No. 2651 of 2007

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

IN THE MATTER OF AMWAY (UK) LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N:

THE SECRETARY OF STATE FOR BUSINESS ENTERPRISE

AND REGULATORY REFORM

Petitioner/Appellant

and

AMWAY (UK) LIMITED

Respondent

GROUNDS OF APPEAL

---

1. The decision of the Learned Judge to dismiss the petition presented by the Appellant for an order that the Respondent be wound up pursuant to the provisions of the Insolvency Act 1986 ("the Petition") was wrong in law and/ or a wrong exercise of discretion in view of the correct findings made by him about the Respondent and its conduct:

   1.1 The Learned Judge correctly found that:

      (a) the Respondent had encouraged others to undertake recruitment to its business in a way which it knew could not be adequately supervised or regulated and for which it provided no training [para 54(l)];

(b) misstatements and misrepresentations had been made in the course of the process of recruiting participants to the Respondent's trading scheme [para 54(l)];

(c) the Respondent could not "reap the benefit of such misstatements or misrepresentations without accepting the proper consequences flowing from the means by which that benefit was obtained" [para 54(l)];

(d) the Respondent had "permitted itself to be surrounded with a penumbra of impropriety and took the advantages to its business thereby gained" [para 54(l)];

(e) the Respondent had run its business "in such a way that it encourages wrongdoing by others" and that running a business in such a way was a "determining factor in the balance" [para 54(l)];

(f) the Respondent had failed to manage its business in a way that accorded with generally accepted minimum standards of commercial behaviour [para 54(j)];

(g) the Respondent had failed to prevent false and deceptive descriptions being given of what its business opportunity offered [para 54(l)];

(h) the Respondent had failed properly to address the manifest risk that recruits to its business had been induced by false and deceptive statements to participate in its trading scheme [para 54(l)];

(i) the Respondent had made no proper income disclosure [para 61];

(j) the Respondent had conducted business in such a way that had it not, under the spur of the presentation of the Petition, revised its business model and offered undertakings to the Court as to the future conduct of that model it was just and equitable that the Respondent should be wound up [paras 48, 53-54 and 61].

1.2 Having correctly made those findings the decision of the Learned Judge not to order that the Respondent be wound up was inconsistent with the approach

set out by the Court of Appeal in *Re Walter L Jacob & Co Ltd* [1989] BCLC 345 and was wrong in law.

1.3 Further or alternatively, having made the findings set out above the Learned Judge:

(a) failed to give proper or sufficient weight to those findings;

(b) gave undue weight to the revised business model adopted by the Respondent;

(c) failed to give proper or sufficient weight to the fact that (as found by the Learned Judge) the real spur for the adoption of that model was the presentation of the Petition.

If the Learned Judge had given proper weight to the matters aforesaid he would and should have ordered that the Respondent be wound up.

2. Further, the decision of the Learned Judge to dismiss the Petition on the basis of undertakings offered to the Court by the Respondent during the course of its Counsel's closing submissions ("the Undertakings") was wrong in law and/ or a wrong exercise of discretion:

2.1 The Learned Judge held, correctly, that:

(a) Any revised business model adopted by a company against which a petition has been presented under section 124A of the Insolvency Act 1986 should be, among other things, "capable of effective and ongoing implementation without the supervision of either the Secretary of State or the court" [para 11].

(b) The Appellant "is under no obligation to approve or police a scheme of undertakings relating to the conduct of an individual company's business" [para 10(c)].

2.2 However:

(a) The Undertakings were not (and are not) acceptable to the Appellant.

(b) The Undertakings were offered and given to the Court, not to the Appellant.

(c) For the Undertakings to be effective they require supervision and policing.

(d) The Court has no means of supervising or policing the Undertakings.

(e) The Undertakings are therefore incapable of any or any effective ongoing supervision or policing.

(f) In the circumstances, the revised business model of the Respondent did not (and does not) meet the necessary standard which the Learned Judge correctly found should be attained so as to be worthy of consideration at the hearing of a petition [para 11].

2.3 The decision of the Learned Judge to accept the Undertakings was inconsistent with (a) previous authority on the disposal of petitions on undertakings (*Re Bamford Publishers Ltd*, 2 June 1977, unreported; *Re Supporting Link Alliance Ltd* [2004] 2 BCLC 486); and (b) the Learned Judge's own correct findings as to the necessary prerequisites for any revised business model, and was wrong in law.

2.4 Further or alternatively, in deciding to dismiss the Petition on the basis of the Undertakings the Learned Judge failed to give sufficient or proper weight to the matters set out in paragraphs 2.1-2.3 above. If the Learned Judge had given sufficient or proper weight to those matters he would and should have ordered that the Respondent be wound up.

3. The decision of the Learned Judge to dismiss the Petition was made after serious procedural irregularities which caused that decision to be unjust. In particular:

3.1 The Learned Judge incorrectly held that the Appellant "did not subject the [Respondent's] new business model to a detailed critique". In fact, the Appellant subjected the said business model to such a critique in the second affidavit of Mr Luke Steadman sworn on 20 November 2007, his Skeleton Argument, his oral opening submissions and his oral closing submissions. No or no adequate reference was made by the Learned Judge to that critique.

