CAYMAN ISLANDS

GRAND COURT

In the Matter of China Shanshui Cement Group Limited (Unreported, 25 November 2015)

WINDING UP PETITION - APPLICATION BY SHAREHOLDERS TO STRIKE OUT PETITION ON GROUNDS DIRECTORS NOT AUTHORISED

The Grand Court of the Cayman Islands confirmed, in a decision by Mangatal J, that the directors of a company do not have statutory authority to petition the Court to wind up the company (whether the company is solvent or insolvent) without the sanction of a resolution of shareholders, unless the articles of association of the company expressly provide otherwise.

In this case a winding up petition, submitted by the directors of the company, was struck out for lack of standing to file the petition. This decision has re-affirmed the application in the Cayman Islands of the English case of *Re Emmadart Ltd* [1979] 1 Ch. 540 in which Brightman J had concluded that:

"*The practice which seems to have grown up [in England], under which a board of directors of an insolvent company presents a petition in the name of the company where this seems to the board to be the sensible course, but without reference to the shareholders, is in my judgment wrong and ought no longer to be pursued, unless the articles confer requisite authority…*".

The decision restores what was generally understood to have been the position under Cayman Islands law until the position was impacted by the first instance decision of Jones J in the Cayman Islands case of Re China Milk Products Group Ltd [2011] 2 CILR 61 ("Re China Milk"). Jones J (applying Section 94(2) of the Companies (Amendment) Law, 2007) held, in 2011, that the Directors of an insolvent company are entitled to present a winding up petition on behalf of a company without reference to shareholders and irrespective of the terms of the company's articles.

Section 94(2), provides as follows:

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

Jones J concluded that the Cayman Legislature must have intended that Section 94(2) would only apply to solvent companies.

In this matter, Mangatal J declined to follow the Judgment of Jones J in *Re China Milk*. Although the Company in *Re China Shanshui Cement* was incorporated before 2009 (and hence Section 94(2) was found to be irrelevant), Mangatal J concluded that:

"*…whatever the intention of the Legislature may have been, all Section 94(2) did was to provide statutory confirmation that, as was previously held in Re Emmadart, where the articles of association of a company expressly authorise its directors to present a winding up petition on its behalf, the directors do not also need to obtain the sanction of a resolution passed in general meeting*".

The restriction on directors statutory authority to petition the Court to wind up the company, as confirmed by the Re Emmadart case, has been criticised (and reversed by statute in England) and not followed in some Commonwealth countries. However, as a result of this decision, it is now clear that the position in Re Emmadart does represent the law in the Cayman Islands.

Editor's note – The position in the Cayman Islands should be contrasted with the position in Bermuda where it has been held that the directors will have standing to petition on behalf of an insolvent company, provided that the bye-laws do not prohibit such an application (see *Re First Virginia Reinsurance Ltd.* [2003] BLR 47). This authority has been relied on in order to facilitate director instigated petitions in numerous cases since.