Neutral Citation Number: [2021] CA (Bda) 16 Civ

Case No: Civ/2022/11

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL/COMMERCIAL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2021: No. 338

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12
Date: 30/09/2022

Before:

THE PRESIDENT, SIR CHRISTOPER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL

- -

IN THE MATTER OF NEWOCEAN ENERGY HOLDINGS LIMITED
AND IN THE MATTEROF THE COMPANIES ACT 1981

Between:

THE HONG KONG AND SHANGHAI BANKING CORPORATION LIMITED
Appellant

- and -

NEWOCEAN ENERGY HOLDINGS LIMITED
Respondent

Kevin Taylor, Walkers (Bermuda) Limited for the Appellant
Keith Robinson, Carey Olsen Bermuda Limited, for the Respondent
Lalita Vaswani, Appleby (Bermuda) Limited, for the Joint Provisional Liquidators

Hearing date(s): 25 July 2022

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APPROVED REASONS

CLARKE P:

1. On Tuesday 26 July 2022 we allowed the appeal of the Hong Kong and Shanghai Banking Corporation ("**HSBC**" or "**the Petitioner**") from the decision of Mussenden J, dated 31 May 2022 (leave to appeal having been granted by the judge on 1 June 2022), and ordered that the Respondent, NewOcean Energy Holdings Ltd **("NewOcean**" or "**the Company**"), a Bermuda company, should be wound up and that the joint provisional liquidators should continue as provisional liquidators with the powers granted pursuant to section 175 of the *Companies Act 1981*, which powers were not to be limited by section 170 (3) of the *Companies Act*, such that the Light Touch Order and the Amended Light Touch Order (see below) were no longer to be in effect. These are the reasons why we did so.

2. NewOcean was incorporated on **19 November 1998**. It is a holding company with a large number of direct and indirect subsidiaries. These carry on business in a number of different fields including the sale and distribution of liquid petroleum gas ("LPG") and natural gas, sales of oil products, sales of electronic products, and property dealing and development. The Company's subsidiaries own an LPG storage terminal, LPG refueling stations, and an oil storage terminal in the People's Republic of China ("PRC"), and the Zhuhai Commercial Property complex ("the Complex"), also in the PRC. The Group also owns vessels, and land in Hong Kong. On **30 July 1999** the Company was listed on the Hong Kong Stock Exchange ("HKSE").

3. In **early 2020** the Company ran into financial difficulties. It entered into negotiations with some of its creditors in relation to the repayment of loans. The Petitioner was a member of a "Core Banks Committee" which commenced negotiations with the Company in about **June 2020**. That Committee expanded into a "**Steering Committee**", with added banks, which negotiated on behalf of over 30 bank creditors for about a year. By **December 2020** two parallel schemes of arrangement were proposed in Bermuda and Hong Kong (the "**Hong Kong Scheme**", the "**Bermuda Scheme**" and, together, the "**Schemes**"). The Hong Kong Scheme was to apply to the Company's wholly owned subsidiary, Sound Agents Ltd **("Sound Agents**"), a Hong Kong company which guaranteed the debts incurred by the Company and the Group to the Bank lenders. The Bermuda Scheme was to apply to the Company.

4. The Schemes were to involve an organised sale of specified assets ("**the Disposal Assets**") the proceeds of which were to be distributed to the "**Scheme Creditors**", which included the Petitioner. The Hong Kong and Bermuda courts ordered the convening of meetings of creditors in their respective jurisdictions on **18 January 2021** to approve the Schemes.

5. The Company proposed that the claims of (most of) the Company's creditors be:

> "*compromised and extinguished under the Schemes and that funds be raised by NewOcean and Sound Agents through a combination of the Group's internal cash flow*

and the organised sale of the Disposal Assets and be distributed to the Scheme Creditors under the Schemes" [1]

In particular, the Company and Sound Agents would ensure that the debts to the "*Core Bank Creditors*" (as defined, including the Petitioner) would be repaid in accordance with a payment schedule[2] which involved payment of 20% of the debts owed to Core Bank Creditors ("the debts") being paid by **30 September 2021** (extendable to **31 December 2021** if holders of 2/3 of the aggregate principal outstanding agreed); 66% of the debts was to be paid by **30 September 2022** (extendable to **31 December 2022** if the Majority Core Creditors, as defined, consented; and 100% of the debts was to be paid by **30 September 2023**. At this stage, the Company was already proposing what amounted to a liquidation of its key assets, rather than some restructuring plan in the traditional sense.

6. The Disposal Assets included the Complex in Zhuhai, PRC, and land in Hong Kong; 11 bunker ships in Hong Kong and Singapore; an oil products storage terminal; a deep-sea oil terminal; an LPG deep-sea terminal, 5 LPG refueling stations and 4 LPG refueling plants. The target disposal dates for each of the assets would take place over a period of 2 years from 30 June 2021 to 30 June 2023 for a total of US$552 million[3]

7. The **18 January 2021** meetings were adjourned for three months because there were ongoing discussions with the Steering Committee. The Schemes were then not pursued due to lack of creditor support, and were effectively withdrawn on **3 May 2021** by the vacation on that date of the dates fixed by the Hong Kong Court for the sanctioning of what was described as the "New Court Scheme" (which had replaced the earlier "Court Scheme").

8. In **June 2021** the members of the Committee formally declared to the Company's bank creditors that the negotiations had been unsuccessful.

The Company's indebtedness to the Petitioner

9. NewOcean was indebted to HSBC on a number of bases. On **30 September 2021** HSBC served a statutory demand on the Company at its registered office for HK$ 5,799,061.20 and US$ 70,646,036.85. The amounts demanded, which included interest, were

(i) HK $ 5.799 million plus US $ 27 million, and US $ 6.3 million, being the sums due under guarantees by NewOcean of loans made to two of its subsidiaries, Sound Agents and NewOcean Resources (Singapore) Pte Ltd ("**NAS**"), under a Facility Letter of 21 January 2020;

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[1] See page 1315 of Exhibit SC-1.
[2] Set out at pages 1326 to 1327 of Exhibit SC-1,
[3] See pages 1332 to 1333 of Exhibit SC-1.

(ii) US $ 7 million due under a Facility Agreement of 25 August 2016 under which HSBC became a lender

(iii) US$ 30.3 million due under a Facility Agreement of 28 May 2018.

The total amount said to be due at the date of the Petition was HK $ 5,433,659.12 and US$ 70,802,320.35.

10. The Company did not pay the amount demanded, or any of it, within 21 days, as a result of which it became deemed unable to pay its debts in accordance with section 162 (a) of the *Companies Act 1981.* None of the amount demanded was paid after the 21-day period.

11. Meanwhile, in **September 2021** the Company had circulated to all its bank lenders the latest draft of its proposal in a form which has been described as "Restructuring Facility Agreement" **("RFA")**[4]**,** referred to as the "*Current Proposal"*. The document is extremely long and complex. It is, in essence, similar to the Schemes and is the proposal that is advanced in these proceedings. It involves a "restructuring" of the debts owed to 31 creditors (banks or funds) party to the scheme, whereby all their debts would become the subject of a syndicated loan due for payment on an Initial Final Repayment Date, being **30 September 2022**. They would, however, become due on an Extended Final Repayment Date of **31 March 2023** if (*inter alia*):

(a) NewOcean had disposed of the LPG Business Assets, the LPG Refilling Plant Assets and the LPG Refueling Station Assets, as defined, together "**the LPG assets**", and used the proceeds to repay the Exposures (i.e. the amounts due to the 31 Original Lenders specified in Schedule 1) to the extent of at least 65% of the amount due together with interest; and had done so by the date of the Extension Request, which was to be given no later than 1 month before the Initial Final Repayment Date; and

(b) that Majority Lenders, as defined, being lenders with loans which were 66.67% in value of total exposure, had notified NewOcean of their consent to the Optional Extension no later than the Initial Final Repayment Date.

12. Under the RFA substantially all of the known assets of the Group with material value would be pledged, and several subsidiaries of the Company would provide guarantees and indemnities. The proposal excluded all but the bank creditors. Thus, even if full payment was made under the scheme, non-bank creditors would not be covered by it. The Company was to realise assets belonging to the Group; the proceeds of disposal were to be received in a "Proceeds Account" and applied to the payments of accrued interest on the Exposures (i.e. the amounts owed to the banks under the term loan agreement to be made available under the Facility Agreement) and the satisfaction of the Company's obligations in respect of those Exposures. This proposal did not commend itself to a significant majority of the Company's bank creditors.

[4] It is, in fact, headed "Facility Agreement",

13. The LPG Assets had been valued as of **June 2020** at US $ 548 million[5]. On **9 November 2021** the Company signed a non legally binding Letter of Intent[6] with a subsidiary of China Huaneng, a PRC state-owned enterprise, providing that the subsidiary would purchase the LPG Assets through the issuance of convertible bonds or preference shares in a company owning the Assets at a range from US $ 270 to 450 million, with a target completion date of before **September 30 2022**. The total Debt at this stage was some US $ 860 million. China Huaneng has now dropped out.

The Petition

14. On **22 October 2021** HSBC presented a petition ("the Petition") to the Bermuda Supreme Court seeking the winding up of the Company on the ground that it was not able to pay its debts and/or that it was just and equitable to wind it up. (The first default in respect of a component of the Debt as defined in the Petition was **2 September 2020** i.e. nearly 14 months before the presentation of the Petition.). The first return date for the hearing of the Petition was **19 November 2021**.

15. On **17 November 2021** the Company filed a notice of motion by which it sought the appointment of its own nominated provisional liquidators on a "light touch" basis and the adjournment of the Petition for 4 months.

16. In his first affirmation of **15 November 2021** Mr Lawrence Shum, the Managing Director of the Company, gave the following picture. The Company was balance sheet solvent, but it had liquidity issues. The Current Proposal for a Scheme of Arrangement was well advanced. The funding requirements for it could be fully satisfied by an orderly disposal of the Company's assets. He referred to the Letter of Intent set out in [13] above ("the LOI"). Five Lenders representing 15.2% of the debts owed by the Company had, he said, seen the LOI and supported the Company's ongoing restructuring discussions, and seven other creditors were in the process of obtaining legal advice regarding the confidentiality terms applying to a review of the LOI. Discussions were in place with 4 lenders who were supportive of the Current Proposal. 16 Lenders amounting to 52.3% of the outstanding claims had said that they needed time to consider the Current Proposal.

