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Insolvency & Restructuring - Nigeria

Alan Dick: Bridging the Gap between Domestic and Cross-Border Best Practice

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The Federal High Court in Lagos recently ruled on the amended winding-up petition brought by Diamond Bank Plc against Alan Dick and Company West Africa Ltd (ADWA).⁽¹⁾ The court ordered the winding-up of ADWA and appointed two Nigerian insolvency practitioners as liquidators and the committee of inspection (made up of representatives of creditors to ADWA). The ADWA winding-up petition may chart a course for Nigerian insolvency practitioners to take advantage of the Cross-Border Insolvency Regulations to trace assets of an insolvent company located or stashed in foreign jurisdictions and the more efficient and robust UK provisions regarding the liquidator's powers to examine the UK-based directors of an insolvent company, and possibly call for the directors' contribution to liquidating the debts of the local insolvent company under Section 214 of the UK Insolvency Act 1986 on wrongful trading.

Background

ADWA was a special purpose vehicle incorporated in Nigeria in 2001 on behalf of Alan Dick UK, with cross-directorship between the two companies (UK-based directors, most of whom were also UK nationals). The company was established to carry out business design and manufacture of communication and electronic equipment, as well as field survey, site selection and path planning equipment, project management and system maintenance for telecommunications service providers. Aside from paid-up capital and office assets (eg, general office equipment and official cars), the company's assets consisted mainly of stock in trade and receivables resulting from contracts with MTN Communication Nigeria Limited, one of the largest global system for communications providers in Nigeria.

ADWA took out loan facilities of over £20 million from Diamond Bank Plc, secured by domiciliation of all ADWA's contract proceeds and a letter of comfort from Alan Dick UK. A similar loan amount was also taken from Zenith Bank Plc. When it became clear that ADWA was unable to meet its commercial obligations to employees, suppliers, bankers, tax authorities and other third parties, ADWA's bankers (which included the substituted petitioner Diamond Bank Plc)

held several meetings with the company, seeking to achieve a debt-to-equity restructuring arrangement. However, ADWA's directors surreptitiously initiated and superintended a compulsory winding-up process on behalf of ADWA, purportedly under the Nigerian Companies and Allied Matters Act 1990.

Challenges

The bank's immediate challenge as a major creditor was the fact that the directors who had fled the jurisdiction had brought the winding-up. If the winding-up was controlled by the company's directors, the most viable asset of the company (which may have been the claims available against those directors) may have been compromised. There were grounds to believe that a substantial portion of the company's funds and assets had been either repatriated to the United Kingdom or converted into foreign assets acquired by the directors, who had refused to submit to the Nigerian courts' jurisdiction. Therefore, it was difficult to examine the directors, especially as the winding-up proceeding was at the instance of the directors. The directors were hiding behind the façade of voluntary winding-up to evade their obligations to creditors.

Petitioner's Strategy

There were three hurdles to overcome. The first was to wrest the winding-up proceedings from ADWA's control through an application to substitute Diamond Bank as petitioner, on the grounds that it was inappropriate for ADWA to be the petitioner as the directors had not met the statutory conditions for members' voluntary winding-up (which required a special resolution by the directors that the company was solvent prior to the proposed winding-up, as well as registration of the company's latest statement of assets and liabilities).⁽²⁾

The second task was to manage the interests of the various creditors, as there seemed to have been a conflict between trade creditors and the major financial providers (eg, Diamond and Zenith Bank). Creditors' meetings were held and it became clear that their interests were ultimately the same. Unity of purpose was achieved through nominations to the committee of inspection, which represented the three groups of creditors.

The third task was to leverage on the powers of the liquidator to follow up on the assets of the company both within and outside of the Nigerian jurisdiction by taking advantage of domestic and cross-border insolvency regulations to examine the UK-based directors⁽³⁾ and the UK-based parent company, and cause the directors personally to contribute to offsetting the liabilities of the insolvent Nigerian company.

The bank was successfully substituted to ADWA on December 17 2008, mainly on the strength of the incompetence of the petition by the company. The creditors were able to unite in their cause to trace the assets and funds of the company through an agreement reached over appointment of prospective representatives for the committee of inspection and the emergence of neutral liquidators.

The result of the agreement was that a winding-up order was obtained within 24 hours of the petitioner and two liquidators being appointed on January 27 2009.

Comment

The Alan Dick Case offers contentious insolvency practice a unique opportunity to use UK cross-border insolvency provisions to follow up on an insolvent company's assets in foreign jurisdictions and to call UK-based directors to account. The Nigerian proceedings and the powers of the liquidators would be recognized and enforceable in the United Kingdom, subject to an application for recognition of the foreign proceedings and the foreign representative (according to Articles 21 and 23 of the Cross-Border Insolvency Regulations). The regulations offer Nigerian liquidators the opportunity to pursue directors under Section 214 of the UK Insolvency Act 1986, which mirrors Section 506 of the Companies and Allied Matters Act 1990. The act creates an alternative liability test of reckless trading or intent to defraud. This domestic provision is untested in contentious insolvency proceedings in Nigeria. It will therefore be interesting to observe the outcome of the ongoing proceedings being initiated by the Nigerian liquidators in the United Kingdom.

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Endnotes

- (1) Suit No FHC/L/CP/654/08.
- (2) See Chapter 3, Part XV of the Companies and Allied Matter Act 1990 on members' voluntary winding-up, in particular the Section 462 requirement.
- (3) Sections 423 and 450 of the Companies and Allied Matters Act 1990 relate to the powers of the liquidator and the court to examine those in control of the company. Article 21 of the cross-border insolvency regulations relates to the powers of liquidators to examine witnesses and obtain information concerning the debtor's assets, records, company books and minutes.

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