IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 186 OF 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF NATURAL DAIRY (NZ) HOLDINGS LIMITED (IN PROVISIONAL LIQUIDATION)

Appearances: **Ms. Katie Pearson and Ms. Aleisha Brown of HARNEYS - On Behalf of the Petitioner**

Mr Chris Levers and Ms Jessica Bush of Mourant Ozannes on behalf of the Company

Before: **The Hon. Justice Nicholas Segal**

Heard: **4th April 2017**

Draft Judgment Circulated: 18th May 2017

Judgment Delivered to Counsel: 19th May 2017

Released for Publication: 19th May 2017

HEADNOTE

Provisional liquidation – order for costs on the application for the appointment of provisional liquidators – section 159 of the Companies Law (2016 Revision) – liability of a company restored to the register on a member's application for the costs of the application

JUDGMENT ON THE PAYMENT OF THE COSTS OF THE SUMMONS TO APPOINT THE JPLs AND THE SECTION 159 POINT

1. I have now had an opportunity to consider and decide what order should be made in relation to the costs of the Petitioner's summons (the **Summons**) for the appointment of provisional liquidators (I refer to Xiamen Hengxing Group Co., Ltd as the Petitioner for the purpose of this Note although, of course, it is now the former Petitioner).

2. I shall make an order that the Company must pay the Petitioner's costs of the application on an indemnity basis with the costs to be taxed if not agreed. Payment of these costs however must await the outcome of the petition. If a winding up order is made then the Petitioner's costs will be paid out of the estate in the winding-up (as costs of the Petitioner for the purpose of CWR O.20, r.1). If the petition is ultimately dismissed or withdrawn, the Company shall remain liable and the timing of payment of the costs liability will need to be dealt with at that time.

3. I have considered the submissions made, both in writing and at the hearing on 4 April (the **Hearing**), by Mr Harlowe on behalf of the Company and Ms Pearson on behalf of the Petitioner. My conclusions can be briefly summarised as follows:

(a). the Court is able to make a costs order in the exercise of its jurisdiction under section 24 of the Judicature Law (2013 Revision). The powers and discretions of the Court under section 24 are to be exercised subject to and in accordance with GCR O.62 (see O.62, r.1(2)). Order 62, r.4 applies the principle that generally costs follow the event (see O.62, r.4(5)).

(b). CWR O.24, r.11 applies to the Summons since that sub-rule covers the taxation of orders for costs made in a liquidation proceeding. Liquidation proceeding includes " any application to Court made in a proceeding commenced under Part V of the [Companies] Law" (CWR O.24, r.7(2)(b)). The direction in CWR O.24, r.8, that in the case of a contributory's petition where the Court has directed that the company is able to participate in the proceeding, the costs of a successful petitioner be paid out of the assets of the company, must also be taken to apply in the case of such an application and not only in relation to the costs awarded after the final disposition of the petition. I have made an order in this case that the Company is able to participate in the proceeding.

(c). Mr Harlowe submitted (in outline) that the Petitioner should not be awarded its costs because (i) I have held that the Petitioner did not have standing to present the petition and therefore the Petitioner was not entitled to an order appointing the JPLs; (ii) that the Petitioner with proper diligence could and should have discovered in advance of presenting the petition and making the application for the appointment of the JPLs that it lacked standing and failed

to make full and proper disclosure of the relevant facts which demonstrated that it lacked standing; (iii) the Company was seriously prejudiced by being made subject to the draconian remedy of the appointment of provisional liquidators on an application by a petitioner who was not entitled to such relief; (iv) one important ground on which the Petitioner sought the appointment of the JPLs has subsequently been shown to be without foundation, namely the need for urgent steps to be taken to submit the resumption proposal and (v) the Petitioner was at least in part unsuccessful on its application because I refused to give the JPLs the full range of powers which the Petitioner sought. Mr Harlowe argued that the fact that I have subsequently decided to permit the substitution of another contributory as petitioner and applicant on the Summons should not affect the award of costs on the Summons. As he said in his written submissions:

"*The procedural convenience of the approach directed by the Court should not result in the Former Petitioner being protected from bearing the consequences of its failures. Indeed, where a finding has been made that a contributory did not have standing to present a petition, in circumstances where it was entirely in its power to check the position, and it obtained an order appointing JPLs on the basis of that petition, it would set a very dangerous precedent if that contributory faced no cost consequences whatsoever in the face of such a fundamental failure.*"