17. In his second affirmation dated **18 November 2021** Mr Lawrence Shum said that the Company had the express support of those holding around 20% of the debts; that another 6.9% of creditors (based on value) had expressly stated that they needed more time to consider; and that none of the lenders contacted by the Company had opposed the JPLs' application. The Company had contacted all (it is said) of the creditors of the Company in an email informing them of the winding up petition and the Company's belief that winding up of the Company would be value destructive for all creditors in the light of developments that month in efforts by the Company to sell significant PRC assets to pay back the creditors, which would be undermined by the winding up.

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[5] E/3377
[6] D2/1805

18. One of the responses was somewhat equivocal. Cathay United Bank Company Ltd, a Hong Kong bank, which was owed some 3.5% of the amount owed to creditors, asked for concrete information about the selling, in order for the matter to be discussed with higher management, saying that there would have to be some stronger point - than the proposition that a soft touch approach was always better - to convince management to support the proposal. In fact, it had supported the petition and confirmed its support on **24 November 2021**[7].

19. In the event no creditors appeared at the first, or any subsequent, hearing to oppose the making of a winding up order or communicated any such opposition to the Court or the Petitioner.

20. On **19** and **25 November** and **9 December 20**21 the Petition was adjourned.

21. On **8 December 2021** Mr Leung of Walkers (Hong Kong), who act for the Petitioner, produced evidence that 12 Banks had between 6 and 8 December 2021 confirmed their support of the petition (and opposed the making of a light touch order), holding between them (together with the Petitioner) 63.6% of the debt owed by the Company, taking the figures in the first affirmation of Mr Lawrence Shum which appear to have been of the order of US $ 845.2 million as at November 2021.

The Light Touch Order

22. On **14 December 2021** Mussenden J declined, as he had previously done, to make a winding up order. Instead he made the Light Touch Order sought by the Company but with the joint provisional liquidators ("**JPLs**") whom HSBC had proposed. The Petition was adjourned for nearly 4 months to **8 April 2022**.

23. Under the Light Touch Order the JPLs' powers were to be limited, pursuant to section 170(3) of the *Companies Act*, and were to be exercised by the JPLs acting jointly and severally. The Order included the following provisions:

> "3. *The JPLs shall be empowered to carry out the following functions:*
>
> *(a) to develop and propose a restructuring of the Company's indebtedness in a manner designed to allow the Company to continue as a going concern, with a view to making a compromise or arrangement with the Company's creditors, including (without limitation) a compromise or arrangement by way of a scheme of arrangement;*
> *…*

[7] D3/ 2572

(i) to deal with all questions in any way relating to or affecting the assets or the restructuring of the Company;

…

(l) in relation to the Company, to review and approve any asset disposition of the Company valued at more than US $40 million;

….

4 The directors and officers of the Company shall provide the JPLs with such information as the JPLs may require (whether expressly requested or not) in order that the JPLs should be able to properly carry out their duties and functions and exercise their powers under this Order and as officers of this Honourable Court.

…

7 Notwithstanding paragraph 3 (i) above[8], the JPLs will obtain the prior sanction of this Honourable Court for any disposition of the assets of the Company where the value of those assets is an amount in excess of US $40 m.

…

13 For the avoidance of doubt, no payment or disposition of the Company's property shall be made or affected outside the ordinary course of business without the direct or indirect approval of the JPLs and no such payment or other disposition made or affected by or with the authority of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 166 of the Act.

…

18 Save as specifically set out herein:

(a) the JPLs will have no general or additional powers or duties with respect of the property or records of the Company;

(b) the Board shall continue to manage the Company's day-to-day affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum of Association and Byelaws, subject to the JPLs' oversight and monitoring of the exercise of such powers in relation to matters relating to the ordinary course of business of the Company pursuant to paragraph 3 thereof, and to matters outside the ordinary course of

[8] Semble a mistake for 3 (l).

business of the Company subject to the JPLs granting prior approval of the exercise of such powers…..

(c) in the event that the JPLs and the Board cannot agree upon a proposed course of action outside the ordinary course of the Company's business, the JPLs and the Board have liberty to apply to the Court for directions."

24. The reasons for the **14 December 2021** Ruling were given on **9 March 2022**. In essence the judge decided that there were four "*exceptional reasons*" why the Petition should be adjourned. These were as follows:

1 The Company had not come to the Court at the last moment "*on a wing and a prayer*". It had come before the Court previously for an order in reference to a scheme to restructure as it was balance sheet solvent but with a liquidity issue. This showed that the Company had engaged in significant efforts to restructure to address its financial position and should be allowed to continue to do so. This early engagement with the Court was an exceptional circumstance [37].

2 The Company had put forward the Current Proposal which detailed a restructuring plan and which included a Letter of Intent with a plan to address the current liquidity issues. The appointment of the JPLs amounted to engaging the "*restructuring troops*" as envisaged by Kawaley CJ in *Re Up Energy Development Group Limited* [2016] Bda LR 94 as officers of the court to assist the Company in efforts to restructure. The JPLs could assist the process by dealing with the creditors to determine if there was merit in the Current Proposal. There was no evidence from the creditors that they had given consideration to the Current Proposal. Thus, an adjournment would allow for the JPLs to engage the creditors on the Current Proposal [38].

3 An order to wind up had the potential for "*value destructive consequences*"; and the appointment of JPLs with "*soft touch* "*powers would ensure that the Company maintained the value of its key assets by avoiding such value destructive aspects and the negative impacts of continuing to operate in the PRC under a winding up order*" [39];

4 The judge accepted that a majority of the creditors supported the winding up. On the one hand HSBC and the other creditors indicated that there was no purpose in granting an adjournment as they did not support the appointment of JPLs with "soft touch" powers. There had been previous attempts to restructure and they had not been successful. Their position was "why put off the inevitable?" On the other hand, the Company's position was that it had a current proposal for which it sought creditor support; the effect of the winding up had the potential to be value destructive; and the Company was balance sheet solvent. The Company asked for a "*short adjournment to attempt a restructuring*". [40]

In the light of the several reasons set out above and having considered all relevant circumstances in the case, including "*that the requested adjournment is not for long period of time"* the judge expressed himself satisfied that he should exercise his discretion to grant the adjournment of the Petition and appoint JPLs with a soft touch powers for restructuring [41].

Section 99 of the Companies Act

25. The Current Proposal attracts the application of section 99 (1) of the *Companies Act*. This is not because the creditors covered by it are being asked to accept some form of compromise which involves payment of less than their debt in exchange for some equity interest, or something like that; but because under the RFA the creditor banks are being asked to enter into an agreement under which the debts owed to them would fall to be paid in **September 2022** or **March 2023**. For that reason, any such arrangement would require the consent of 75%, in value terms, of the relevant creditors (namely, in the present case the unsecured creditors).

26. Section 99 of the *Companies Act* provides:

> ***"Power to compromise with creditors and members***
>
> *99 (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them or between a company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.*
>
> *(2) If a majority in number representing* ***three-fourths in value of the creditors*** *or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company."*

27. In essence what is proposed is the sale of assets in order to pay the Company's debts which is a liquidation in all but name, but carried out not by liquidators appointed by the Court but by the Company. It is, as Hargun CJ observed in *In the Matter of Trinity Limited* on 13 August 2021,

something of a misnomer to say that it is a restructuring. In that case a winding up order was made after four adjournments between January and August.

28. The decision of Harris J in *Re Trinity (Management Services) Limited* [2021] HKCFI 2207 is to the same effect. I note, also, that at paragraph 17.32 of Offshore Commercial Law in Bermuda (2nd edition) Kawaley CJ, as he then was, observed that Section 170 of the Companies Act had been used in Bermuda in circumstances when it is considered *'desirable to restructure the affairs of an insolvent company rather than to simply liquidate assets*'.

Events between 14 December 2021 and 9 May 2022

29. Between **14 December 2021** and **8 April 2022** the Company breached the Light Touch Order in a number of ways. The Company refused to meet with the JPLs on a regular basis and insisted that all communications with the Company should be routed through the Company's local HK counsel –Kobre & Kim ("**K & K**"). At the only meeting with the Company's management on 22 December 2021, the meeting was heated and two of the Company's representatives took photos of the JPLs' team at the meeting[9] . In their second Report, see [77] below the JPLs noted that they had asked for a meeting with the Company's management and the Company had agreed to such a meeting but that no indication had been given as to when the meeting would take place.

30. In breach of paragraph 4 of the Light Touch Order the Company failed to provide the JPLs with critical information to enable them (i) to opine on whether the "Current Proposal" was in the interests of the creditors and (ii) to discharge their duties and functions. The information not provided included financial information up to **31 December 2021** and current details about the Company's creditors.

31. In **December 2021** there were multiple resignations of the Company's directors and others. Those who resigned were Mr Lawrence Shum, one of the sons of Mr Shum Siu Hung ("Mr Shum") and Mr Chen Ziniu, who were executive directors; and three of the Company's non-executive directors, who were then replaced. That left only Mr Shum as executive director. Mr Shum, together with his family, controlled over 40% of the Company's share capital. In the first three months of 2021 many of the Group's senior employees resigned including a general manager responsible for overseeing the Group's operations in the PRC[10]. In **January 2022** Mr Cheung Man Kin, the Company secretary resigned and was replaced; and Crowe (HK) CPA Limited, the Company auditor, also resigned. In their report annexed to the 2020 annual report, Crowe had provided a disclaimer of opinion and stated that they were was unable "*to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these consolidated financial statements*". This

[9] C/12/276]
[10] See para 7.7. of the JPLs' first report.

was due to multiple material uncertainties relating to whether the Group could continue as a going concern.

32. On **28 January 2022** the JPLs held an informal (virtual) meeting of creditors of the Company via Zoom. In attendance were the JPLs, individuals from Allen & Overy, the JPLs' legal advisers, and FTI Consulting, the JPLs' financial advisers, and representatives of K & K and of the Company's financial advisor – Oriental Patron. None of the Company's directors attended. There were 61 attendees representing 23 Bank creditors with a total combined debt of US $ 741.2 million.

