A dispute with the company or between shareholders? The characterisation of just and equitable winding-up petitions

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The Grand Court of the Cayman Islands has provided welcome guidance to Cayman Islands-incorporated companies and their shareholders on the question of when a contested petition to wind up a company on the just and equitable ground will be considered a dispute between the petitioning member and the company which is the subject of the petition, and when it will be considered a dispute between the petitioner and other members of the company (an inter partes proceeding).

The decision of *Re Madera Technology Fund* (***Madera***) follows the 2021 judgment of Segal J in *Re China Shanshui Cement Group* [1] and outlines a number of principles for the court to apply when considering whether to join other shareholders to a just and equitable winding up petition proceeding.

Subject matter or participant?

A member or shareholder of a Cayman Islands-incorporated company may present a petition seeking orders that the company be wound up on the basis that, in the opinion of the court, it is just and equitable to do so. [2] Once a petition has been presented, the petitioner must file a Summons for Directions seeking directions on the conduct of proceedings, including as to whether the proceeding should be treated as a proceeding against the company, or as an inter partes proceeding between one or more members of the company as petitioner and one or more members as respondent. [3] If the court determines that the petition should be an inter partes proceeding, the participating shareholders must be joined as respondents, with the company continuing to participate on a nominal basis only (such as for the purposes of giving discovery). [4]

An order that a winding up petition is an inter partes proceeding will determine, among other things, whether the company's assets may be used to fund the defence of the petition, and the extent to which other shareholders in the company will participate in the proceedings.

In some cases, such as in tightly held companies or where the board of the company is deadlocked, it may be readily apparent to the court that the company is unable to participate and the dispute should properly be characterised as an inter partes proceeding. However, in other cases, such as *Madera*, it is less clear cut.

Facts in *Madera*

Madera Technology Fund (CI) Ltd (the **company**) is an exempted limited company incorporated in the Cayman Islands which operates as a feeder fund. At all relevant times, the company had two directors who collectively held 6.4% of shares in the company (the **directors**).

The petitioner was a trust established under the laws of Mexico which held 29.5% of the shares in the company. Following a breakdown in the relationship between the company and the petitioner, the directors caused the company to compulsorily redeem the petitioner's shares and converted those shares into non-voting shares.

As a consequence, the petitioner presented a petition seeking to wind up the company on the just and equitable ground on the basis that the petitioner had justifiably lost confidence in the probity with which the affairs of the company were being conducted. The petitioner filed a summons seeking directions that the petition proceeding be treated as an inter partes proceeding between the petitioner and the directors as respondents.

Characterisation of the petition

Richards J considered a line of English and Cayman Islands authorities in support of the following general principles on the characterisation of just and equitable winding up petitions:

- there is a general principle that the funds of a company should not be spent on litigation where the real essence of the dispute is between the shareholders [5]
- the court must consider whether participation in the proceedings by the company was " *necessary or expedient in the interests of the company as a whole*" [6]
- the essential question is whether it is right to say that the company had " *a separate and independent position*" to the shareholders [7]or whether it has a " *real interest independent of its shareholders in defending the petition*" [8]
- a relevant consideration is whether the petitioner alleges that the shareholders are implicated in the misconduct alleged in the petition. [9]If the petition makes allegations against shareholders, procedural fairness dictates that they should be joined

Richards J found that because the directors were shareholders, the Court had jurisdiction to make an order joining the directors as respondents. [10] However, her Ladyship found that the Court

retains an underlying discretion as to whether it is appropriate to characterise the dispute as a dispute between shareholders and make orders for joinder.

Richards J found that although the conduct of the directors was central to allegations that the company should be wound up, the conduct complained of related to their actions taken in their capacity *as directors* of the company, and the petitioner did not make any allegations about their conduct as shareholders. Her Ladyship found that the shareholdings of the directors "are incidental to the alleged activity and are neither the essence of nor central to and do not feature in it." [11]

Consequently, Richards J refused to exercise her discretion to join the directors, characterising the dispute as one "with the company and with its directors" and finding that the company had a "real interest" in the proceeding. [12]

Conclusion

In the absence of a freestanding remedy for unfair prejudice or oppression in the Cayman Islands, a shareholder may present a just and equitable petition as a means of resolving disputes with other shareholders, including in cases involving allegations of oppressive or improper conduct. The Court in *Madera* took a pragmatic approach on characterising just and equitable petitions which will be helpful for shareholders and companies alike and will ensure that courts are able to prevent companies from improperly depleting their resources in defending a dispute in which they have no real interest.

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[1] (Unreported, Segal J, 21 January 2021). Ogier acted for the petitioner in this hearing.

[2] Companies Act (2022 Revision), section 92(e).

[3] Companies Winding Up Rules, O.3, r.12(1).

[4] Financial Services Division Guide (August 2015), C6.5.

[5] *Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579; *Re Crossmore Electrical & Civil Engineering Ltd* (1989) 5 BCC 37; *Re a Company No 005685 of 1988 ex parte Schwarcz* (1989) 5 BCC 79; *Re Freerider Limited* [2009] CILR 604.

[6] *Re a Company (No. 001126 of 1992)* [1993] BCC 325 at 333.

[7] *Arrow Trading & Investments v Edwardian Group Ltd (No 2)* [1993] BCC 325; *Re Freerider Limited* [2009] CILR 604.

[8] *Re China Shanshui Cement Group* (Unreported, Segal J, 21 January 2021) at [39].

[9] *Re China Shanshui Cement Group* (Unreported, Segal J, 21 January 2021) at [33(s)].

[10] *Madera* at [110].

[11] *Madera* at [114].

[12] *Madera* at [113], [116]. Notably, Richards J said that the fact that the Directors only had a small shareholding of 6.4% was "possibly not a complete answer" and suggested there may be some scenarios where joinder of minor shareholders was appropriate, including in cases involving unfair buy out arrangements or oppressive conduct: *Madera* at [108].

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Key Contacts

Gemma Bellfield (nee Lardner)

Partner

Cayman Islands

E: gemma.bellfield@ogier.com

T: +1 345 815 1880

Corey Byrne

Senior Associate

Cayman Islands

E: corey.byrne@ogier.com

T: +1 345 815 1842

Jeremy Snead

Partner

London

Cayman Islands

British Virgin Islands

E: jeremy.snead@ogier.com

T: +44 20 3835 9470

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