

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

3 CAUSE NO: FSD 50 OF 2013 (AJJ)

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6 The Hon Mr Justice Andrew J. Jones QC
7 In Chambers,
8 26 June 2014
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11 IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
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13 AND IN THE MATTER OF AMBOW EDUCATION HOLDING LTD. (IN PROVISIONAL
14 LIQUIDATION)
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17 **Appearances:**

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19 Mr Nigel Meeson QC and Mr Ben Hobden of Conyers Dill & Pearman for the Petitioner

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21 Mr Neil Timms QC instructed by Mr Nick Hoffman of Priestleys for the Company
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25 ;



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28 **REASONS**

- 29 1. This is an application by the Petitioner for an order pursuant to CWR Order 24, rule 8
30 that the costs of the petition be paid on the indemnity basis out of the Company's assets
31 and an order that the Petitioner be released from the undertaking in damages given to
32 the Court in connection with the appointment of provisional liquidators. The Company
33 opposed this application and made a cross application for directions to be given in
34 respect of a proposed enquiry as to damages, which would necessarily involve making
35 an application for a determination that the Petitioner was not entitled to the order for the
36 appointment of provisional liquidators. I dismissed the Company's application and,
37 having considered the Petitioner's application, concluded that I should make no order for
38 the costs of the petition, to the extent that such costs are not covered by any previous
39 orders. I now give my reasons for these orders.
- 40 2. The general rules as to costs in connection with winding up proceedings are contained in
41 CWR Order 24, rule 8. The rules applicable in the particular circumstances of this case
42 are as follows :-

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44 "(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are
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1 (a) if the Court has directed that the company itself is properly able to participate in the
2 proceeding, the general rule is that the costs of a successful petitioner be paid out of the
3 assets of the company;

4 (b) –

5
6 (4) The Court shall make orders for costs in accordance with these general rules unless it is
7 satisfied that there are exceptional and special circumstances which justify making some other
8 order or no order for costs.”
9

10 3. The first question is to determine whether or not the Petitioner should properly be
11 regarded as having been “successful” having regard to the final outcome of the
12 proceedings. In order to make this determination, it is necessary to look at the purpose
13 of the petition, the grounds upon which it was presented, the Company’s response and
14 the actual outcome. In this case the Petitioner was not seeking a winding up order. The
15 petition was based upon events arising in connection with an investigation conducted by
16 the Company’s Audit Committee into allegations of fraud made against the Company by
17 a former employee. The existence of these allegations and the fact that the Audit
18 Committee had commenced an independent investigation was disclosed to the market in
19 an SEC filing made in July 2012. The Audit Committee instructed the law firm of Fenwick
20 & West LLP (“Fenwick”) and the accounting firm of Ernst & Young LLP to conduct the
21 investigation. At some point the scope of the investigation was enlarged to include
22 concerns about suspected witness interference and in March 2013 the Audit Committee
23 concluded, on advice from Fenwick, that the Dr Jin Huang, the Company’s Chairman
24 and CEO, should resign or take a leave of absence pending the completion of the
25 investigation. She refused to do so. The result was that two of the three Audit Committee
26 members resigned. The Audit Committee was reconstituted in a way which Fenwick
27 considered inappropriate with the result that it resigned. The Company’s auditors, the
28 Chinese firm of PricewaterhouseCoopers (“PWC”), also resigned. In the light of these
29 resignations, the NYSE suspended trading in the Company’s ADS’s and announced that
30 it was re-assessing the Company’s suitability for continued listing. It was this sequence
31 of events which prompted the presentation of the winding up petition.
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33 4. The petition was presented on the grounds that Dr Juang was acting in a manner which
34 was oppressive and unfairly prejudicial to the Company’s shareholders and that the
35 Company’s articles of association prevented its shareholders from requisitioning a
36 meeting and had the effect of entrenching Dr Huang’s effective control, with the result
37 that there would never be any transparently independent investigation of the fraud
38 allegations. The Petitioner asserted that it had justifiably lost confidence in Dr Huang to
39 manage the Company’s affairs in the best interests of its shareholders. The Petitioner
40 made an application for the appointment of provisional liquidators on the basis that there
41 was a real and urgent need for the investigation to be concluded under independent
42 supervision. Mr Robin Hollington QC put the Petitioner’s case in this way –
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44 “So, in our submission, this is a very unusual case, where it is manifestly in the interests of
45 the shareholders, that provisional liquidators be appointed, because to appoint them will reassure

1 the market that the investigation is transparently independent. And secondly, if successful, the
2 winding up order will be avoided.”
3

4 Counsel asked that no directions be given for the trial of the petition until after the
5 investigation was completed. Assuming that the investigation would exonerate Dr Juang
6 and other senior management from any involvement in fraud or other wrongdoing, he
7 contemplated that the Petitioner would seek alternative relief in the form of constitutional
8 changes which would enable directors to be removed from office by an ordinary
9 resolution of the shareholders, whereupon the Petitioner would invite the Court to return
10 the Company to the control of its shareholders and discharge the appointment of
11 provisional liquidators.
12

