

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Pacific China Holdings Limited (the Company) -v- Grand Pacific Holdings Limited HCVAO2010/039

INSOLVENCY - BVI APPEALS - LIQUIDATORS' REMUNERATION

The issue in this case was who should bear the ultimate liability for the joint liquidators' remuneration, costs, fees and expenses (the "Liquidators' Remuneration") where their appointment had been subsequently set aside by the Court of Appeal. The Appeal was the Company's from the decision of the Commercial Judge who found that he did not have jurisdiction to order that a petitioning creditor be made ultimately liable for the Liquidators' Remuneration. The Company argued on appeal that jurisdiction existed under either S. 233(4) of the *Insolvency Act* (the statutory jurisdiction point) or alternatively, in the exercise of the Court's costs jurisdiction under Civil Procedure Rules ("CPR") 64.3 (the costs jurisdiction point). Further, it accepted that there was no good reason in principle or policy why a petitioning creditor should not be ordered to pay the Liquidators Remuneration especially where the appointment had been subsequently set aside because it had been wrongly obtained and was consequently an abuse of process.

The Court of Appeal did not agree that there was statutory jurisdiction as contended for by the Company. In its view a successful appeal against the making of a winding up order resulting in the setting aside of that order did not and could not equate to a termination of the liquidation under Section 233 of the *Insolvency Act*. Wholly different considerations are engaged on a Section 233 termination which specifically states that the Court may order the termination of liquidation if it is satisfied that it is just and equitable to do so.

The Court of Appeal however did allow the appeal on the costs jurisdiction point. It held that the Court by virtue of Rule 64.3 of the CPR had the power to award costs arising out of or related to any proceedings to a person who is not necessarily a party to the

proceedings. Crucially it held that the Court had a wide discretion in all matters relating to expenses including the power when necessary to direct which of the parties is to bear the costs of the remuneration and expenses of any professional man or other officer appointed by the court to act in the proceedings which have come to an end.

The importance of this result cannot be overstated. Until this decision there were no reported cases in the jurisdiction which dealt comprehensively with the question of liability for Liquidator's Remuneration in such circumstances, and very little in the way of English or other Commonwealth authority on point. This is perhaps attributable to the fact that not many appointments of liquidators over BVI companies are ultimately set aside and so the issue does not arise. It means that where office holders are appointed by the Court and the appointment order is under appeal, parties seeking the appointment are at risk of paying the office holders costs.

The Respondents have issued a motion for leave to appeal this decision to Her Majesty in Council.

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