(d). however I do not accept these arguments. This is a case in which, in light of the orders I have made for the substitution of Sky Upright (both in relation to the petition and the Summons) and the giving of the requisite undertaking in damages by Sky Upright, the appointment of the JPLs has continued, the order appointing them remains in force and is unaffected and is to be treated as properly made. In these circumstances it seems to me that the Company should be liable for costs as the unsuccessful party in the normal way. The Company has been made and properly remains subject to the order and was the unsuccessful party. Had I adopted the alternative approach available, on the Company's application for relief resulting from the Petitioner's lack of standing to present the petition, which would have been to dismiss the petition and discharge the JPLs, Sky Upright would have presented a fresh petition and application for the appointment of provisional liquidators, which would have been granted. The Company would then have been liable for the costs of that application. I accept that I have held that the Petitioner's failure to check and verify its entitlement to present the petition in advance of doing so was serious but I do not consider that, in all the circumstances, this is a sufficient reason on its own to depart from the normal order as to costs. As

Ms Pearson pointed out, I have already ordered that the Petitioner pay the Company's costs of the Company's summons seeking an order that the petition be dismissed and for a declaration that the Court had no jurisdiction to order another contributory to be substituted. The Petitioner has therefore already been made responsible for the additional costs suffered by the Company in dealing with the consequences of the Petitioner's failure to verify its entitlement to present the petition.

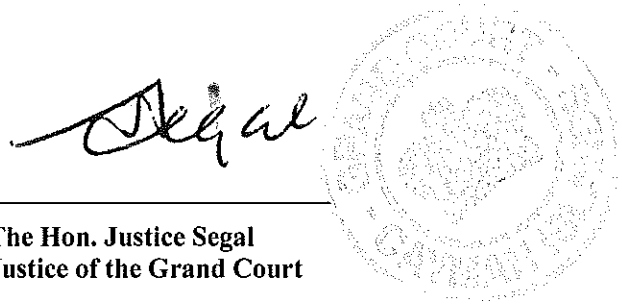
(e). Mr Harlowe accepted at the Hearing that circumstances have not materially changed such that the grounds for appointing the JPLs no longer exist nor is it the case that there is no longer a proper basis for the appointment of provisional liquidators (save that it has now become clear that there is more – but only limited – time to file the resumption proposal).

(f). the order for costs would usually or could be made at the hearing of the petition. I see no reason to defer a decision on costs until then. But I also do not see a proper basis for accelerating the timing of payment of the costs. They should be paid once the petition has been disposed of either upon the making of a winding up order or the dismissal or withdrawal of the petition. I note Ms Pearson's reliance on the references in the judgment of Jones J in *In re Ambow Education Holding Ltd (in provisional liquidation)* (unreported, 26 June 2014) to earlier orders made by the learned judge awarding the petitioner in that case its costs on the application to appoint the provisional liquidators (in advance of the final hearing of the petition). These statements are consistent with the approach I have taken in this case but do not directly deal with the issue of the timing of payment of the costs so ordered.

(g). the costs should be paid on the indemnity basis and taxed if not agreed.

3. At the Hearing the Petitioner also sought an order that the Company be required to pay the Petitioner's costs of the successful application made by the Petitioner under section 159 of the Companies Law (2016 Revision) for the restoration of the Company to the register. I shall make such an order but I require the Petitioner to issue and file an application under section 159 seeking such relief (and I shall grant the Petitioner leave to do so). While the issue of costs (and the Company's liability therefor) could and should have been dealt with at the time of the section 159 application, section 159 permits the Court "*by ... [a] subsequent order*" (in the

restoration proceedings) to "*give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off*". This provision seems to be sufficiently wide to permit the Court to make an order that the Company should pay the Petitioner's costs of making the application (on the standard basis to be taxed if not agreed) so as to ensure that the Petitioner is not out of pocket as a result of taking action for the benefit of the Company and all its members and creditors. It seems to me that it would be unjust for the Petitioner to have to bear the costs of bring the restoration proceedings in circumstances where restoration is for the benefit of the Company and other stakeholders and the need for the application arises because of the Company's own default in failing to maintain its registration. However, as I have said, it also seems to me that there does need to be a proper application seeking the appropriate relief and order under section 159.



The Hon. Justice Segal
Justice of the Grand Court