



Directors' Powers to Petition for Winding Up – A Corporate Perspective



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In furtherance to my litigation colleague, Nigel Meeson's, recent article [\[click here to view\]](#), the following gives a corporate perspective on the Cayman Court's recent decision with regard to the power of directors of a company to present a winding up petition.

The Grand Court of the Cayman Islands confirmed, in a decision by Mangatal J dated 25 November 2015 in *Re China Shanshui Cement Group Limited*, that the directors of a company¹ 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 *Re China Shanshui Cement*, 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*² 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, which article 80 of Table A does not."*³

The *Re China Shanshui Cement* 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*⁴. Jones J (applying what some saw as a rather strained interpretation of the legislation, as amended by the *Companies (Amendment) Law, 2007*) had 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.

¹ Per Section 36 of the Exempted Limited Partnership Law, 2014, the provisions of Part V of the Companies Law (being sections 89 to 155) apply to exempted limited partnerships and references to a director include reference to the general partner of an exempted limited partnership.

² [1979] 1 Ch 540 – the effect of *Re Emmadart Ltd* was reversed by the Insolvency Act 1986 in England (S.124) but in *Banco Economico S.A. v Allied Leasing and Finance Corporation* [1998] CILR 102, the *Re Emmadart Ltd* case was confirmed as having represented Cayman Islands law at that time.

³ Article 80 of Table A was a general empowering article authorizing the directors, subject to conditions, to exercise the powers of the company.

⁴ [2011] 2 CILR 61



Section 94(2) of the *Companies Law*, which was introduced by the *Companies (Amendment) Law, 2007*, 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.”*⁵

Jones J, having considered the deliberations of the Law Reform Commission leading up to the 2007 amendments, concluded that the Cayman Legislature must have intended that Section 94(2) would only apply to solvent companies.⁶ Section 94(2) contains no express limitation of that nature.

In *Re China Shanshui Cement*, 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 appointment of one or more provisional liquidators in connection with a winding up petition can be a useful tool in a restructuring due to the resulting moratorium on other proceedings. Particularly where a company is facing actual or potential insolvency, the power to petition for a winding up can be of significant comfort to directors and can facilitate the preservation of assets and value through an expedited restructuring. Denying the directors the power to petition to wind up the company absent express authority either in the articles or in a resolution of shareholders may therefore be considered commercially undesirable, although standard and accepted in some structured finance special purpose vehicles.

Those who are considering taking appointment as directors of a Cayman Islands company are encouraged to check whether the directors are given the power in the articles to petition for a winding up. Depending on the financial position of the company, shareholders may have little or no continuing economic interest in the company and, given the time that it can take to convene a general meeting, a requirement for shareholder consent in support of a petition for winding up could operate to the detriment of creditors and/or the company.

The restriction on directors confirmed by the *Re Emmadart* case has been criticised (and reversed by statute in England) and not followed in some Commonwealth countries⁷. It does however represent the law in the Cayman Islands. Whether the Cayman Legislature sees fit to legislate to restore the position taken in *China Milk* remains to be seen.

⁵ The date of commencement referred to in Section 94(2) is 1 March 2009, being the commencement date of the 2007 amendment.

⁶ “... *Bearing in mind that the directors of an insolvent company and the general partner of an insolvent exempted limited partnership owe duties to safeguard the interests of creditors (whereas shareholders and limited partners do not) the Legislature cannot have intended to inconvenience their ability to seek the protections which flow from the presentation of a winding up petition.*” [Jones J, *China Milk*].

⁷ In particular, in a line of Australian cases and, in Bermuda, in *Re First Virginia Reinsurance Ltd [2003] 66 WIR 133*.



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