33. At this meeting, the JPLs' minutes of which are before us[11], and which is addressed in the 3rd affidavit of Mr Tze, the Head of the Special Credit Unit of HSBC, Mr Fung, one of the JPLs, said, *inter alia*, that the JPLs had only been able to meet with the Company's management once - in December. Since then the Company had only been liaising with the JPLs through their legal and financial advisers (K & K and Oriental Patron). Mr Fung provided an update on progress and indicated that, in the JPLs' view, the Company had not been fully cooperative with them. Apart from the RSA the JPLs had been provided with some other ancillary information the majority of which had come in the last few days. They were still missing key information detailing the current cash position, current financial positron, latest management accounts and current group structure. The Company had informed the JPLs about an interested party and other potential bidders for the assets. But the JPLs had no information about who had been running the sale process, and had seen no Information Memorandum that would normally detail the assets for sale, indicative prices and timing of completion of any deal nor any preliminary terms. The Chairman had told the JPLs at the December meeting that the PRC operations had all been currently suspended. From what they had gathered it appeared that the Company was experiencing a liquidity crisis and was reliant on the sale of assets to fix it. The JPLs had attended some calls and meetings with some potential buyers of the Group's assets but the discussions were preliminary. There were no concrete offers or signed formal documentations.

34. Mr Fung observed that the Company was a holding company and any funds required to repay its debts at the company level could only come from repayments of any intercompany debt and the upstreaming of dividends. The JPLs had no visibility as to the financial performance of the numerous operations in the Group. The JPLs needed unfettered access to books and records and co-operation from the Company. The JPLs were of the view that the Company had not fully met what they would have expected in progressing a restructuring. It would appear as if they were not willing to provide the JPLs with the opportunity to facilitate a restructuring

35. Mr Ham of K & K said that the Company wanted to focus the Group as much as possible on the meaningful economic differences in the restructuring discussions to see if an economically reasonable deal could be reached. He wished to solicit feedback from creditors as to the perceived reasons for the prior breakdown in discussions and the required terms, from their perspective, to

[11] E/4275.

obtain support for the scheme; and to invite creditors to reach out to the Company to discuss matters further. Mr Ham stated that the Company first received a sealed copy of the order on **20 December 2021** and the meeting with the JPLs was arranged for 2 days later. The Company intended to repay its creditors by disposing of assets and was committed to selling the LPG assets to repay its creditors by the third quarter of 2022 as per the last restructuring proposal in September 2021, and would like to engage with its lenders in discussions on a bilateral basis (i.e. with individual creditors). That approach was objected to by HSBC and another of the creditors who wished the Company to be transparent to maximise the chances of a successful restructuring. On Mr Tse's evidence the suggestion of communication on a bilateral basis appeared to be intended to exclude HSBC and HASE, the other creditor who objected, from access to relevant information.

36. Mr Joseph Chan of Oriental Patron reported that they had been talking to potential investors in the LPG assets - described as Investors A, B, C, D, E and F. A had dropped out. He had been given to understand that the Company and B had a term sheet in exchange and Oriental Patron was also in discussion with them. Oriental Patron had prepared a term sheet in October 2021 for C, but it had not been signed. Discussion was ongoing. D had ceased discussions. There had been telephone conversations with E and he was given a quote of $ 450 million. (This passage of the minute is unclear and may refer to what Mr Tse described, at [17] of his 3rd Affidavit, namely that a buyer had offered to pay $ 250 million for the LPG Business and its terminal, and that had been rejected because the Company considered that a price range of US 450 to 600 million was reasonable). Investor F, who was Cathay Capital, was willing to speak to the JPLs about a potential deal. He invited the lenders to sign a nondisclosure agreement so that the Company could show details of the asset disposal programme and a restructuring proposal. As is apparent, these discussions were preliminary, and it was not apparent that potential buyers had made any concrete offers or subject to contract agreements or signed any informal documentation.

37. Some of the creditors present, particularly the representatives of Rabobank and Standard Chartered, were very critical of the Company. One of them said that what was being said was highly disappointing, and pointed out that 63.5% of the banks supported a liquidation and expected the Company to work with the JPLs, who had been ignored and sidelined. The Company had been talking about the urgency of sales of assets for the past 18 months and the creditors had only seen broken promises. They wanted the Company to be transparent with the JPLs. The fact that the JPLs were unaware of how much cash the Company had was obviously troubling. Mr Sutton, one of the JPLs, indicated that the next two weeks were going to be important and that if there was no change within the next fortnight the JPLs would go back to Court.

The Share Pledges

38. On **18 February 2022** there were two significant share pledges – the New Soho Share Pledge and the Shangyang Share Pledge. The pledges were not notified by the Company to the JPLs before or after they were made. Nor were they disclosed to the HKSE.

39. As to the former, the Company holds an indirect interest 99.9% shareholding in Zhuhai Chengfu Trade Co. Ltd (**"Chengfu"**), which in turn holds 100% of the shares in Zhuhai Chenghai Trade Co. Ltd ("**Chenghai**"). On **18 February 2022**, Chengfu pledged all of its shares in Chenghai to a company called Zhuhai New Soho Commercial Management Co. Ltd. ("**New Soho**" and the "**New Soho Share Pledge**"). Chenghai holds the Commercial Property Business, which includes the Complex (which is around 9.4% of the Company's asset base).

40. As to the latter, the Company holds an indirect 68% interest in the shares in NewOcean Energy (Hong Kong) Company Limited ("**NewOcean Hong Kong**"), which in turn holds 65% of Baifuyangxinhai Energy (Zhuhai) Co, Ltd ("**Baifuyangxinhai**"). Baifuyangxinhai holds the Oil Products Storage Business (which includes a storage terminal) in Zhuhai in the PRC. On **18 February 2022**, NewOcean Hong Kong pledged its 65% shareholding in Baifuyangxinhai to a company called Shenzhen Shangyang Industrial Co. Ltd ("**Shangyang**" and the "**Shangyang Share Pledge**").

The New Soho Share Pledge

41. In paragraph 16 (d) – (f) of his Fourth Affirmation Mr Shum describes how the New Soho Share Pledge came to be made. On **21 December 2021** the Company had entered into a Letter of Intent with a PRC based limited partnership, Beijing Tianxi Investment Management Center ("**Beijing Tianxi**") for the sale of the Complex[12]. On **16 February 2022** Chengfu, which holds the Complex through Chenghai, signed an agreement with New Soho, a project company set up by Beijing Tianxi. Under that agreement New Soho had what has been described as an option to acquire the Complex by acquiring the shares of Chenghai within 6 months upon the issuance of title deeds and a joint valuation by New Soho and Chengfu. The final consideration was not to exceed 10% of a valuation which was to be carried out. As a prerequisite to the commencement of due diligence Beijing Tianxi required the Company to obtain the title deeds which required, first, the settlement of outstanding construction fees. In order to achieve the liquidity to do so Beijing Tianxi, through Chengfu, paid part of the fees (RMB 10 million) by way of deposit to Chengfu, with an expression of intent to buy the Complex and to provide further payment to settle the construction fees, in exchange for a security interest in Chengfu's shares in Chenghai, which Beijing Tianxi required in order to provide comfort pending completion of the transaction[13].

42. The agreement provided that if Chengfu defaulted it was to pay double the deposit to New Soho and when it did so the pledge would be released. If New Soho did not acquire the Complex within 6 months it would be deemed to be in breach of the Agreement and Chengfu would be entitled to forfeit the deposit and New Soho was to release the pledge. The latter provision would seem to indicate that the agreement constituted more than an option (which, in its terms, it is not expressed to be).

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[12] D3/3092

[13] D3/3094.

The Shangyang Share Pledge

43. In paragraph 21 (h) of his Fourth Affirmation Mr Shum states that the Shangyang Share Pledge was made because Baifuyangxinhai was not in a position to return a pre-paid rental fee which Shangyang had made in respect of 5 of the 10 years' worth of rent due under a lease to it of the oil storage terminal dated 31 March 2021. This had been done in order to free up liquidity. The pledge was made because, as a consequence of the Petition, Shangyang insisted on it in order to secure the liabilities of Baifuyangxinhai (in the event that Baifuyangxinhai breached the lease it could be liable for up to RMB 118 million) and threatened to repudiate the lease, which would be devastating to the resale value of the Terminal, and the Company was not in a position to return the pre-paid rental.

44. Both the Commercial Property Business and the Oil Products Storage Business are assets which the Company seeks to have sold in order to pay off its creditors. The JPLs, who were supposed to be having oversight of the affairs of the Company, were not told that the pledges were to be made and had no opportunity to consider whether what was being done was in the best interests of the Company. Both pledges reduced the value of the Group's interest in the respective assets which may not necessarily be restored in future.

45. The Company contends that these pledges, which were, in my view, outside the ordinary course of business[14] (being a response to abnormal financial difficulties: see *Countrywide Banking Corporation Ltd v Deab* [1998] AC 388; and *Re Freerider Ltd* [2010] 2 CILR 154), were not breaches of paragraphs 3 (i), 7 or 13 of the Light Touch Order because they were entered into by indirect subsidiaries of the Company and not by the Company itself. This may be technically correct but the making of these important dispositions without any prior notice to the JPLs was an approach quite inconsistent with the co-operation and engagement with them which was to be expected of the Company if the Light Touch order was to proceed successfully – which no doubt accounts for the fact that the Company later agreed to add a reference to subsidiaries in the relevant paragraphs of the Order. Further if, as seems likely, the Company used the power given to it by its status as an indirect shareholder in the companies which made the actual pledges, to procure that they did so, there would appear to have been a breach of clause 18 (b) of the Light Touch Order since the procurement of such pledges could not be said to be in the ordinary course of business of the Company[15].

The First Report of the JPLs

[14] The judge appears to have made no decision on that issue.
[15] I would not, however, accept that, if that is what happened, there would have been a disposal of assets by the Company even though the effect of what was done will have reduced the value of the Group's assets.

46. In **March 2022** the JPLs provided their first report to the Supreme Court. On **17 March 2022** Mussenden J ordered that this report ("the **First Report**") and all subsequent reports should be sealed unless the Court ordered otherwise.

47. The First Report was highly critical of the Company. Among the several matters raised in it were the following:

- Paragraph 3.3.

  - "*The Company has not provided the JPLs with any current financial information such as…*" There then followed a list of 6 items of information said to be critical to the JPLs understanding of the Company's financial challenges and to a determination as to whether a restructuring would provide a better return for the Company's creditor than a compulsory liquidation

  - "*The Company has not updated the JPLs on the financial position of the Company after 30 June 2021 but the JPLs have reasons to believe that the Company's financial position has deteriorated significantly since the end of that reporting period*". This meant that the JPLs did not know who all the Company's creditors were and how much they were owed and the JPLs were unaware of whether there were other trade creditors to take into account.

- 3.4.

  - The Company had been reluctant to communicate with the JPLs in relation to the formulation of a further restructuring scheme. The JPLs had inadequate knowledge of the Company's intentions in relation to non-Bank lenders.

