In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)
2012 No. 243

IN THE MATTER OF TITAN PETROCHEMICALS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

EX TEMPORE RULING
(in Court)

Date of Hearing: October 18, 2013

Mr. Cameron Hill and Mr. Nicholas Miles, Sedgwick Chudleigh, for the Petitioner

Mr. Mark Diel and Mr. Kevin Taylor, Marshall Diel & Myers Limited, for the Company

Background

1. Before dealing with the substance of the applications before the Court for a winding-up order, alternatively for the appointment of provisional liquidators to displace the management and, in the further alternative, for the appointment of joint provisional liquidators with 'soft' powers, which are opposed by the Company, it is helpful to remember in broad outline the history of the present proceedings.

2. On or about July 9, 2012, Saturn Petrochemical Holdings Ltd., a purported redemption creditor, petitioned to wind-up the Company. On August 13, 2012, the Petition was first heard and thereafter it was adjourned, more or consensually, on several occasions to enable the Company to pursue attempts at a restructuring.

3. On April 29, 2013, the Company filed an application to strike-out the Saturn Petition and on May 10, 2013 the Court ruled that the Petition was liable to be struck-out. The strike-out Order was not made on that date. The matter was adjourned to allow KTL Camden, the present Petitioner, to apply for substitution. And that substitution application was, in the event, granted on July 23, 2013[1].

4. Thereafter the present Petitioner sought the appointment of provisional liquidators and, alternatively, an interim injunction preserving the Company's assets while further and renewed restructuring efforts were pursued. An interim injunction was first granted on August 23 this year. On August 16, 2013 the Petition was adjourned until September 26, 2013 and on September 26, 2013 the Petition was further adjourned to today's date.

5. At a hearing on August 30, 2013, in Chambers I believe, I encouraged the Company to work with the Petitioner to see whether an informal committee of creditors could be established to monitor the restructuring efforts with a view to avoiding the need to appoint provisional liquidators. My reluctance to appoint joint provisional liquidators, even with 'soft' powers, was based in part on the fact that the Petitioner appeared to be the only creditor with positive concerns about management's ability to manage the process. My reluctance was also prompted by concerns to avoid the burden of any unnecessary provisional liquidation costs for a company which appeared, possibly, to be capable of managing the restructuring process without any formal supervision from this Court.

The current state of the proceedings

6. The Petition was heard today and the broad picture which presented itself was that the restructuring process had not progressed at the rate which had originally been hoped. In addition, for reasons that are ultimately in my judgment not decisive, the composition of the informal committee which the Company very properly attempted to put together ended up being not representative of the general body of unsecured creditors at all. It was conceded that all committee members who had agreed to serve were in fact note-holders who were, to some extent at least, secured and therefore had interests which were different to those of the Petitioner and other unsecured creditors.

7. In fairness to the Company, it must be pointed out that it appears that at least one unsecured creditor, which wrote a letter of support which was exhibited to the Fourth

[1] The Company's present attorneys commenced acting only after the May 10, 2013 strike-out Ruling.

Affirmation of Tang Chao Zhang, was happy that the note-holder members on the committee was capable of representing its interests.

8. The other matter of concern to the Court, which presented itself at today's hearing, is that the Court is still very much in the dark, as is the Petitioner, about the broad financial picture. Mr. Diel explained, to some extent, the reason why there appeared to be considerable reluctance about disclosing the identity of creditors and the amounts of their claims: the existence of confidentiality agreements. I accept that the existence of confidentiality agreements is a plausible explanation for this reticence because it is, I think, a notorious fact that investors in China are generally very concerned about confidentiality. So it is not surprising, in a sense, that a company being asked to disclose information, as it were, on a voluntary basis as part of a contested winding-up hearing, has not felt itself able to do so to the extent that might otherwise be the case for a company with a centre of gravity in another part of the world.

9. Be that as it may the Court is left in a position where it is difficult to objectively ascertain the extent to which the committee is indeed able to adequately represent the interests of unsecured creditors. And, indeed, it is unclear what stake the unsecured creditor which has positively supported the committee has in relation to the unsecured creditor pool as a whole.

10. The Company today, broadly, opposed all of the applications brought by the Petitioner and sought an adjournment in order to pursue the presently ill-defined restructuring process. It is not necessarily a cause for cynicism that no restructuring proposal has yet taken shape. Sometimes it is possible to create order out of chaos when the balance of commercial factors is right. But, be that as it may, the present position is that the Company is subject to winding-up proceedings and it is extremely uncertain how the balls that are presently in the air will be aligned when they eventually fall to earth. In these circumstances there is a concern about the need for some kind of independent monitoring of the situation.

