

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)

Claim No: BVIHC (COM) 2021/0091

IN THE MATTER OF ZHAOHENG (BVI) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN: -

HYDRO ENERGY HOLDINGS B.V.

Applicant

-v-

(1) ZHAOHENG (BVI) LIMITED
(2) ZHAOHENG HYDROPOWER LIMITED

Respondents

Appearances:

Mr. Patrick Lawrence QC, with him Mr. Christopher Pease of Harneys for the Applicant
Mr. Robert Levy QC, with him Mr. Shaun Folpp of Campbells for the Second Respondent
The First Respondent did not appear

2021: July 30
August 16

JUDGMENT

- [1] **JACK, J [Ag.]**: On 1st June 2021 on an *ex parte* application by the applicant (“Hydro”), I appointed provisional joint liquidators (“PJLs”) over the first respondent (“the Company”). Subsequently, I added the second respondent (“ZHL”) as a respondent to the application. ZHL served evidence, although not from Mr. Xu, the man whose conduct was criticized by Hydro.

- [2] The return date on the application for the appointment of PJLs was 30th July 2021, the last day of term. Mr. Lawrence QC appeared for Hydro. Mr. Levy QC appeared for ZHL. The Company did not appear. Although the return date was listed for a whole day, this was inadequate for hearing all the issues. Due to the nature of the appointment of PJLs, it was undesirable that the matter be adjourned part heard to the next term.
- [3] Although Mr. Lawrence QC's application for an extension of the appointment was logically prior, in fact I invited Mr. Levy QC to address me on the merits first. Under the merits I included the question as to whether the existence of Hong Kong arbitration proceedings meant that the appointment of PJLs should not have been made, either as a matter of law or as a matter of discretion. I thought that I had made that clear to Mr. Levy, since the arbitration issue was potentially a knock-out point for him, whereas the merits of ZHL's position on the facts were perhaps more difficult. Due to a misunderstanding, Mr. Levy did not in fact address me orally on the arbitration point.
- [4] After I gave an oral judgment in which I rejected ZHL's case on the merits and on the arbitration issue, the misunderstanding came to light. I therefore gave Mr. Levy QC a week in which to decide whether he wanted a further oral hearing of the arbitration point and the remaining issue of material non-disclosure. Time for appealing was extended, so that there would not be a need for two appeals to be brought, in the event my determinations were to be appealed. Subsequently, ZHL asked me both to reconsider the arbitration point and to decide the material non-disclosure point on paper on the basis of the skeleton arguments already submitted for the hearing on 30th July. This is my judgment on those two points.
- [5] As regards the arbitration issue, I have re-read paras 56 to 67 of Mr. Levy QC's skeleton argument. I have not yet seen a transcript of my oral judgment of 30th July 2021, but I have re-read my notes of that judgment. I held that the decision whether to wind-up a company on the "just and equitable" ground was not arbitrable. There is nothing in Mr. Levy's skeleton which causes me to alter my opinion as to that.

Even if I were wrong in that holding, I would in any event have made the appointment of PJs as a matter of discretion. The Hong Kong arbitration will not be determined quickly. There is an urgent need for protective measures for the reasons I gave in my oral judgment. The protective measures granted by the Hong Kong courts have proven inadequate.

[6] As regards non-disclosure, ZHL's application for discharge lists ten matters of non-disclosure:

“(i) The fact that the only material asset of the Company is its shareholding in Zhaoheng Hydropower Holdings Ltd ('Zhaoheng Cayman'), constituting 91.07% of the issued shares of Zhaoheng Cayman;
(ii) the fact that the only material asset of Zhaoheng Cayman is its shareholding in Zhaoheng Hydropower (Hong Kong) Ltd ('Zhaoheng HK'), constituting 100% of the issued shares of Zhaoheng HK;
(iii) the fact that Zhaoheng HK is currently in liquidation and qualified Hong Kong insolvency practitioners have been appointed as interim liquidators;
(iv) in those circumstances, explaining how the appointment of provisional liquidators was necessary for the purpose of maintaining the value of assets owned or managed by the Company, as opposed to interests further below the Company in the corporate structure which were, by reason of the appointment of competent liquidators over Zhaoheng HK, *prima facie* protected by that appointment;
(v) the fact that the liquidators of Zhaoheng HK could have their appointment recognized in Shenzhen in the People's Republic of China ('PRC') under the recently adopted pilot scheme concerning the mutual recognition of and assistance to bankruptcy (insolvency) proceedings between the Hong Kong Special Administrative Region and the PRC (whereas there would be no such recognition of this provisional liquidation (or indeed liquidation should that materialise) of the Company);
(vi) Mr. Silvers' evidence whereby he asserted that the appointment of liquidators over Zhaoheng HK would not prevent Mr. Xu from exercising control over the subsidiary companies in the People's Republic of China;
(vii) Hydro's failure to explain the obligations, duties and powers of the liquidators appointed over Zhaoheng HK, and why the fact of the appointment of those liquidators rendered the extraordinary step of appointing the JPLs appropriate in the circumstances;
(viii) Hydro's failure to explain to this Court what discussions it had had with the liquidators appointed over Zhaoheng HK, and, to the extent that it had not had any such discussions, the fact that it had not had such discussions;
(ix) Hydro's failure to properly to explain why it was appropriate to make its application *ex parte* in circumstances where all of the allegations made in pursuing its application concerned conduct far removed from the Company