- 6.3.

  - "*The JPLs have requested confirmation from Mr Shum and K & K on numerous occasions as to whether a revised RFA or other new restructuring arrangements have been prepared. To date the Company has not provided a response to this request*".

- 7.1.

  - *"it is regrettable that the Company has not afforded the level of cooperation that the JPLs hoped to receive"*

  - *"the Company's apparent restructuring strategy seems to amount to no more than an informal and opaque liquidation process devoid of certainty and transparency on a*

fair and legitimate assets disposal process, with no comfort that the sale proceeds can or will be upstreamed to meet the Company's liability to creditors".

- 7.6.

  - "*The Company has advised the JPLs that it currently does not have sufficient liquidity to maintain a sustainable business and that they are focusing their efforts on disposing the core operational assets of the Group. In summary, the JPLs are concerned that the Company might simply be looking to conduct its own liquidation".*

- 8.3.1.
  - "*As at the time of this report, the JPLs have not been provided with the requested information in any of the six categories of key items* (listed*). The JPLs consider that for any credible restructuring proposal to be formulated, it is critical that the requested information be provided*". Reasons were then given,

- 8.3.4.1

  - "*The Company in its own capacity, essentially has no business and the Group's businesses and assets are operated through its subsidiaries, mainly within the PRC. Thus, the flow of funds in order to repay the debts of the Company in any restructuring could most likely only come from repayments of any intercompany debt and the streaming of dividends. On the basis that operations and assets are held through its subsidiaries, it will be necessary to understand the net asset position and debt levels of the Company's operating subsidiaries, as their debts would need to be provided for before any net funds could be streamed back to the Company".*

  - "*Based on the paucity of information provided, the JPLs cannot assess the Group's ability to support the repayments as currently proposed. The Company is focused on utilising the proceeds from its asset disposals to fund the restructuring. The JPLs are however unable to determine the value, timing and the impact of the disposals given significant parts of the business will cease once the sale is completed…"*

- 12.1.

  - *"The Board of Directors and the Company have not demonstrated any willingness to offer real assistance to the JPLs to enable them to properly conduct their duties. The Company contests the powers and authorities of the JPLs and asserts that the JPLs are no more than court-appointed observers in the provisional liquidation process. This is not what light touch provisional liquidation encompasses and is contrary to the clear and unequivocal terms of the Appointment order"*

- 12.3.

- *"The JPLs are of the view that, at this stage, there is no realistic prospect of credible restructuring proposals being developed or certainty that the interests of creditors will be protected unless (a) all information and access requested by the JPLs is promptly provided and facilitated and (b) the authority of the JPLs to have full and unimpeded conduct of the asset disposal process and the formulation of restructuring proposals (including, without limitation, for that purpose access to group facilities, assets, personnel and books and records, prospective bidders and their the company's advisers) is confirmed by the Bermudian Court.*

- *The JPLs are of the view that, if the status quo is maintained, provisional liquidation is not in the best interests of creditors. The Company is likely to reach a point of functional deadlock. The Company apparently needs to dispose of core assets to provide sufficient liquidity to support a restructuring and is difficult to see how the Company will be able to maintain any meaningful operations thereafter. The Company's lack of resources appears to be contributing to a disorderly approach towards both the sale of assets and maintenance of its operations."*

- *"There is an apparent lack of managerial oversight and control in respect of administration as well as operations, most notably from the JPLs' perspective in respect of the Company's books and records. The Company will not be able to complete the proposed sale without the consent of the JPLs and the Bermudian court. The JPLs cannot grant such consent without a better understanding of the Company's financial position.".*

- *"The Company is already clearly insolvent on a cash flow basis and may well be on a balance sheet basis (without current financial information, the JPLs cannot say). The JPLs are concerned that as things stand, the Company is on the path towards a disorderly insolvency without due oversight."*

- *"In the light of the situation, the JPLs have by their letter of 14 March 22 written to K & K to reiterate the need for the Company and its advisers to provide the information, access and cooperation the JPLs consider is necessary if a restructuring is to be proposed, and to formally put the Company on notice that the Company has 10 days in which to do so, and that the JPLs will report to the Bermudian Court whether the Company has reversed course."*

- *"Whether this outcome can be averted with the board in situ is, respectively, a matter for the Bermudian Court and creditors of the company.".*

48. Although the Company did not receive a copy of the Report until it was unsealed, much of what is in it was included in the letter from Mr Fung to the Company dated **14 March 2022**[16]. The Company did receive Appendix I of the Report which set out in considerable detail a summary of the JPLs' powers and how they had sought to exercise them. It indicated that in many cases they had been unable to act for want of information or access to the Board.

49. Similarly, in a letter of **25 March 2022** to all known creditors, Mr Fung said that very little progress had been made over the last three months in developing and proposing a debt restructuring. He set out a number of concerns, including:

(a) the failure of the Company to provide information requested about a number of transactions identified through independent search involving shares held by the Company and the Group between **1 August 2022** and **22 February 2022** which appeared to be outside the ordinary course of business and whose rationale was not understood;

(b) the fact that to date the JPLs had not been allowed any monitoring or supervision of the Company or the Board, had no visibility on operations or assets disposals and were unable to satisfy themselves that the interests of creditors were being safeguarded;

(c) correspondence was conducted only through the Company's counsel who had made it clear that the Company would continue to resist providing information to the JPLs; and

(d) the JPLs were currently unable to assess, let alone pre-judge the feasibility of a successful debt restructuring.

The judge did not refer to the Report or this letter in his judgment under appeal.

50. Meanwhile, on **16 March 2022** the Petitioner filed a letter saying that it was instructed to seek a winding up order on **8 April 2022**. At the same time the Company filed an amendment summons seeking to limit the scope of the JPLs powers by inserting after the words "*empowered to carry out the following functions*" the words:

> "*for the purposes of facilitating a restructuring of the Company's indebtedness in a manner designed to allow the Company to continue as a going concern"*

51. By **28 March 2022** bank creditors representing 64.8% of the total debts supported the making of a winding up order: see the 3rd Affidavit of Mr Tse of 28 March 2022. The extra 1.2% came from

[16] C/384

Dah Sing Bank (in a letter dated 25 March 2022). In addition, on **29 March 2022** another creditor, Fuhon Bank (Hong Kong) Limited had expressed its support for the winding up of the Company.

52. On **1 April 2022** trading in the shares of the Company on the HKSE was suspended because of its failure to produce an Annual Report for 2021. The Company has not published any audited results since 2019 due to a disclaimer of opinion in the 2020 Annual Report, in which the independent auditor stated that it was unable "*to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these consolidated financial statements*" due to multiple uncertainties as to whether the Group could continue as a going concern.

Dispute between the JPLs and the Company

53. On **15 March 2022** Mr Shum, the Chairman of the Company made, in his 3rd Affirmation a number of complaints about the activities of the JPLs. He had become concerned that the JPLs had taken adversarial measures against the Company and its employees (mostly labourers) that had undermined restructuring efforts. The JPLs were said to have shown a complete disinterest in the sale of the Company's assets, including declining to meet with a potential purchaser. They appeared, it was said, to be focused on developing a litigation case against the Company. The complaints were said to be threefold in character namely that the JPLs (i) had sought to seize assets belonging to the Company despite the Company's objections that doing so would deprive the Company of limited liquidity; (ii) had conducted multiple aggressive and unannounced approaches to the Company's offices and employees, which had startled them and raised concerns about job security; (iii) had made misstatements to creditors thereby undermining restructuring efforts.

54. A particular (but not the only) complaint was that at the meeting with creditors in January 2022 one of the JPLs had said that the sale of the Company's assets would be a "*liquidation sale*" rather than a "*restructuring sale*" and when confronted with a request for the grounds of the statement the JPLs were unable to explain the basis for it. Another JPL said that unless there was a miracle the JPLs would be making an application to the court saying that the arrangement was not working. Mr Shum expressed the concern of the Company that the JPLs had not exercised their powers for the purpose granted to them, namely in a way that prioritised the facilitation of a successful restructuring.

55. On **24 March 2022** Mr Fung made an affirmation in response. In essence he said that the JPLs had been making every effort to further the restructuring, but the difficulty was that the Company refused to prove the JPLs with the information that they needed. In response to their request for information and access they had received increasingly adversarial correspondence. In relation to the first allegation he said that the JPLs had been almost entirely focused on trying to obtain information about the Company and its finances. The JPLs had no power to seize company assets and had not attempted to do so. It was simply untrue that the JPLs had adopted "raid-style" or "shock and awe" tactics. When in **December 2021** the JPLs tried to contact the Company management and no response was received, two members of staff went to the registered office in

Hong Kong and were told to return the next day, which they did, and were then told that the JPLs should contact K & K which they did. The JPLs' staff had managed only to speak with the receptionist at the office building and one apparent employee.

56. As to the comment at the informal creditors' meeting, it was a direct response to Oriental Patron, the Company's financial adviser, describing what was intended by the Company. Mr Sutton, one of the JPLs, commented that what Oriental Patron were describing was not a restructuring, but was essentially a sell down of core operational assets which implied that there would be no ongoing business of any substance, that being indeed a liquidation summary. (If that is what Oriental Patron said, the comment was not, in my view, inapposite). Mr Sutton was not, in context, saying that the JPLs intended that a liquidation should take place, or that a sale of assets should only be conducted in a liquidation. Mr Fung ended by concluding that in order to do their job the JPLs needed the Company's cooperation, which had not been currently forthcoming, despite every opportunity being given, and despite repeated urging by the JPLs that the Company should allow them to do the job for which they were appointed.

Mr Shum's fourth affirmation

57. On **1 April 2022** Mr Shum made his 4th affirmation. This is a lengthy work of some 57 paragraphs. In it he complained that the Company had not received much assistance from the JPLs in developing and proposing a restructuring of the Company's indebtedness in a manner designed to allow the Company to continue as a going concern, as it would have expected in order to give the Company and the JPLs opportunities to pursue the proposed restructuring through the sale of the LPG assets by September 2022. It recorded that the Company was negotiating to dispose of the LPG assets for up to US 450 million and that the Company had concluded an agreement with a buyer in mid-February 2022 for the potential sale of the Zhuhai Commercial Complex with the potential to generate around US $ 286 million in cash: see [41] above. The targeted timeline for disposal was, barring unforeseen circumstances, before **October 2022** for the LPG assets in accordance with the basis of the first adjournment of the order; and the fourth quarter of 2022 for the Commercial Complex barring unforeseen circumstances in the PRC. If those sales generated $ 450 million and $ 286 million that would enable the Company to repay creditors representing over 95% of the outstanding debt of the Company. If the Company was also able to dispose of its Oil Storage Terminal, valued at around US $ 103.65 million, and in which the Company had an indirect 79.2% interest, it would be in a position to repay all of its creditors in full. The Company firmly believed that it was central and in the best interests of the Company's creditors and the Company that it be given more time to complete the restructuring efforts it had commenced. Sale of the core assets as a going concern would allow preservation of their value for creditors. Those assets would be severely devalued in an immediate liquidation due to revocation of licenses and termination of trade contracts.

