

THE COURT'S POWER TO VARY, REVOKE AND RESCIND ITS OWN ORDER

Mark Forté & Tameka Davis – February 2010

Introduction

The extent to which the BVI Court had the power to vary or revoke an order previously made has been the subject of some recent scrutiny - particularly in BVI's Companies Court's jurisdiction to rescind a winding up order. The scrutiny has been in the case of the former by the express power to do so under the UK Civil Procedure Rules; and in the case of the latter, the English Insolvency Rule 7.47, which allows the Companies court to rescind its own order.

In the BVI there is no express power under the Eastern Caribbean Civil Procedure Rules 2000 ("the Rules") to vary or revoke an order, and there is no statutory equivalent to English Insolvency Rule 7.47 in the BVI.

The purpose of this article is to examine the likely scope of the Court's jurisdiction in the BVI. This will no doubt be of interest to potential litigants who may wish to vary, revoke or rescind an order of the BVI High Court, in circumstances where an appeal against that order may not in fact be desirable.

Variation and Revocation

While the Rules do not give the court the express power to vary or revoke its own order, such a departure from the English Rules is unlikely to make much of a difference in practice since according to George-Creque J (as she then was, currently senior judge in the ECSC Court of Appeal) in Bagani Stiftung v JMV Fixed Income Arbitrage Performance Partners, Ltd et al "...it is also well settled that the court retains this power under its inherent jurisdiction..."¹.

The issue in that case was how the court would exercise its discretion to set aside its previous order following a full inter partes hearing. The Court in deciding not to set aside its order approved and followed the English dictum in Collier v Williams [2006] 1WLR 1945. That case not only said that a party seeking a discharge of an order made at an inter partes hearing must either show a material change in circumstances or that the judge was misled in some way, but also that the above circumstances were the only circumstances where the power to revoke or vary an order already made should be exercised.

The expression "only circumstances" may be a slight exaggeration since the court in Re Thirty Eight Building Ltd (in liquidation) (No 2), Simms v Saunders [2000] 1 BCLC 201 acknowledged that there was a power of review in very exceptional circumstances, for example, where it might be necessary to correct an obvious injustice. This makes sense; after all, the court is exercising its unfettered inherent jurisdiction.

The judge in Bagani went on to state that she was of the view that a similar approach must be adopted for the purpose of revisiting an order earlier made. She also expressed the view that "[9].../...where a matter has come on for hearing on full notice and an order has been made, it is not open to a party on a later application to set aside the order or seek to reargue or invite a review of the same material to the court being persuaded to come to a different conclusion thereon. That would be tantamount to the court acting as an appellate court in review of its own order".

¹ Paragraph 9, George Creque J, (as she then was) in Bagani Stiftung v JMV Fixed Income Arbitrage Performance Partners, Ltd et al (Anguilla) Claim No AXA HCV 2008/0042.

On that latter view the English authorities appear to suggest that there may be a window of opportunity to do just that even after a judgment had been handed down (but before it has been drawn up). This is premised on the notion that as a matter of principle, a judge retained control of a case to the extent of being able to reconsider the matter of his own motion or to hear further argument on a point which had been decided prior to perfection of its order, i.e. the Barrell jurisdiction².

While our Superior Courts are not bound to follow the findings of English Courts and might very well take a different view of the matter, the English common law is binding on our Courts, and, so far at least, English and indeed other cases from common law jurisdictions have been considered persuasive. Based on the foregoing it is our view that:

- i. The Court has an inherent jurisdiction to vary or revoke its own order at anytime.
- ii. The court will not exercise its jurisdiction at (i) unless it is demonstrated to its satisfaction that
 - (a) there has been a material change in circumstances
 - (b) it was misled
 - (c) there are other exceptional circumstances justifying the variation or revocation – e.g. an obvious error
- iii. After judgment has been handed down but before an order is perfected the Court on a matter of principle can reconsider a matter and hear further argument on a point already decided.

Rescission

The absence of any statutory power similar to that which exists in England means that our considerations on this issue will also fall to that of common law.

