JULY 2024

UPDATE

TYR Capital Partners SPC Ltd: Grand Court dismisses winding up petition due to 'crystal clear' non-petition clause

Update prepared by Nicholas Fox and Adam Barrie (Cayman Islands)

On 21 June 2024, the Court dismissed a just and equitable winding up petition on the basis that the petitioner was contractually bound not to present a petition. This case provides guidance on the approach the Court will take when construing the terms of a contract. The Court will adopt the natural and ordinary meaning of the words in their overall documentary, factual and commercial context.

Background

Tyr Capital Partners SPC Ltd (the **Fund**) applied for an order that the winding up petition presented against it by TGT GP (the **Petitioner**) in its capacity as general partner of TGT LP be struck out. The application was made pursuant to section 95(2) of the Companies Act (2023 Revision) (the **Act**) on the ground that the Petitioner was contractually bound not to present a winding up petition against the Fund.

Section 95(2) of the Act provides:

> "*The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.*"

The Petitioner subscribed for non-participating shares (the **Initial Shares**) in the Fund by way of a subscription agreement dated 27 December 2021 (the **Agreement**). Clause 21 of the Agreement, as far as relevant, provided:

> "***Non-Petition***. *The Investor agrees that it shall not, under any circumstances… institute against the Fund… any… liquidation proceedings under any Cayman Islands law…*".

A further subscription for a different class of shares (the **Second Shares**) was made under a separate subscription agreement on 29 June 2022 (the **Second Agreement**), under which, the non-petition clause was identical.

On 30 November 2022, pursuant to the Fund's Articles, the Fund converted some of the Petitioner's Initial Shares which were exposed to the FTX cryptocurrency Chapter 11 bankruptcy proceedings in the US into a separate non-redeemable class of shares (the **FTX Special Investment Class**). The conversion was effected by redeeming the relevant Initial Shares and then the FTX Special Investment Class shares. There was no new subscription agreement governing those new FTX Special Investment Class shares.

Decision

Construction of contracts

The judge examined in detail the relevant principles to be applied when construing a contract.[1] The Court is tasked with identifying the intention of the parties by reference to "*what a reasonable person having all the*

[1] *In the Matter of Tyr Capital Partners SPC Ltd* (Unreported, 21 June 2024) at [15].

background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".[2]

There must be a focus on the meaning of the relevant words, in their documentary, factual and commercial context. This is assessed in the light of:

- the natural and ordinary meaning of the clause;
- any other relevant provisions of the contract;
- the overall purpose of the clause and the contract;
- the facts and circumstances known by the parties at the time the contract was executed; and
- commercial common sense, albeit disregarding subjective evidence of the parties' intentions.[3]

The arguments regarding construction of this contract

The Company argued that the non-petition language was clear. As properly construed, it prevented the Investor (i.e. the Petitioner) from instituting liquidation proceedings. It was argued that, as such, the winding up petition fell to be dismissed.

For its part, the Petitioner pointed out that both the Agreement and the Second Agreement contained identical non-petition clauses. It argued that if the non-petition clause in the first Agreement was properly to be construed as applying to *all* shares held by the Petitioner, both at the date of the Agreement and at all points in the future, then the non-petition clause in the Second Agreement would have been otiose which (they argued) it clearly was not. The Petitioner argued that it is common practice for Investment Funds to have each new share subscription be subject to its own subscription agreement, and that the terms of such agreements (and, thus, such subscriptions) could vary. For example, some might contain non-petition clauses, some might not. They argued that, on this basis, one possible construction open to the Court was that:

- the Agreement applied to the Initial Shares only;
- similarly, the terms of the Second Agreement applied to the Second Shares only; and
- the FTX Special Investment Class shares, which had not been issued under any subscription agreement, were accordingly not held pursuant to any binding agreement containing a non-petition clause.

It was the Petitioner's case that, accordingly, there were the two different potential constructions of the nature and effect of the clause in the Agreement. When considering those rival constructions, the Court should have regard to which construction made more commercial common sense. The FTX Special Investment Class shares were non-redeemable. It was therefore unlikely that a reasonable commercial person would have agreed to accept such shares on terms that prohibited a winding-up petition from being brought in respect of them, as that would mean that such a shareholder would have no exit route from the Fund (being both unable to redeem those shares or bring a winding-up petition as a holder of them).

Construction of this contract

The Court disagreed with the Petitioner and held that there was no reason to depart from the natural and ordinary meaning of the words of clause 21 of the Agreement. The Agreement was drafted and agreed between sophisticated legal entities and made it *crystal clear* that the Petitioner abandoned its statutory right to present a winding up petition against the Fund.[4]

The Court held that the non-petition clause in the Agreement did not only apply to the Initial Shares, but to all shares held by the Petitioner. A key basis for this conclusion was that '*Investor*' was defined in the Agreement as the '*undersigned*'. Accordingly, the Court held that the non-petition language was not limited to the type of shares subscribed for under the Agreement.