58. Mr Shum made a number of complaints as to the conduct of the JPLs who, he said, the Company had concluded regarded themselves as being appointed for the purpose of advancing the aims of

the creditors who sought an immediate and value destructive winding up of the Company. The Company was, he said, balance sheet solvent and it had maintained business operations under his leadership. The disclaimer of the audit opinion in 2020 arose from the fact that the Company had submitted an application for a scheme of arrangement. The delay in publishing 2021 accounts was attributable to the severe Covid difficulties in China which delayed the preparation of annual results. There had been no dissipation of assets by the Company.

59. The complaints about the JPLs included (a) failing to accept an invitation to meet with Cathay Capital, a potential buyer of the LPG Assets on the ground that they had not received "all outstanding information"; (b) failing to provide contact information of a potential bidder; (c) engaging Allen & Overy when there was a potential conflict of interest, principally on the basis that Allen & Overy acted for a bank which was involved in ongoing litigation adverse to the Company in the Hong Kong High Court; (d) refusing to confirm that they will abide by the Company's non-disclosure agremenets requested by potential buyers; (e) failing to dispel misrepresentations it had made over transactions entered into by the group; (f) apparently lacking objectivity by concurring in a litigation strategy to support the petitioner's winding up petition; (g) declaring that information provided was not adequate, when the Company had made extraordinary efforts to comply with the JPLs' legitimate information requests; and (h) not making follow up inquiries about the potential sale of LPG Assets to China Huaneng.

60. Mr Shum described in his affirmation the progress of sale negotiations. Kingkey Asset Management Ltd had expressed interest in acquiring the LPG assets at US $ 450 million and three other potential investors were actively engaged in negotiations with the Company for the acquisition of those Assets. The Commercial Complex had been valued by Savills in **November 2021** as worth c US $ 286 million, on **21 December 2021** the Company had entered into the Letter of Intent with Beijing Tianxi for the sale of the Complex to which I have referred at [41] above. He described the circumstances in which the New Soho Agreement and the New Soho Pledge. pledge that had been made.

Notification to the creditors.

61. On **6 and 7 April 2022** the creditors who had confirmed their support for the Petition were sent a copy of Mr Shum's 4th affirmation of 1st April 2022, and were asked whether that made any difference to their support of it. Their responses of **6-8 April 2022** confirmed that they still supported it. (Neither of these matters are referred to by the judge). The email of **8 April 2022** from the lawyers for Citibank N.A. made it very clear that it had been Citibank's consistent view and business judgment since before 14 December 2021 that there should be no restructuring; that a winding up order was in the best interests of all creditors and should be made forthwith; that the Bank was concerned about the costs being incurred and did not support a rescheduling, not having been provided with any new restructuring proposal, which would not be agreed to in any event. Citibank's view was said not to be the result of any actions of the Company or the JPLs.

Further adjournments

62. On **8 April 2022** the hearing of the Petition was again adjourned, and further adjournments took place of hearings on **12, 14,** and **25 April** and **4** and **9 May 2022**. No creditors appeared to support the continued adjournment of the Petition.

63. At the hearing on **14 April 2022** the Court ordered, *inter alia*, that, following a summons issued by the Company on **12 April 2022**, the order of **12 March 2022** should be varied so as to provide that the JPLs could serve on the Company and the Petitioning creditor any report filed with the Court. The Company duly received a copy of the First Report on that date.

64. The Court also ordered that the order made on **14 December 2021** be varied so that section 3 (i) should read:

> *"in relation to the Company, review and approve any asset disposition the company or its subsidiaries valued more than US $~~40~~5 million"*

and so that section 7 should read:

> *"Notwithstanding paragraph 3 (i) above, the JPLs will obtain the prior sanction of this Honourable Court for any disposition of the assets of the Company or its subsidiaries where the value of those assets is an amount in excess of US $~~40~~ 5m."*

and so that section 13 should read:

> "*For the avoidance of doubt, no payment or disposition of the Company's property or the property of its subsidiaries shall be made or effected outside the ordinary course of business without the direct or indirect approval of the JPLs and no such payment or other disposition made effected by or with the authority of the JPLs in carrying out their duties and functions the exercise of their powers under this Order of the avoided by virtue of the provisions of section 166 of the Act".*

65. By the time of the hearing on 14 April 2022 the JPLs had agreed to provide to the Company most of the documents that it had sought.

66. On **22nd April 2022** Mr Shum made his sixth affirmation in which he complained that the JPLs had withheld information from the Company, e.g. that they had met with a potential investor, had had discussions with the Petitioner and the Steering Committee without notice to the Company, and had met an asset management company which had indicated an interest in participating in the restructuring. He also complained that the First Report had not informed the Court about the JPLs' site visits to the Group's facilities in the PRC or the repeated invitations to meet Cathay Capital, and had only referred to the updates on progress made by OPAL at the January meeting in the minutes of the meeting at Annexure S to the Report, and that the Report contained unsupported conclusions about dissipation of assets. He also complained that the JPLs had not dealt adequately

with the Company's objection to the JPLs' refusal to undertake to be bound by the Company's own NDA obligations which risked terminating mature discussion with multiple bidders.

Adjournments

67. On **25 April 2022** the Petition was again adjourned until **4 May 2022** when it was adjourned until **9 May 2022**. Between **8 April** and **9 May 2022** no creditor came forward to support the continued adjournment of the Petition or the Current Proposal.

The ruling of 9 May 2022 Further adjournment

68. On **9 May 2022** the judge ruled that the Petition should again be adjourned to **8 July 2022**. It is against the further adjournment of the Petition made by this order that the appeal is brought. The judge also ordered:

(a) that the order of **14 December 2021** be amended[17] in accordance with the Company's summons of **16 March 2022** so as to provide in paragraph 3:

> "*The JPLs shall be empowered to carry out the following functions for the purposes of facilitating a restructuring of the Company's indebtedness in a manner designed to allow the Company to continue as a going concern"*

(b) that the Company should comply with certain undertakings as to the production of documents given in the 7th affirmation of Mr Shum of 9 May 2022, in which he had undertaken to provide a substantial quantity of documents.

(c) that the Company should adhere strictly to the Amended Order in respect of the dissipation of Assets.

The reasons for the Ruling of 9 May 2022 were delivered on **31 May 2022**.

The basis of the Ruling of 9 May 2022

69. In his ruling the judge recorded that the JPLs had indicated a willingness to continue to work with the Company. They had provided a list of 80 items of information that the Company was presently working on to provide [21]. Mr Riihiluoma for the JPLs had indicated to the Court that this development was a positive start, but that if an adjournment was granted further requests for documents might arise out of the information provided.

[17] The Petitioner submits that this restriction on the Petitioner's powers was wrongly made and was made without giving the Petitioner the opportunity to respond. In the light of our decision to order a winding up it is not necessary to reach a conclusion on this point. The JPLs had indicated that they were neutral on the question and the amendment has no bearing on what we have to decide.

70. The basis of the Ruling is an analysis as to the then current position in respect of the four Exceptional Circumstances, which the judge had found to exist at the time of the December 2021 order, which, in the judge's view, still applied.

71. In relation to Exceptional Circumstance 1, the judge took the view that the Company had made some progress to restructure its affairs; he was satisfied that the developments as put forward by the company were consistent with the original plans submitted at the December hearing. He thought there was a willingness on both parties to work together in the efforts to address the Company's financial position and the debts owed to it.

> "*Whilst there has been the impression that the Company has barrelled forward on its own without regard to the JPLs with these developments, I anticipate that the Company and the JPLs will work together in a purposeful manner to give effect to the December 2020 (sic) Order*".

72. In relation to Exceptional Circumstance 2, the judge remained of the view that the Company should be allowed time to pursue the Current Proposal with the updated information and developments since the December 2021 Order. He noted that the relationship between the Company and the JPLs:

> "*started on a difficult basis with both the JPLs and the Company making complaints about each other. The latest position appears to be a significant improvement in the relationship in that the JPLs have provided a list of approximately 80 items they require and the Company has undertaken to provide a vast majority of that information, with a small number of items not in existence and one matter (Hong Kong Stock Exchange credentials) likely to be in dispute".*

73. On the basis that the information would be provided he took the view that the JPLs should be able to consider the information and then engage the creditors on the Current Proposal to see if there was any merit to it. He was hopeful that the JPLs as restructuring troops were seen by the Company as friendly forces rather than an invading enemy. His expectation was that the Company would be fully participating in the provision of information to the JPLs so that they could properly assist the Company, the Creditors and the Court.

74. In relation to Exceptional Circumstance 3, the judge remained of the view that there was potential for value destructive consequences in making a winding up order. He was still of the view that the JPLs with "soft touch" powers would assist in ensuring that the Company maintained the value of its key assets by avoiding such value destructive impacts and negative impacts of continuing to operate in the PRC under a winding up order. It was incumbent on the Company to cooperate fully with the JPLs in order to benefit from their expertise as "restructuring troops" in order to avoid any value destructive consequences.

75. In relation to Exceptional Circumstance 4, the judge said that he had "*once again given serious consideration to the views of the creditors and to their position at top of the hierarchy of interests that I should bear in mind*". The judge recorded Mr Robinson's submission that the creditors had not given proper consideration to the efforts of the Company and that they had been prejudiced in one way or another against the restructuring efforts. He did not however make any finding that either of these submissions were well founded and it would have been difficult for him to do so given the fact that the creditors concerned had expressed their position more than once and, on the last occasion, had done so after receipt of Mr Shum's fourth Affirmation.

76. The judge said that the Company should be given the opportunity to "*work with the restructuring troops"* so that proper information could be collated, analysed and properly put before the creditors for their full consideration. This decision reflects the fact that, whilst the September 2021 Current Proposal has been made available, the creditors had not in fact received anything by way of a provisional offer or agreed term sheet or the like, let alone a collation or analysis of information about any deal(s) that might finance the payment of the monies outstanding. Further the Company had had ample previous opportunity to work with the restructuring troops.