Application for an immediate winding-up order and cross-application for an adjournment

11. As far as the application for a winding-up order today is concerned, I have little difficulty in rejecting that application. Mr. Hill referred the Court to various authorities many of which predated the modern corporate rescue period and which I therefore found to be of little assistance. The one authority that he did cite which I consider to be relevant in terms of articulating the principles for dealing with an application to adjourn a winding-up petition was the case of *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633. This was a decision of Neuberger J (as he then was) and at page 638 he summarised the applicable principles as follows:

"*Fourthly, where, as here the battle is between creditors of the company, some in favour of a winding-up order being made and others against it, there is authority for the proposition that a winding-up order will be made if the majority of creditors support the petition , and can only be refused if the majority support the opposition…*

For my part, I would not accept that the mere fact that a majority of creditors support the making of a winding-up order would be an absolute bar in all circumstances to the court refusing a winding-up order. The wording of s 125(1) of the 1986 Act is such, and the winding-up jurisdiction is such…that….the discretion of the court is to be regarded as untrammelled by any absolute rule. Furthermore, in Re Palmer Marine Surveys Ltd [1986] BCLC 106 at 110, Hoffman J said:

> *'Even if the creditors in favour of the continuation of the voluntary liquidation are a minority in value, the court may refuse a compulsory order if there appears to be no advantage to the creditors in making one…'*

None the less, I think it would require a wholly exceptional case before the court would deny a petitioning creditor a winding-up order in circumstances where the majority of creditors supported the making of a winding-up order…" [emphasis added]

12. The difficulty that the Petitioner has in the present case is that there is no or no credible evidence before the Court that the majority of creditors seek a winding-up order.

The application to appoint provisional liquidators with 'full-blown' powers

13. As far as the application to appoint provisional liquidators to displace the management is concerned, the same considerations apply and that application is refused.

The application to appoint provisional liquidators with 'soft' powers

14. The application to appoint joint provisional liquidators with 'soft' powers is in fact based on the Court's powers under section 164 of the Companies Act 1981, in part. Section 164(1) provides:

> "*On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit…*" [emphasis added]

15. Those powers allow the Court to adjourn a winding-up petition to enable a restructuring to be considered and have been exercised in various cases by this Court for more than ten years[2].

16. More narrowly, the provisions of section 170 of the Companies Act dealing with the power to appoint provisional liquidators and, when so appointing them to limit the liquidator's powers[3], gives the Court the power to appoint joint provisional liquidators or a single provisional liquidator with the power, rather than displacing the management of the Company, simply to monitor the management while a restructuring takes place.

17. In this particular instance, the Court has already formed the view that there is the need for some form of independent verification by a representative creditor body of the restructuring process being carried out by the management. The idea of an informal committee was based on the Chapter 11 unsecured creditors' committee which is in the United States a statutory beast. It is clear as a matter of the experience of this Court in dealing with Chapter 11 proceedings in conjunction with Bermuda provisional liquidation proceedings, that not only are such committees solely made up of unsecured creditors. In practice, attempts are made to ensure that such committees are representative of the general body of unsecured creditors taking into account different categories of claim.

18. In this case (the best efforts of the Company notwithstanding), it has not been possible to constitute such a committee. Perhaps the Court was overly ambitious in suggesting this solution because whenever one is dealing with an insolvency proceeding, it is important that whatever structure is adopted to manage the insolvency process finds support in the legislative scheme. The Companies Act of Bermuda presently lacks any express 'administration' powers but the tried and tested approach in this Court has been to appoint provisional liquidators with 'soft' powers to monitor the restructuring process and to assess whether or not the process is in fact being carried out in the best interests of the creditors.

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[2] The seminal judgment laying the foundation for this extensive practice is the judgment of L. Austin Ward CJ (as he then was) in *Re ICO Global Communications (Holdings) Ltd.* [1999] Bda LR 69.

[3] Section 170 of the Companies Act 1981 provides as follows:

"*(1)For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.*
(2)The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.
(3)When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him" [emphasis added].

19. The advantages of such an approach are manifest in the present case because, while the Company may have difficulty in disclosing certain information to the Court by reason of confidentiality agreements, a liquidator appointed by the Court acting as both an officer of the Court and an agent of the Company would be able to gain access to all relevant information, filter it appropriately and report to the Court.

20. And so in these circumstances, having regard to the entire history of these proceedings, I am satisfied that the most prudent course to take in relation to a restructuring process which is extremely intangible and prone to unforeseen risks, is to make an order appointing joint provisional liquidators to monitor the restructuring process.

21. Having said that, in this particular case there are two unusual features. Firstly, Mr. Diel has indicated that there are conflict of interest concerns about the identity of the liquidators proposed by the Petitioner. Those concerns will have to be addressed. Secondly, the concerns that I have about avoiding a wastage of costs have not dissipated and it seems to me that, in the first instance at least, the Court would want to appoint provisional liquidators with very limited powers to take a very high level view of what the position of the Company is and whether or not a restructuring does appear to be seriously possible having regard to the interests of unsecured creditors as a whole.

22. In these circumstances I would need to hear further from counsel as to the precise terms of the provisional liquidation order as well as regarding the identity of proposed appointees. I will adjourn those matters until 2.30 pm this afternoon.

[After hearing counsel the Court rejected the conflict of interest objections of the Company and appointed Mr. Garth Calow and Ms. Alison Tomb of PricewaterhouseCoopers as Joint Provisional Liquidators empowered to, *inter alia*:

> "*(a) review the financial position of the Company and, in particular, to assess the feasibility of any restructuring proposals of the Company;*
>
> *(b) to monitor the continuation of the business of the Company by the existing board of directors of the Company...*".

The Petition was adjourned until December 13, 2013 at 9.30 am.]

Dated this 18th day of October, 2013 _____

IAN R.C. KAWALEY