---

[2] Ibid. citing *Arnold v Britton* [2015] UKSC 36 at paragraph 15 applying the dicta of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at paragraph 14 and of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21.

[3] *Arnold v Britton* at paragraph 15.

[4] *In the Matter of Tyr Capital Partners SPC Ltd* (Unreported, 21 June 2024) at [77] and [99].

In disagreeing with this argument, the Court not only relied upon the wording of the Agreement, it also concluded that it could not "*... take the Second Agreement into account when construing Clause 21 of the Agreement, as it post dates the Agreement.*"[5] The Court held: "*... in construing Clause 21 in the Agreement it is not permissible for this court to have regard to the subsequent Second Agreement. This would offend a primary rule of contractual construction namely that the court may only have regard to the circumstances before and at the time of the contract and not as Lord Hodge powerfully reiterated in National Commercial Bank Jamaica at paragraph 32: "... events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation...*"".[6]

The Court found that the Petitioner signed up to clause 21 with the knowledge of the possibility under the Fund's articles that non-redeemable special investment shares could be issued to the Petitioner in the future. If it was intended by the parties that clause 21 was confined to specific investments, it was open for them to expressly say so, but they did not.[7]

Just and equitable

The Petitioner advanced two alternative arguments, the first being that the Court has the power under its just and equitable jurisdiction to allow a party to disregard the terms of a non-petition clause if the circumstances of the case are such that it would be an improper exercise of the powers of the directors of the Fund to rely on such a clause.[8]

The judge rejected this argument as it would clearly contravene the express statutory recognition of non-petition clauses under section 95(2) of the Act. The judge supported this conclusion with reference to the dicta of Lord Hodge in *FamilyMart China Holdings v Ting Chuan* [2023] UKPC 33 at paragraph 89 that "*in the exercise of this equitable jurisdiction the court must have regard to a party's contractual obligations...*".[9]

Alternative relief

The Petitioner also argued that the relief available under section 95(3) of the Act should fall outside the scope of clause 21. Pursuant to section 95(3), the Court can, as an alternative to a winding up order, make orders regulating the conduct of the company's affairs in the future and require the company to refrain from doing any act complained of by the Petitioner.

This was also rejected by the judge on the basis that the only way in which the Petitioner can seek section 95(3) relief is by first presenting a winding up petition by way of petition under section 94(1), which says "*An application to the Court for the winding up of a company shall be by petition presented either by -... (c) any contributory or contributories...*". This would clearly contravene clause 21.

Comment

The construction issue in this case was not straightforward, and the Court applied commendable thought and analysis to it.

The conclusion that the Court reached is clearly one that was open to it, and is on any view, a sensible construction of the clause in question. It is a fair observation that, if the parties' intention had been to confine the effect of the Agreement to the Initial Shares, then they could have done so easily, with relatively modest and straightforward changes to the wording of the Agreement.

On the other hand, it is notable that the conclusion reached expressly discounted the existence of (i) the Second Agreement, and (ii) therefore the question of the intended nature and effect of the Second Agreement and the identical non-petition clause within it. That then raises the question of whether the result of this case would have been different if the Second Agreement had been entered into before the Agreement.

---

[5] Ibid. at [89].

[6] Ibid. at [84].

[7] Ibid. at [82] and [83].

[8] The Petitioner relied on *Re Aquapoint LP* (Unreported, 4 October 2023) where the Court of Appeal held at paragraph 66 that reliance on the entire agreement clause in that case would be inconsistent with the free-standing duty to act in good faith.

[9] *In the Matter of Tyr Capital Partners SPC Ltd* (Unreported, 21 June 2024) at [103].

Moreover, the Petitioner's argument that each issuance of shares was always intended to be governed by its own terms contained within its own subscription agreement is supported, at least to some extent, by the Fund's Offering Memorandum, which stated that the Fund "... *may accept Subscriptions at closing and normally completed Subscription Documents (including a Subscription Agreement) with respect to any initial* ***or additional*** *Subscriptions...*" [emphasis added].[10]

For those reasons, it is possible to have some measure of sympathy for the Petitioner. Whilst its preferred construction was not adopted by the Court, which found no reason to go beyond the natural and ordinary meaning of the words used, it can be appreciated why the Petitioner viewed itself as having an argument worth making.

This case serves as a reminder that the purpose of contractual construction is to ascertain the objective meaning of the language agreed between the parties and it is not the role of the Court to relieve a party from the consequences of a bad bargain. It also emphasizes the importance of ensuring, at the outset, that parties to a contract ensure that the language used reflects their actual intentions.

Contacts

Nicholas Fox
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9268
nicholas.fox@mourant.com

Adam Barrie
Senior Associate
Mourant Ozannes (Cayman) LLP
+1 345 814 6346
adam.barrie@mourant.com

[10] Ibid. at [60].