10 given an undertaking which ensured that the lost  
11 capital was in fact recovered, it would not be  
12 distributed as dividends, the Court would in the  
13 exceptional circumstances confirm the proposed  
14 reduction.

15

16 Another case of some applicability is Re Thorn EMI  
17 PLC [1989] BCLC pages 612. Harman, J., in the  
18 Chancery Division held:

19

1            "The Court had a discretion  
2            whether or not to confirm a  
3            reduction of a share premium  
4            account and would normally do so  
5            where:  
6

7                   (a) the shareholders were  
8                   treated equitably;

9                   (b) the reduction proposals  
10                  were properly explained;

11                  (c) the creditors were  
12                  safeguarded; and

13                  (d) the reduction was for a  
14                  discernable purpose."  
15

16 I now turn to the question of paragraph 3(c) of  
17 the Order dated 15 February 2005:  
18

19            "On or before 8 March 2005,  
20            notice of hearing of the Petition  
21            herein shall be published once in  
22            the following newspaper:  
23

24                   (a) the Cayman Islands  
25                   Gazette; and

26                   (b) Kampo (in Japanese)."  
27

28 The evidence before me is that the publishing  
29 office of Kampo informed the ING staff that Kampo

1 would not accept the Notice of the Petition for  
2 publication because it contained information  
3 extraneous to that required by Japanese law and  
4 regulations. In the premise a more limited  
5 announcement was published in Kampo and the full  
6 notice of the Petition was submitted in a mass  
7 circulation newspaper read by Japanese business  
8 people. It is my view that in the circumstances  
9 the announcement published in Kampo and the steps  
10 taken to advertise the Petition are sufficient  
11 compliance with section 3 (c) of the Order as the  
12 purpose of the Order has been achieved.

13

14 In this case I intend to exercise my discretion  
15 and grant the order for the confirmation of the  
16 reduction of the share capital. There can be no  
17 question that the shareholders are not being  
18 treated equitably and the reduction proposals were  
19 properly explained as being for tax purposes, the

1 creditors were safeguarded and the reduction was  
2 for a discernable purpose.

3

4 For those reasons I allow the application for the  
5 reduction in share capital.

6

7 Dated this 8<sup>th</sup> day of April 2005

8

9

10 Judge of the Grand Court