3.2 The Learned Judge held that it was not open to the Appellant to submit that the Court could not trust the management of the Respondent. Such a holding was inconsistent and incompatible with: (a) the Learned Judge's correct finding that the management team putting forward the proposals as to future conduct had failed properly to supervise the business in the past, and (b) of the Learned Judge's findings, on an interim application heard during the course of the trial, that:

> "... I regard it as a significant ground for not admitting this evidence that there is an express recognition by Amway that it does not say before this court that its business has a reputation for integrity or is one about which no complaints are made." (Page 5, lines 19-23)
>
> "... part of [the Respondent's] new business model provides to prospective business owners a document, one section of which is headed, "A company you can trust", and which trumpets the fact that Amway has simple shared values which guide its actions and enable it to achieve everything it is capable of without compromise or harm, including "integrity", "respect", "trust", "credibility", "treating people fairly" and "giving [them] opportunities to reach their full potential"."
>
> "Nonetheless [Counsel for the Respondent] has made as clear as can be that those are not contentions which Amway will seek positively to establish before the court. It will not seek to persuade the Court that it is as it describes itself to prospective participators. I am to be invited to approach such statements as entirely neutral. They may or may not be accurate: Amway does not assert that they are" [page 6: lines 3-19].

3.3 During the Appellant's closing submissions the Learned Judge correctly stated, in the context of the possibility of disposing of the Petition on undertakings, that the choice he was faced with was "either to wind the company up or dismiss the petition, there is no middle way". The Learned Judge having correctly and properly indicated that he was not considering disposal of the Petition on undertakings, Counsel for the Appellant stated that he would move on in his submissions, thereby not addressing the Court further on the inadequacy and inappropriateness of the Undertakings ("the middle way"). The course ultimately adopted by the Learned Judge, namely disposal of the Petition on undertakings, was therefore: (a) one which the Learned Judge had expressly stated he was not considering; and (b), as a

direct result of that statement, one on which the Appellant did not address the Court as fully as he otherwise would have done.

It is the Appellant's contention that the matters set out above, which the Learned Judge did not refer to or address in his judgment, were serious procedural irregularities which caused the decision to dismiss the Petition on the Undertakings to be unjust. Further or alternatively, in exercising his discretion not to order that the Respondent be wound up the Learned Judge wrongly failed to give any or any sufficient weight to the matters set out above. If the Learned Judge had given any or any sufficient weight to those matters he would and should have ordered that the Respondent be wound up.

4. The Learned Judge was wrong not to make any findings as to whether the business model operated by the Respondent prior to presentation of the Petition was an unlawful lottery contrary to section 1 of the Lotteries and Amusements Act 1976. Had the Learned Judge made such findings he should have found that the business model was an unlawful lottery and that that was a material factor in determining that it was just and equitable that the Respondent be wound up.

5. The Learned Judge was wrong in law to find that the business model operated by the Respondent prior to presentation of the Petition did not constitute an unlawful trading scheme in contravention of section 120(3) of the Fair Trading Act 1973. The Learned Judge should have found that the said business model did constitute such an unlawful trading scheme and that that was a material factor in determining that it was just and equitable that the Respondent be wound up.

6. Even if (contrary to the Appellant's case) the decision of the Learned Judge to dismiss the Petition was not wrong and/ or vitiated by serious procedural irregularity, his decision that the Respondent should pay the Appellant's costs of the Petition only up to 20 November 2007 and that the Appellant should pay the Respondent's costs thereafter was wrong as a matter of law because in the exercise

of his discretion he failed to give proper or sufficient weight to the following facts and matters:

6.1 The Learned Judge's (correct) findings that the Appellant "is not a licensor of approved business models or a business design consultant", that his officials had "exhibited an appropriate degree of caution in entering into any form of negotiation with the [Respondent's] management" and that he "is under no obligation to approve or police a scheme of undertakings relating to the conduct of an individual company's business."

6.2 The Learned Judge's (correct) findings that the Appellant's investigation and presentation of the Petition were "a sufficient salutary lesson" to the Respondent and a "clear warning to its peers that if the risks warning to its peers that if the risks inherent in the multi-level model are not rigorously followed then serious and expensive consequences follow". It is the Appellant's contention that the costs order made by the Learned Judge is inconsistent with and serves to dilute the said salutary lesson and clear warning.

6.3 The dismissal of the Petition was expressed to be contingent upon the giving of the Undertakings and:

6.3.1 Undertakings were only offered by the Respondent to the Court during the course of its Counsel's closing submissions.

6.3.2 One of the undertakings so offered was not to recruit new Amway Business Owners until the Respondent had published earnings data in accordance with a specified income disclosure policy. As the Learned Judge correctly held (para 57(e)), "[The Respondent's] evidence in fact resisted the idea of unilateral income disclosure...and the unconditional offer of income disclosure was in fact only made at trial".

6.3.3 One of the Undertakings, namely to maintain an induction programme for new Amway Business Owners, was not in fact offered by the Respondent but was required by the Learned Judge [para 62].

6.3.4 The undertakings given to the Court by the Respondent on 21 May 2007 were: (a) given in response to the application by the Appellant for the appointment of a provisional liquidator; and (b) given pending the hearing of the Petition only.

If the Learned Judge had given appropriate weight to those facts and matters he would and should have exercised his discretion so as to order that the Respondent pay the Appellant's costs of the Petition.