77. The judge said that he had considered the resignations of the directors and other officials of the Company but noted that there was evidence that the Company had still been able to maintain operations. He was also aware of the issues in respect of the production of the financial statements of the Company. He had previously accepted submissions that the Company was balance-sheet solvent but facing a liquidity problem. The Company had indicated that it needed until **31 July 2022** to publish its 2021 Annual Results. He was not persuaded that he should refuse the adjournment because of the issue of the financial statements because the Company intended to issue its 2021 annual results by **31 July 2022**. Further he had not seen any certain evidence that the Company was not balance-sheet solvent. On that basis the Company should be given the opportunity to work closely with the JPLs on the Current Proposal as progressed since the December 2021 order. There should be an opportunity for the JPLs to seek creditor support for the restructuring on the basis of information to be provided.

Kuwait Petroleum

78. Prior to the 9 May 2022 hearing, on **12 April 2022**, a trade creditor (Kuwait Petroleum Corporation) had filed a winding up petition in the Hong Kong Court on insolvency grounds (arising from the failure of the Company to pay US $ 3,065,860.44 in respect of contracts for the sale of LPG), and had asked that Court to exercise its jurisdiction to wind up a foreign company in Hong Kong (the "**Hong Kong Petition**"). The Company failed to notify the Petitioner, the JPLs or the Bermuda Court that the Hong Kong Petition had been filed. This cannot have been other than intentional. Mr Shum's 6th affirmation was sworn on **22 April 2022** and made no mention of the Petition. This was, in my view, a breach of paragraph 4 of the Light Touch Order. Nor was any notice given to the HKSE and no mention of this petition appeared on its message board. The JPLs found out about it for themselves. The Hong Kong petition was, at the time of the hearing

before us, due to be heard on **27 July 2022**. Ashurst, the attorneys for Kuwait Petroleum made it plain in a letter of 4 May 2022 that Kuwait Petroleum did not wish to participate in any restructuring.

79. Knowledge of the filing of the petition was of particular importance given that the Company had not provided adequate information about the extent of the debts owed by it to trade creditors. This was, we were told, the first time that the supporting creditors, the JPLs or the Court became aware of the identity of one of the trade creditors. Moreover, the filing of the petition added another corporation to the number of those wishing to have the Company wound up, in a context where creditor sentiment was of great importance.

The Second Report

80. On **6 June 2022** the JPLs produced their 2nd Report. In it they said that the Company had started providing information to the JPLs and set out the two batches of information obtained in pdfs on **25 May** and **2 June 2022**. But a significant number of items of information remained outstanding, including certain key items. 64 of the 80 items on the JPLs' Information Request List remained wholly or partially outstanding The Report recorded that the JPLs had previously requested eight sets of information and that all of it remained outstanding. As a result, the JPLs continued to remain uncertain as to whether the asset disposal initiative pursued by the Company would result in the settlement of debts to the creditors of the Company.

81. In relation to asset sales the Company had indicated that it had received an offer of US $ 450 million from Cathay Capital in respect of a potential sale of the LPG Asset. But the offer itself was not available to the JPLs because of the refusal of two relevant parties to waive non-disclosure obligations owed by the Company. The Company said that discussions were continuing with the two companies to explore ways of providing the JPLs with information.

82. As to asset sales, the Company had provided the names of certain potential investors and had requested the JPLs to confer with them; but the JPLs believed that engaging in discussions with the potential investors without the benefit of background and current details of the sale and marketing process would be an unproductive exercise.

83. The JPLs had not been provided with any current information in respect of the financial position of the Company and the Group, as a result of which the JPLs were unable to make any informed assessment as to the feasibility of any restructuring proposal being put forward.

84. The conclusions of the Report included the following:

- *The Company has not provided all current financial information in order to evaluate its current financial position. This is critical when considering the viability of any restructuring proposal.*

- *The JPLs consider the following current financial information remain outstanding:*

  - *Latest set of financial and management accounts of the Company and its subsidiaries*
  - *A list of bank accounts with current balances held by the Group*
  - *The latest cash flow position of each entity in the Group*

85. The Report also stated that the JPLs considered that the Company had not addressed key issues including whether the "*Current Proposal*" would be amended to take into consideration all of its creditors and not just the bank creditors; what was the security position of the Group; and how the funds from the realisation of assets would flow to the creditors. The JPLs called for a sizeable amount of information and recorded that relevant and critical information remained outstanding in order to assess the viability of any restructuring proposal put forward by the Company. It appeared that one problem that arose was that a significant amount of information was said to be located in the PRC and to require the Chairman personally to travel there in order to authorise its release. It was unclear when the remaining information would be available to the JPLs.

Events subsequent to the Ruling of 9 May 2022

86. The **9 May 2022** order had provided that the matter should be listed on 10 June 2022 for the purpose of updating the Court on the disclosure of information by the Company to the JPLs. On **10 June 2022** the matter was mentioned. On this occasion Mr Shum's 8th affirmation provided details of what further documents had been provided. At the hearing the JPLs accepted that some information had been provided by the Company but said that critical components to enable the JPLs to perform their duties were still lacking.

87. In a letter of the same date from Oriental Patron to K & K, Oriental Patron reported that there had been progress in relation to the sale of the LPG assets with Cathay Capital IBV L.P (Investor E) , which was said to be expressing strong interest (sic) in acquiring the LPG Assets and had been undertaking due diligence on a review of the Zhuhai LPG terminal; and with Kingkey Management Limited, Cathay Capital remained in "active discussions" with the Company in respect of its interest to acquire the LPG assets. Oriental Patron was also exploring opportunities with other investors who had expressed interest in the LPG Assets but progress had been delayed because potential investors were reluctant to take steps in the weeks leading up to the 9 May 2022 hearing due to concerns that a winding up order might be made. In relation to the Zhuhai Commercial Property Complex TCC Capital, which is described as the entity which was party to the 21 December Letter of Intent, had been engaged in documentary and site inspection due diligence which was expected to be completed by end of August 202 following which there would need to be an updated valuation report and a finalization of the sale price with TCC internal approval expected within 2 months so as to be in a position to provide agreed terms for the JPLs approval by October 2022.

88. On **8 July 2022** the hearing of the Petition was adjourned to **2 September 2022**. By then the JPLs had filed a 3rd Report, which we have not seen, but which is said to have reported progress in the form of further document disclosure and discussion with potential investors but to have expressed concern about the failure to provide cash flow projections and other financial information. The JPLs indicated that, if these matters remained as they are, they had concerns about their ability to assist the Company and the Court. An affidavit as to progress was filed by Mr Selivia, the managing director of Cathay Capital and a 9th affidavit from Mr Shum on document disclosure and interests from potential investors. We were not shown those affidavits.

89. In the light of the submissions made the judge expressed the view that there was interest in potential investors to advance a restructuring and remained of the view that the Company should be given time for restructuring based on the reasons in his December 2021 and May rulings. The judge required provision of firm proposals by the Company to the JPLs within 14 days which we were told, were provided to the JPLs on Friday 22 July. The judge also ordered the submission of cash flow projections, which the Company had undertaken to produce, within 7 days. We were told that the JPLs had some preliminary comments on the proposal which they would relay to the Company in due course; and that they still had not got a complete picture as to the financial position of the Company.

The approach that the Court should take in relation to the making of winding up orders or the adjournment of winding up petitions.

90. There is a body of authority on the approach to be taken by the Courts on this question. The starting point is section 164 (1) of the *Companies Act* which confers an unfettered discretion in the following terms:

> ***"Powers of Court on hearing petition***
>
> *164 (1) 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, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets."*

91. A petitioning creditor who has a *bona fide* and undisputed debt has, as between himself and the company, a right to a winding up order (a form of execution by which the creditor seizes the debtor's assets by the hand of the liquidator) *ex debito justitiae*. But a winding up order is a class remedy and the right of the creditor is a representative right as one of a class. In deciding, therefore, whether to make a winding-up order attention must be paid to the interests of the relevant class or classes of creditors. In the present case the relevant class is that of the unsecured creditors who,

between them are owed, at least US $ 845 million, and, in fact, more when interest is taken into account.

92. If a majority of creditors wish the Company to be wound up, and for good reason, it would be exceptional for the Court to decline to make such an order. That said, the Court's approach is not one of arithmetic. If 51% are in favour and 49% are against the Court may derive no assistance from the numbers. But the position is different if there is a substantial majority in favour. Further, in the present case it is necessary to take account of the fact that, in order for a restructuring to take place it would be necessary to secure the votes of creditors representing ***three-fourths in value of the unsecured creditors.*** – and not simply three-fourths in value of those who vote. This requirement is not referred to by the judge in any of his rulings and does not appear to have been taken into account by him.

93. The entitlement of a substantial majority of creditors to a winding up has been expressed in different terms in the authorities, some of the expressions of entitlement being close to absolute. Thus in *In Re Crigglestone Coal Company Limited* [1906] 2 Ch 327 Buckley J held that, if the company had assets, the creditor who proves insolvency is, as between himself and the debtor company, "*without exception, entitled ex debito justitiae to a winding up order*". He had, however, referred earlier, with approval to the words of Lord Cranworth in *Bowes v Hope Life Insurance and Guarantee C*o [1869] 11 H.L.C 389, 492 that "*One does not like to say positively that no case could occur in which it would be right to refuse it; but ordinarily speaking, it is the duty of the court to direct a winding up*". He went on to say that there was another consideration, namely that the order sought would be for the benefit of a class of which the petitioner was a member. The right *ex debito justitiae* was a representative and not an individual right. If a majority of the class took a different view to that of the petitioning creditor the Court would give effect to it. This was a matter upon which "*the majority of the unsecured creditors are entitled to prevail, but upon which the debtor has no voice".*

94. In *In re P & J Macrae Ltd* [1961] 1 WLR 229 the majority of creditors opposed a winding up order for no reason that was expressed. Willmer LJ said that:

> "*I have no doubt that where a majority of creditors do for good reason oppose the winding up of the company, then, prima facie, they are entitled to expect their wishes to prevail, in the absence of proof by the petitioning creditor of special circumstances rendering a winding up order desirable in spite of their opposition. But I am certainly not prepared to accept the view that the bare fact of the opposing creditors being in a majority is of itself sufficient, still less conclusive*".

