Conyers Dill & Pearman

OFFSHORE CASES

MAY 2015

CAYMAN ISLANDS

COURT OF APPEAL

DD Growth Premium 2X Fund -v- RMF Market Neutral Strategies (Master) Limited.
CICA 24/2014 (was FSD 33/2011), per Mangatal J (29 May 2015)

CIVIL PRACTICE AND PROCEDURE - APPLICATION FOR SECURITY FOR COSTS OF AN APPEAL - SUB-SECTION 19(2) OF THE COURT OF APPEAL LAW (2011 REVISION) - SECTION 74 OF THE COMPANIES LAW (2013 REVISION) (JUSTICE MANGATAL SITTING AS A SINGLE JUDGE OF THE COURT OF APPEAL)

Conyers Dill & Pearman ("Conyers") represented RMF Market Neutral Strategies (Master) Limited ("RMF"). This case concerned a fund named DD Growth Premium 2X Fund (In Official Liquidation) ("2X"), which suffered severe financial difficulties in the wake of the Lehman Brothers' collapse in 2008. RMF was an investor in 2X for some time and redeemed shares from 2X on multiple occasions. RMF's redemption of shares is the primary basis for this dispute.

The issue in this case primarily concerned redemption requests made by a group of redeeming shareholders known as the "December Redeemers" when 2X was of questionable solvency. Certain parties, such as RMF amongst others, were able to redeem their shares and obtain payment whilst others received nothing. Consequently, the dispute involved 2X's Joint Official Liquidators attempting to "claw back" monies paid to RMF during this period. The Judge ultimately agreed with Conyers' point regarding Section 37(6)(a) of the *Companies Law*. In particular, Section 37(6)(a) - (b) of the *Companies Law* states:

(a) "*A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made, the company shall be able to pay its debts as they fall due in the ordinary course of business.*

(b) *The company and any director or manager thereof who knowingly and wilfully authorises or permits any payment out of capital to effect any redemption or purchase of any share in contravention of paragraph (a) commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years*".

This case has significant legal implications because it concerned the capital maintenance doctrine which is designed to protect the creditors of a company. Smellie CJ held that ultimately, RMF did not have to repay the redemption monies despite the fact that 2X was insolvent when the payments were made. Smellie CJ reasoned that as the funds were paid from share premium, they were not legally classified as capital and as a result, the redemptions did not breach the *Companies Law*.

The above referenced hearing concerned an application for security for costs of an appeal under Section 19(2) of the Court of Appeal Law and Section 74 of the Companies Law. 2X appealed the prior Judgment made by the Honourable Chief Justice Smellie on 17 November 2014. In particular, Section 19(2) of the Court of Appeal Law states:

"*The appellant shall, at the time of lodging the notice of appeal required by subsection; (1), deposit in the Grand Court the sum of fifty dollars as security for the due prosecution of the appeal together with such further sum as security for costs of the appeal as a Judge of the Grand Court may direct, and such security for*

costs may be given by the appellant entering into a bond by himself and such sureties and in such sum as the Judge of the Grand Court may direct, conditioned for the payment of any costs which may be awarded against the appellant and for the due performance of the judgment of the Court".

Furthermore, Section 74 of the *Companies Law* states:

"*Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if he is satisfied that there is reason to believe that if the defendant is successful in his defence the assets of the company will be insufficient to pay his costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given*".

In support of the application for security for costs, RMF argued, amongst other things, that: (1) unlike a court of first instance, the Court of Appeal has to take into account the fact that 2X, the Appellant, had already had the issue of security for costs determined against it; (2) it would be an injustice to allow the Appeal by 2X to proceed without security for costs being furnished as RMF would be unable to enforce a costs order against 2X due to its impecuniosity and (3) when determining whether an Order for security for costs would prevent an Appeal, it is necessary for 2X to establish not only that it is unable to furnish security from its own resources but it is also unable to realise the money from elsewhere, namely shareholders (i.e. banks and large institutional investors) or third party funders.

In determining that 2X should provide security for costs, the Court ultimately held, amongst other things, that 2X did not provide suffice evidence: (1) of its investors or backers; (2) of its investors' inability, as opposed to unwillingness, to provide the security for costs and (3) to satisfy the Court that RMF, which had previously obtained a Judgment in its favour and an Order for security for costs, was attempting to stifle a genuine appeal by 2X.

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