The question as to the Court's jurisdiction to rescind an order was considered in Re Intermain Properties [1986] BCLC 265. There, while the court held that it did not have the jurisdiction to rescind a perfected order, it did recognize the existence of such a jurisdiction, after perfection, in circumstances where the initial order had, for whatever reason, been a nullity. Indeed, in the recent case of F & B Ltd (petition number 15380 of 2009, summarized in Insolvency Intelligence, Vol 22, Dec 2009), a case where it appeared that the order had been perfected, the Chief Registrar held that it ought to be open to the court to rescind an order of its own motion where it happened to spot that an obvious error had been made. [See Re Calmex Ltd, Calmex Ltd v C Lila Ltd [1989] 1 All ER, 485, where the court was prepared to rescind a winding-up order even after it had been made where it was made by mistake.]

These cases, albeit English, appear to recognize, in principle at least, an inherent jurisdiction to also rescind an order where some form of mistake had occurred, or misunderstanding, which justified rescission or at the very least a variation of the order. Indeed, this appears to be the reasoning in Cornhill Insurance plc v Cornhill Financial Services Ltd and others [1993] BCLC 914 after examining the history of r. 7.47 (1) of the UK Insolvency Rules. While there is no equivalent provision in our BVI legislation, there is no reason why such a power could not be exercised under the Court's inherent jurisdiction, which for the avoidance of doubt was retained by virtue of section 11 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance.

In Cornhill, the court went on to state that
"... In company cases that inherent jurisdiction of the court to protect itself was most often exercised in relation to mistakes or misunderstanding. In other contexts the court protects itself against abuse because of fraud or in the case of ex parte injunctions, because of some lack of candour on the part of the applicant for the injunction."

² Re Barrell Enterprises [1972] 3 All ER 631 CA.

In Re Piccadilly Property Limited Management Ltd [1999] 1 BCLC 145 the court cautioned that the jurisdiction to rescind must be exercised with utmost caution and rarely³.

In Izod, Re, ex p Official Receiver [1898] 1 QB 241, the court was prepared to rescind a winding-up order where a satisfactory creditors arrangement had been entered into. There, as in Picadilly, the CA made it clear that it would only do so with great caution and under special circumstances which make it clear that the arrangement is for the benefit of the creditors (See A L Smith at pp 248 – 9). So it is not good enough if the petitioning creditor has been paid off – there are other considerations such as the position of other creditors, and the conduct of the debtor.

The ambit of this jurisdiction to rescind has been considered in a number of other cases cumulating with the decision Papanicola v Humphreys and others [2005] 2 All ER 418. Laddie J summarised the position as follows:

- (1) The jurisdiction to vary or rescind an order gives the court a wide discretion to review, vary, or rescind *any* order made in the exercise of the bankruptcy jurisdiction.
- (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.
- (3) Those circumstances must be exceptional.
- (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words, there must be something new to justify the overturning of the original order.
- (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.
- (6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation the applicant gives for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion.

A review of these cases all indicates the extent of the discretion the Court clearly has jurisdiction to consider, ranging from situations where the company has discharged liabilities of creditors, proven solvency and an ability to trade successfully going forward, and demonstrated no obvious public policy grounds for otherwise remaining under the supervision of liquidators. The learned judge in Bagani was not asked to consider the issue of rescission, but it is hard to see how under our system the position would be much different. Whilst it seems likely that a similar jurisdiction exists in the BVI and the principles applicable above are likely to be deployed before the Courts here, it is worth noting that the newly formed Commercial Court in the BVI will consider the position afresh and will continue to forge its own path in the development of jurisprudence in this area as applicable to the BVI as an offshore jurisdiction. It is not to be taken as read that English authority and less likely Commonwealth authority will be followed as a matter of course, but common sense dictates that the approach to rescission in particular will be consistent with Papanicola. Predictability as to how the Court will exercise its discretion is, however, more difficult to anticipate.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

³ Judge Colyer QC (Sitting as a judge of the High Court) at page 164.

Notes to Editors

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