95. Upjohn LJ referred to the complete and unfettered discretion of the Court, which was to be exercised judicially, and to the fact that "*although an undoubted creditor is as a general rule entitled to an order ex debito justitiae, there may be special cases where, apart altogether from the wishes of creditors generally, the Court may not think fit to make an order".* "*The weight to*

be given to those wishes varied according to the number and value of the creditors expressing wishes, and the nature and quality of their debts". He observed that if the majority was 51/49 the weight to be given to the majority was obviously negligible, but

> "*at the other end of the scale there is the case where an overwhelming proportion of the creditors in number and value opposes the petitioner who is virtually alone. In that case clearly the weight to be given to those creditors, unless there is some reason for disregarding them, must be very great, and in the ordinary case in the absence of special circumstances will be decisive*."
>
> *All one can say as between those two limits is that the weight to be given to the wishes of the opposing creditors must necessarily depend on all the circumstances of the case, but other things being equal, will increase in the mind of the judge as the majority of opposing creditors increases*.

96. Willmer LJ observed that, when Buckley J in the *Crigglestone* case said that the right to obtain a winding up order was "*a matter upon which the majority of the unsecured creditors are entitled to prevail"* he cannot have intended to mean that the voice of the majority of creditors was decisive on whether a winding up order should be made. He meant that, when weighing all the circumstances in deciding whether to wind up the company, the voices of the creditors must either ultimately be for or against, and that is in the ordinary case determined by the majority; but the power of the voice must necessarily depend on all the circumstances.

97. And at page 240 he said:

> *"When the judge had decided what weight, if any, he is going to give to the wishes of the majority of creditors, he balances that together with all the other relevant circumstances in evidence before him in order to see whether in the end it is proper that a winding up order should be made. The final decision rests not with the creditors not the judge".*

98. In *Re Demaglass Holdings Ltd* [2001] 2 BCLC 63 Neuberger J, as he then was, laid down a number of principles. These included the following:

(i) At least in the absence of good reason a creditor of a company who has not been paid is entitled to a winding up order virtually as of right. He then referred to Lord Cranworth in *Bowes.*

(ii) There was authority for the proposition that a winding-up order will be made if the majority of creditors support the petitioner and can only be refused if the majority opposed its making. He cited the judgment of Brightman J, as he then was, in *Re Southard & Co Ltd* [1979] 1 WLR 546,550 where he said:

> "*As often been said the decision in the case at present is a matter for the discretion of the judge. However, it is clear that the court ought not to deprive the petitioning creditor of his prima facie right to a winding up order* ***unless there is an opposing majority****, and, if there is no voluntary liquidation in existence or in contemplation, unless there are good reasons for such opposition. I have been told that there is no reported case where the court has denied a creditor its prima facie right to a winding up order ex debito justitiae at the instance of a minority of opposing creditors".*
> (Bold added)

99. In that case, where there was an existing voluntary liquidation, Brightman J declined to make a winding up order in circumstances where the petitioning creditor and the supporting creditor were owed the major part of the indebtedness, and the 7 opposing creditors were in the minority. But the single supporting creditor belonged to the same group of companies as the company in liquidation, in circumstances where the petitioning creditor was morally responsible for the insolvency and large indebtedness of the company, which was its subsidiary; had originally put the company into voluntary liquidation; and had no good reason not to leave the voluntary liquidation, which it had initiated, to proceed undisturbed.

100. Neuberger J did not accept that the mere fact that a majority of creditors supported the making of a winding-up order would be an absolute bar, in all circumstances, to the court refusing to make a winding-up order. Nonetheless he thought that 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.

101. The Court would give little weight, if any, to the views of the secured creditors, at least insofar as their debts were secured and the court would have greater regard to the views of independent creditors as opposed to creditors connected with the company.

102. In that case the majority of the unsecured creditors supported the proposal of the receivers of the company that the petition be adjourned for 10 weeks to allow for an orderly sale of the glassware of the company in stock which would, it was said, be likely to enable about £1.7 million more to be recovered than would be the case if there was a fire sale in a winding up. The court was also satisfied that the receivers had been conducting the sale of assets in a sensible and efficient manner.

103. In *In the matter of LAEP Investments Ltd* [2014] Bda LR 35 Hellmann J referred at [39] to the approval by Kawaley CJ, at paragraph 27 in *Re Gerova Financial Group Ltd* [2012] Bda LR 43, of the following reference in *McPherson's Law of Company Liquidation*, 1st English edition at para 3.57 to:

> *"the rule that a petitioner who can prove that a debt is unpaid and that the Company is insolvent is entitled to a winding up order ex debito justitiae, which has been taken*

to mean that, in accordance with settled practice, the court can exercise its discretion in only one way, namely by granting the order"

104. That proposition was subject to the qualification that the winding-up petition had to be brought for the benefit of the class of creditors to which the petitioner belongs and not for some purpose of his own. Even so it seems to me that the "*in only one way*" proposition goes too far. I note that in a footnote to his judgment Kawaley CJ made reference to the 2nd edition and said that none of the limited exceptional grounds for refusing to make an order applied to the case before him.

105. In *Re Maud, Maud v Asbar Block S.a.r.l* [2016]EWHC 2175 (Ch) [18] Snowden J, as he then was, cited at [79] – [81] *Crigglestone* and *Macrae* and, also, the decision of Mr Richard Sykes QC in *Re Leigh Estates (UK) Limited* [1994] BCC 292 where the latter said:

"The following matters are clear:

Although a petitioning creditor may, as between himself and the company, be entitled to a winding-up order ex debito justitiae, his remedy is a 'class right', so that, where creditors oppose the making of an order, the court must come to a conclusion in its discretion after considering the arguments of the creditors in support of and opposing the petition: see Re Crigglestone Coal Company Ltd [1906] 2 Ch 327, in particular the statements of principle of Buckley J at first instance, and s. 195 of the Insolvency Act 1986…

It is plain from the well-known authorities on the subject that, where there are some creditors supporting and others opposing a winding-up petition it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices on each side of the contest…"

Adjournments to allow time to pay

106. In the same case Snowden J referred to the ability of a court to adjourn a petition in its discretion in the following terms:

"*99 At this juncture, I should refer to a further point concerning the adjournment of a winding-up or bankruptcy petition that also featured in the judgments of the Registrar and in the arguments of the parties. A practice exists under which the judge may exercise his discretion to adjourn the petition rather than make an immediate bankruptcy or winding-up order on the basis that there are*

[18] This was a bankruptcy case, the essential collective nature of which was said by the judge to be no different to its corporate equivalent of compulsory winding-up.

> *reasonable prospects of payment of the petition debt within a reasonable period."*
>
> *...*
>
> *101 As the authorities cited by Lewison LJ [in Sekhon v Edginton [2015] 1 WLR 4435] make clear, this practice can be viewed either as the exercise of a general discretion of the court to refuse to make a bankruptcy order and/or as an exercise of the discretionary case management powers of the judge to adjourn the petition. For reasons that I have already explained, it is almost always exercised at the behest of the debtor in situations where the petition is not otherwise opposed. Moreover, as the authorities to which Lewison LJ referred demonstrate, it places the onus upon the debtor to produce evidence of his means and ability to pay, and requires the judge to form his own view of whether that evidence justifies giving the debtor a (limited) period of time to pay."*

107. In *In the matter of Glenn Maud Edgeworth Capital (Luxembourg) S.a.r.l. v Glenn Maud* [2020] EWHC 1469 Snowden J referred again to *Re Leigh Estates (UK) Limited* and, having weighed the debts and the reasons given by the creditors for their support or opposition to the making of a bankruptcy order, remained of the view that the balance of the class interest clearly lay in favour of the making of a bankruptcy order on the petition in question.

108. In *In re Trinity (Management Services) Ltd* [2021] HKFI 2207 Harris J observed that:

> "[8] *What the Court has been presented with is a justification for an adjournment, which relied on different things: seeking time to pay a debt in full, restructuring a swathe of corporate debt with the support of some creditors and protection of creditors' interests by the appointments of provisional liquidators. This has tended to obscure the fact that in fact the Company in this petition (and I apprehend Holdings in Bermuda) are only really doing the first. As I have already explained what is proposed is not properly characterised as a restructuring. The provisional liquidators have been appointed on the application of Holdings after this Petition and Standard Chartered' s petition in Bermuda had been issued in order, I think it might reasonably be assumed, to bolster Holdings application for an adjournment*"

109. In that case Holdings was the guarantor of Trinity, which Standard Chartered Bank sought to wind up, and the proposal was that the petition to the Hong Kong Court to wind up Trinity be adjourned to enable Holdings to sell one of its best known brands and to pay Standard Chartered and the other bank creditors in full. Holdings would then continue with its existing business but without one of its best known brands.

110. These authorities are of relevance in that Mr Taylor, for the Petitioner, submitted that the reality of this case is that what is proposed is not a restructuring in the traditional sense, but simply an

adjournment to allow time to pay. There is no proposed scheme whereby creditors will take less than the full amount of their debt in return for some other benefit or anything similar.

111. In my judgment the Current Proposal does involve a restructuring of a kind, because it involves a change in the terms of the debts due to the Bank creditors, which are to become due under a syndicated loan and payable at a later date. Hence the need for a 75% majority. But the case is, in reality, in substance an application for an adjournment for time to pay, as it was in *Trinity (Management Services) Ltd.*

112. The decision of the learned judge was an exercise of discretion, which can only be set aside on well-known principles i.e. that the judge has failed to take into account some material consideration or has taken into account an irrelevant one or exercised his discretion in a manner which is plainly wrong.

Conclusions

113. In my judgment the learned judge failed, in the light of the material before him, to take into account (sufficiently or in several cases at all) a number of relevant considerations namely:

(a) the size of the majority needed in order for the restructuring to take place; taken with

(b) the size of the majority of bank creditors who seek a winding-up and oppose an adjournment;

(c) the absence of any opposing majority of creditors;

(d) the requirements of exceptionality;

(e) the fact that what had been proposed was in substance an adjournment in order to permit a sale by the Company of its assets in order to pay creditors;

(f) the history of the case and, in particular the fact that the application for provisional liquidators followed a previous unsuccessful attempt to implement a similar (albeit not identical) Scheme;

(g) the absence of any clear agreement to purchase assets of the Company's subsidiaries which would be likely to pay off the outstanding debt within a reasonable time;

(h) the absence of any up to date financial accounts;

(i) the behavior of the Company's management.