which could only be properly addressed by liquidators appointed over Zhaoheng HK (or companies further down the corporate structure) and not by the JPLs over the Company appointed by this Court; and
(x) to the extent that facts suggesting potential misconduct by Mr. Xu or others have been asserted by Hydro in pursuing its application, that misconduct is said to have taken place primarily, if not exclusively, at the level of the PRC subsidiaries of Zhaoheng HK, while Hydro has not asserted that there has been any misconduct by the Company at all.”

- [7] The law relating to non-disclosure on an *ex parte* application is extremely familiar to this Court. I cannot recall an application to set aside an *ex parte* order which did not raise some issue of non-disclosure. I am happy to accept Mr. Levy QC's summary of the law in this regard at paras 68 to 70 of his skeleton.
- [8] None of the ten points are in my judgment matters where there was non-disclosure. Point (i) was set out in para 14(1) of Hydro's skeleton argument for the *ex parte* hearing. Points (ii) and (iii) were set out in para 14(2).
- [9] The whole of Hydro's skeleton is really addressed to point (iv), however, the matter is summarised at para 86(7).
- [10] The documents whereby the PRC courts expressed their willingness to recognize liquidators appointed in Hong Kong in limited parts of the country were only signed on 14th May 2021¹, just days before the *ex parte* application to me. It is unclear what publicity was given to them or what knowledge Hydro should have had of them. The first case on them was the decision of Harris J delivered on 20th July 2021 (after the *ex parte* hearing),² to which I referred in my oral judgment.
- [11] In any event it was and is unclear how easy it will be for Hong Kong practitioners to obtain recognition of their appointment in the PRC. Some delay in gaining control of the Shenzhen subsidiary and the other PRC subsidiaries is inevitable. Delay is likely to be inimical to the protection Hydro seeks from Mr. Xu's continuing control

¹ See the judgment of Harris J.

² [2021] HKCFI 2151.

of elements of the group. I do not consider there was any material non-disclosure under (v). Point (vi) is part and parcel of the issue of recognition of Hong Kong liquidators.

- [12] As to (vii), the Court is well aware in general terms of the duties of Hong Kong liquidators, since Hong Kong insolvency law is rooted in English insolvency law. ZHL has identified no relevant difference to the powers and duties of BVI liquidators which should have been disclosed.
- [13] As to (viii), discussions with the Hong Kong liquidators would not have been material. Hydro wanted different liquidators appointed.
- [14] As to (ix), the decision whether to hear a matter *ex parte* was mine. Hydro fairly raised the point at para 84 of its skeleton.
- [15] As to (x), Hydro's concern was as to Mr. Xu's conduct in relation to the whole group. If he was behaving improperly in relation to the various subsidiaries, it is a fair inference that, given the continuing opportunity, he would behave so in relation to the Company.
- [16] Accordingly, there was in my judgment no material non-disclosure. I therefore refuse to discharge the appointment of the PJLs on that ground.
- [17] Even if there had been, I would not in my discretion have discharged the appointment. I would reach that conclusion on conventional grounds: see points (6) and (7) of the summary of the relevant principles in **Brink's Mat Ltd v Elcombe**.³ I should add, however, that (had it been relevant) I would have considered a relevant factor the fact that the appointment of a liquidator is a class remedy. Careful consideration would need to be given to discharging an interim remedy in such cases on the basis of misconduct, where all the members of the relevant class are not necessarily *in pari delictu*. The nature of a class remedy is such that the Court

³ [1988] 1 WLR 1350 at pp 1356-1357.

should be reluctant to discharge protection for the class where the conduct said to debar the remedy was that of only a few. In the event, the point does not arise.

[18] Accordingly, I continue the appointment of the PJLs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar