

Campbells

Restructuring, Liquidation And Litigation Issues

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Clawback Claims

Fairfield Sentry Limited v Bank Julius Baer & Co. Ltd & 33 Others
BVI Commercial Court, Justice Edward Bannister, 16 September 2011

The preliminary issues:

- In circumstances where Fairfield's Articles of Association contained a provision to the effect that "*any certificate as to the [NAV] per Share or... Redemption Price given in good faith by or on behalf of the Directors shall be binding on all parties*", did the documents which were sent and made available to redeeming investors by Fairfield and its Administrator and which contained details of the NAVs and Redemption Prices constitute "certificates" within the meaning of the Articles which would be binding on all parties?
- Did redeeming investors give good consideration for the payment of their Redemption Prices by surrendering their shares in Fairfield, and if so does the provision of that consideration preclude Fairfield from pursuing claims to recover "overpayments" of redemption proceeds?

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The answers:

- To constitute a “certificate” as to NAV or Redemption Price within the meaning of Fairfield’s Articles of Association, a document must actually be signed by or on behalf of the directors and it must also certify a valuation carried out by or on the instructions of the directors. On the facts, it was held that the documents provided to redeeming investors were not signed, that they had been provided by the Administrator on behalf of Fairfield (rather than on behalf of the directors who were the body of persons responsible for producing the NAVs), and that they were not therefore binding on the parties.

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The answers (cont'd):

- By surrendering their rights as shareholders the redeeming investors gave good consideration for the redemption proceeds which they received, and a party will not be able to recover a payment made by mistake where the payer has received consideration from the payee. Although obiter, the Judge took the view that the claim would also fail because *restitutio in integrum* was not possible; that is, the parties could not now be put back in the positions they were in before the redemptions.
- It was not therefore open to Fairfield to seek to recover redemption payments simply because it had calculated the applicable NAVs based on information which has subsequently proved unreliable for reasons unconnected with any of the redeemers.

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Other points:

- The Liquidators are appealing to the Court of Appeal on the consideration point. Given the amounts at stake this issue is likely to be appealed by either party to the Privy Council.
- Some or all of the defendants are cross appealing on the certificate point.
- Although he did not decide the issues on this basis, Justice Bannister appeared to have serious doubts as to whether the Liquidators (if their appeal succeeded) would be able to establish their claim that Fairfield's true NAVs were nil or almost nil, and even if they could whether they would be entitled to claw back redemption proceeds if the shares which were redeemed really were worthless.



NAV Restatement Issues

Section 112 of the Companies Law (2011 Revision):

- (1) The liquidator shall settle a list of contributories, if any, for which purpose he shall have power to adjust the rights of contributories amongst themselves.
- (2) In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have power to settle and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves.
- (3) A contributory who is dissatisfied with the liquidator's determination may appeal to the Court against such determination.

CWR O. 12, r.1(1)

- The official liquidator is required by section 112 of the Companies Law to settle a list of contributories for the purposes of identifying those members:
 - who are liable to contribute to the assets of the company and ascertaining the amount of their respective contributions; and
 - who are entitled to participate in the distribution of surplus assets available after the company's creditors have been paid in full and ascertaining the amount of their respective entitlements.
- The statutory purpose is not expressed to include identifying former members who have been overpaid redemption proceeds.

CWR O. 12, r.2(1)

- The official liquidator must rectify the company's register of members if he is satisfied that:
 - the company is or will become solvent and:
 - the company has issued redeemable shares or redeemed those shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has (i) issued an excessive or inadequate number of shares in consideration for the prices paid by one or more subscribers and/or (ii) paid out excessive or inadequate amounts to former members in consideration for the redemption of their shares.
- Both members and former members of the company have the right to appeal if they are dissatisfied with the liquidator's exercise of his powers under section 112 of the Companies Law

CWR O.12, r.2(5):

If the official liquidator considers that it will be impractical or not cost effective to rectify the company's register of members on each relevant redemption date in accordance with the applicable / appropriate GAAP, he shall nevertheless rectify the register in such manner which is both cost effective and fair and equitable as between the shareholders.

The power of directors to present winding up petitions in respect of solvent and insolvent companies

**Re China Milk Products Group Limited
Grand Court, Mr Justice Jones, 22 July 2011**

- Prior to the amendments to the Companies Law on 1 March 2009, the directors of a Cayman Islands company, whether solvent or insolvent, could only present a winding up petition in the company's name if authorised to do so by either the Articles of Association or an ordinary resolution of the shareholders.
- See *Re Emmadart Ltd* [1979] 1 Ch. 540; *Re Global Opportunity Fund Ltd* [1997] CILR N7; and *Banco Economico SA v Allied Leasing and Finance Corporation* [1998] CILR 102

**Re China Milk Products Group Limited
Grand Court, Mr Justice Jones, 22 July 2011**

Section 94(2) of the Companies Law (2011 Revision):

“Where expressly provided for in the articles of association of a company, the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf without the sanction of a resolution passed at a general meeting”.

**Re China Milk Products Group Limited
Grand Court, Mr Justice Jones, 22 July 2011**

- Directors of insolvent companies incorporated before 1 March 2009 have the power to present a winding up petition in the name of the company without the authority of a shareholders' resolution and irrespective of any restrictions in the company's articles.
- Directors of insolvent companies incorporated after 1 March 2009 have the power to present a winding up petition in the name of the company without the authority of a shareholders' resolution, unless the company's articles expressly reserve that power to the shareholders.

**Re China Milk Products Group Limited
Grand Court, Mr Justice Jones, 22 July 2011**

- Directors of solvent companies incorporated before 1 March 2009 only have the power to present a winding up petition in the name of the company if authorised to do so by an ordinary resolution of the shareholders, irrespective of any powers granted to the directors in the company's articles of association.
- Directors of solvent companies incorporated after 1 March 2009 have the power to present a winding up petition in the name of the company if authorised to do so by either (i) an ordinary resolution of the shareholders, or (ii) an express power in the company's articles of association.



Liquidation Committees

- Recent decision of the Grand Court in the Sextant Funds liquidations affirmed the right of liquidation committees to obtain source information that had been considered by liquidator in formulating a settlement with a defendant.
- This information had been provided to the committee in summary form and disclosure was resisted on the basis that it was confidential, not cost/beneficial to the estate and not necessary for the committee to discharge its consultative role.

- Court noted that the liquidation committee's role is to form a judgment and express an informed view to the liquidator, who must provide them with whatever information they request, subject only to the following specific limitations in the rules:
 - The request is unreasonable and frivolous
 - The cost of complying with the request is excessive relative to the importance of the information
 - The liquidator will be unable to recover the cost of providing the information from the company's assets

Litigation Funding Issues for Liquidators

- Preference of liquidators for litigation to be funded from the estate.
- In absence of assets, however, liquidators have other sources of funding to turn to.
- Maintenance and Champerty.

- Emergence of Third Party Funders.
- Allows litigation to commence or continue ... but nothing is free ... terms will provide for big upside to the third party on any recovery.
- Liquidators may assign bare causes of action exempt from the consequences of champerty.
- If there are contractual restrictions on assignment, liquidators can assign the fruits of litigation but they must maintain sufficient control of the proceedings.

- Devil is in the detail – and the deal can be structured in many different ways.
- Court Approval required.
- Indemnities and security for costs?

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