13 5. The Petitioner's application for the appointment of provisional liquidators was heard on 7
14 June 2013 and determined on the basis of lengthy affidavit evidence filed on behalf of
15 the Petitioner and the Company. Dr Huang made two affirmations in which she
16 explained why she had refused to resign. She described herself as public face of the
17 Company and considered that her resignation would trigger a loss of confidence
18 amongst its customer base. She also made the point that her resignation would have
19 constituted an event of default under a secured loan agreement. Having considered the
20 submissions of counsel for both parties I concluded that the Petitioner had made out a
21 *prima facie* case for making a winding up order and that it was necessary to appoint
22 provisional liquidators, otherwise a transparently independent investigation of the
23 allegations made against the Company and its senior management would not likely be
24 possible. I made an order that the Petitioner's costs of this application be paid out of the
25 assets of the Company. The Company did not seek leave to appeal against this
26 decision.
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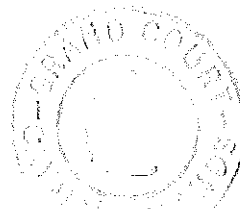
28 6. The Order for the appointment of provisional liquidators contemplated that the
29 investigation would be completed under their supervision, but this did not happen
30 immediately. For the reasons explained in their First Report dated 5 July 2013, the
31 Provisional Liquidators concluded, contrary to evidence filed on behalf of the Company,
32 that the Company and the Group was in fact cash flow insolvent. There was no available
33 cash with which to pay the fees necessary to complete the investigation. This
34 unexpected turn of events led the Court to take the unprecedented course of directing
35 provisional liquidators who had been appointed on a contributory's petition in respect of
36 an apparently solvent company to undertake a financial restructuring exercise with a
37 view to avoiding an insolvent liquidation. By an Order made on 22 August 2013 on the
38 application of the Provisional Liquidators themselves, they were directed to “focus the
39 exercise of their powers to performing functions which, in their reasonable opinion, are
40 required to facilitate the financial and operational restructuring of the of the Company
41 and its subsidiaries and affiliates (together “the Group”) and enable the Group to
42 continue as a going concern ...”. The Company's board of directors did not consent to
43 the continuation of the provisional liquidation as if it had been commenced on the



1 application of the Company under section 104(3), but the proceeding did in fact continue
2 on this basis with their co-operation.
3

4 7. Having secured interim funding, an order was made on 13 November 2013 by which the
5 Provisional Liquidators were authorized to re-commence and complete the investigation
6 previously being undertaken by the Audit Committee and to engage the services of legal
7 counsel and forensic accountants for this purpose. The investigation was completed and
8 a report was delivered on 20 February 2014. The investigators concluded that there was
9 insufficient evidence to substantiate the original allegations of fraud against the
10 Company's management in relation to its acquisition of Changsha School and
11 insufficient evidence from which to conclude that any witnesses had been subjected to
12 acts of retaliation by management. The investigators found that the process surrounding
13 the Company's disposition Suzhou College was not conducted with the level of oversight
14 and review by the Company's board of directors, legal and finance teams that one would
15 expect from a US-listed company following best practice, but this finding was considered
16 to be of less importance. The key finding was that there was insufficient evidence from
17 which to substantiate the allegations of fraud. On this basis, the Provisional Liquidators
18 were able to conclude a restructuring agreement which included a revision of the
19 Company's articles of association so as to prevent management from dominating the
20 board of directors. By an Order made on 5 May 2014 the Court sanctioned the execution
21 by the Provisional Liquidators of a restructuring agreement. On 13 May 2014 the
22 Provisional Liquidators were discharged from the performance of any further duties and
23 the petition was formally dismissed.
24

25 8. The conclusion I draw from this sequence of events is that the Petitioner should be
26 characterized as having succeeded on its petition. It made out a prima facie case for
27 making a winding up order and succeeded in having provisional liquidators appointed.
28 The investigation was concluded under the supervision of the Provisional Liquidators
29 and the Company's articles of association were amended, albeit as a term of the
30 restructuring agreement rather than by order of the court following upon the adjudication
31 of the petition. However, in my view there are exceptional and special circumstances
32 which justify making no further order for costs in favour of the Petitioner. First, the
33 Petitioner has the benefit of an order for the costs of the application to appoint
34 provisional liquidators in any event. Second, the nature of the proceeding changed as a
35 result of the order made on 22 August 2014. Thereafter, the proceeding was driven by
36 the Provisional Liquidators as if they had been appointed on the application of the
37 Company under section 104(3). In these circumstances I think that all questions about
38 the incidence of costs could and should have been considered in respect of each
39 individual application made in the provisional liquidation in accordance with GCR order
40 24, rule 9. I do not think that it is appropriate for the costs of these applications to be
41 swept up in an order for the costs of the proceedings as a whole, especially when the



1 Court never gave any directions for the trial of the petition. It follows in my judgment that
2 it is now appropriate to make no order for costs.
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4 9. As a pre-condition to ordering an enquiry as to damages, the Company must establish
5 that the Petitioner was not entitled to an order for the appointment of provisional
6 liquidators. In the events which have happened, it is not now open to the Court to make
7 such a finding. The Court's determination that the Petitioner was entitled to an order for
8 the appointment of provisional liquidators was made on an *inter partes* application
9 following full argument by both sides. The Company did not seek leave to appeal. The
10 Court's finding that the Petitioner had made out a *prima facie* case for a winding up order
11 still stands. Nor did the Company seek leave to appeal against the order made on 22
12 August 2013. The petition was dismissed, without having been adjudicated, as a result
13 of the Court's order to sanction the Provisional Liquidators' decision to enter into the
14 restructuring agreement. In these circumstances it is not now open to the Court to
15 entertain a proceeding for the purpose of determining whether or not the Petitioner
16 would have been able to establish a case for the grant of a winding up order if the
17 petition had been tried on its merits. The proceeding was conducted on the basis that
18 the Petitioner was entitled to an order for the appointment of Provisional Liquidators and
19 the proceeding came to a conclusion as a result of the Court's decision to sanction the
20 restructuring agreement promoted by the Provisional Liquidators. In my judgment this
21 this sequence of events leads to the conclusion that the Petitioner is entitled to be
22 released from its undertaking.
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24 Dated the 15th day of July 2014

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The Hon. Mr. Justice Andrew J. Jones Q.C.
JUDGE OF THE GRAND COURT