114. As to (a) the size of the majority needed to approve the "restructuring" was 75% (by value). The judge makes no reference to this key requirement in his ruling and there is no indication that he took it into account. Nor did the judge express any view as to the likelihood of 75% of the creditors approving the Current Proposal. The prospect of that majority being met seems to me remote, particularly in the light of the matters set out in the following paragraph.

115. As to (b) creditors who were owed some 66% of the outstanding bank debt opposed the adjournment. It is the creditors and not the Company, or the Court who, in general, are the best judges of what is in their interests. In *Re Glenn Maud Edgeworth Capital (Luxembourg) SARL* [2020] EWHC 974 (Ch)Snowden J held at [79] that:

> "*I do not think, however, that there is support in the authorities for [the] proposition that it is for the court to formulate some view of a hypothetical rational creditor who is a member of the class, or (which may amount to the same thing) to impose its own view of the commercial merits or the best interests of the class*".

116. The creditors in the present case were, for the most part, experienced bankers. The relevant class consists of unsecured and independent creditors none of whom have an interest or connection with the Group, who are sophisticated international investors, with experience in offshore liquidations and restructuring and the implications of light touch provisional liquidation versus a winding up. The judge made no finding that their support of the winding up has been "tainted" or "prejudiced" by any factually untrue or material misstatements by the JPLs; and it is plain that they remained supportive of a winding up despite being provided with Mr Shum's fourth affidavit. Whilst none of them were represented at the hearing they had recently expressly confirmed their views in writing. No lender appeared at the hearing (whether by representation or by written communication) to support the continuance of an adjournment and such support as had previously been given was not confirmed.

117. There was no evidence from any of the creditors in the 66% category that they might change their minds in the future and support the Company. This was not surprising, bearing in mind the Company's previous conduct, its failure to pay creditors over a long period, the long drawn-out negotiations, which went back to mid-2020, and the creditors' persistence in their objections after being asked to confirm on two separate occasions. In those circumstances the prospect that a sufficient number would do so seems to me to be unlikely, or, at best, speculative.

118. As to (c), it is apparent from the authorities that the absence of any opposing majority is, of itself, a significant factor against refusing to make a winding up order (and said, in some cases, to be essential if a winding-up order was to be refused); the significance is obviously greater when the majority in favour of winding up is sizeable and the percentage necessary to implement the "restructuring" is 75%.

119. As to (d), I would accept that the mere fact that a majority support a winding up petition is not conclusive. But this is not a mere fact case; nor is it one where the figures are simply matters of mathematical nicety. The majority is substantial. The percentage necessary for the scheme to go forward is large. Whatever may be the position in cases where the majority is slender, or the worth of its views is debatable (e.g. if the majority is aligned to the company or acts for some ulterior motive) in a case such as this I would accept that it should be wholly exceptional, particularly having regard to its history, that the wishes of the majority should not be followed.

120. A principal matter that was relied on as exceptional was that the Company wished to be able itself (rather than JPLs or liquidators in a compulsory liquidation) to sell off sufficient assets at a price which, if it could be achieved, would pay the debts of its creditors, and that the Company had engaged in significant efforts for a long time to address its financial position. This does not seem to me an exceptional circumstance for present purposes. The fact that the Company had been engaged in this exercise since mid-2020 without success would seem to me to point against refusing to make a winding-up order. The longer the delay in the past the more justified is the support for a winding up.

121. The judge took into account the risk that a winding-up might deleteriously effect the value of the Company's assets[19]. In the light of all the other matters to which I refer, I do not regard that as a sufficiently exceptional circumstance justifying in this case the refusal of a winding up order sought by so substantial a majority of creditors. It is not uncommon for a liquidation prejudicially to affect the company's assets, sometimes significantly. Mr Taylor pointed out that a petitioning creditor is not required to demonstrate that the winding up will result in the greatest return to creditors as a whole, only that there is a prospect of some benefit from making it: *Re Demaglass* at page 638. That is, however, only a threshold requirement to enable an order for winding up to be made. That said, in a case such as this, the large majority creditors may properly be allowed to make their own judgment as to what course is best. It must also be borne in mind that, even with a compulsory liquidation, it is always open to the liquidators to negotiate with the Chinese authorities and others and to take steps with a view to ensuring the continuance of the businesses of the subsidiaries of the Company pending a disposition of the companies owning those businesses.

122. In his ruling the judge said that he had given "*serious consideration to the views of the creditors and to their position at the top of the hierarchy of interests that I should bear in mind*". Whilst

[19] New Ocean Energy Zhuhai, which is an affiliate of Baifuyangxinhai obtained a lengthy opinion from a Chinese law firm (D/1909) which was that there was a material risk (sic) that in the event of a liquidation five important licences held by Baifuyangxinhai or other affiliated companies of the Group might be cancelled such that its business could not continue. The risk was not said to arise by virtue of the liquidation order itself but because the liquidator might demand to take over the relevant companies and the relevant takeover procedures might lead to uncertainty in management and operation of the companies; and the liquidation of the Company might have an adverse effect on relevant business contracts of its subsidiaries or even lead to the suspension of services by partners and suppliers which would impact on the sustainability of the overall operation of the NewOcean Group and a major turnover of employees.

those words show that the judge recognised that the creditors were at the forefront of those whose interests were to be considered, it is not apparent, as I have said, that the judge had in mind, took into account or gave any great weight to the percentages of (a) the independent unsecured creditors who sought a winding up; and (b) the creditors whose consent was necessary in order to secure the restructuring which was sought.

123. As to (e) the judge referred at 24 b.ii to the Petitioner's submission that what was proposed was a sale of key assets to pay the Company's creditors which the Courts had consistently held to be a liquidation rather than a restructuring, which should be conducted by independent liquidators supervised by the Court. But he failed to apply that principle. As I have said what was proposed was, in substance, an application for time to pay. Such an application would have required the Company, if it was to avoid a winding-up order, to show (which it did not) that an adjournment should be granted because there was a reasonable prospect of the sums due being paid within a reasonable (and limited) time from (at the latest) the making of an application for adjournment i.e. **17 November 2021**. What would be reasonable should be judged in the context of the delay that had already occurred, by that date (which was some 18 months). The greater the previous delay the lower the amount of reasonable time available. Possible partial payment by **October 2022** at the earliest, with further payment likely to be postponed to **March 2023** does not seem to me to be payment within a reasonable time.

124. As to (f) this is a case where negotiations between the Company, which is cash flow, and may well be balance sheet, insolvent, and the bankers began in **June 2020**. The original scheme was withdrawn in **April 2021** when the negotiations had been unsuccessful. The Petition was filed on **22 October 2021**. The application for a Light Touch Order was made on **17 November 2021**. The petition had been adjourned a considerable number of times since the first hearing on **19 November 2021**. When it was adjourned on **14 December 2021** it was, as the judge put it, on the basis that the Company asked for a "*short adjournment to attempt a restructuring*" and that "*that the requested adjournment is not for long period of time"*[20]. A further 5 months then elapsed until the **9 May 2022** hearing at which the Petition was adjourned for a further two months, on the basis that the debt might be paid (as to 95%), as was contemplated, by **31 March 2023**, some 2 ¾ years after the commencement of negotiations, 17 months after the presentation of the petition, and some 8 months after the hearing before us. Delay of such an amount justifies the unacceptability of it to a majority of creditors and such delay, together with the failure of the Company to persuade any creditors who oppose the Current Proposal to change their minds and support it (with the result that, in fact, no progress has been made in securing from the bank creditors agreement to the Current Proposal or any other restructuring plan) is a powerful factor in favour of making a winding up order, particularly in a case where the restructuring is, in essence, a request for time to pay.

[20] We were told that the Company, in its argument before the judge said that the Company was not saying that it could produce a scheme within 4 months but that it needed 4 months to advance matters. It is not apparent however that in his judgment the judge was proceeding on that basis.

125. As to (g) there did not, on the material before the judge in May 2022 appear to be a prospective purchaser or purchasers who would be likely to purchase assets for the amount of the debt within a reasonable time. In respect of the Zuhai Commercial complex, in **February 2022** there had been an agreement to purchase within 6 months of the issuance of title deeds and a joint valuation, which might amount to $ 286 million. In respect of the LPG Assets there had been a non-binding letter of intent of **9 November 2021** with a putative price of $ 270- $ 450 million. But, when the matter came before the judge in **May 2022** there was, so far as was apparent, no contract and no prospective purchaser or purchasers who had made any form of offer at any price which could be accepted By **10 June 2022** there had been strong interest from Cathay Capital in purchasing at US $ 450 million but there was still no such contract or offer and whether and when one might materialise was uncertain. In such circumstances the bank creditors who had waited so long had a strong claim to have the *debitum justitiae* honoured.

126. As to (h) there were before the judge no reliable up to date financial statements and the JPLs had not been able to come up with a view as to the Company's financial position. Whether or not the Company is balance sheet insolvent cannot be determined in the absence of any audited financial results since the 2019 Annual Report, the audited report for which was filed on 28 April 2020. Further, although the Company adduced evidence of its unaudited 2020 Annual Report and 2021 Interim Results it had not produced any unconsolidated accounts (whether audited or otherwise) so that it is entirely unclear whether or not it, itself, is balance sheet solvent. The judge approached the matter on the basis he should grant an adjournment because the Company intended to issue its 2021 Annual Report by 31 July 2022[21] and that the Company stood by its position that it was balance sheet solvent and he had not seen "*any certain evidence that it is not*". Whatever the Company said, the true position, as it seems to me, is that it was wholly unclear whether or not the Company was balance sheet solvent.

127. As to (i) those behind the Company had, in breach of the Light Touch Order, failed to cooperate with the JPLs, by not providing the requisite information. They had, also, wholly failed to advise the JPLs or the Court of the trade creditors' winding up petition in Hong Kong. In addition, they had caused or allowed the two share pledges to be made.

128. In relation to the supply of information, as time passed matters had improved but there was still, in May 2022 a raft of information that was needed; and, in the light of what had happened previously, the scope for confidence in respect of a timely supply of all necessary information in future was limited.

129. In relation to the deliberate non-disclosure of the Hong Kong petition the judge does not seem to have determined whether the Company was in breach of its obligations, or regarded the breach by

[21] A more recent announcement on 29 June 2022 was that these accounts would be published "*as soon as practicable"*.

the Company as of any substantial relevance (as, in fact, it was) in considering whether the Petition should again be adjourned.

130. In respect of the share pledges, the judge referred at [27]- [28] to the Petitioner's submissions – that the Company had breached the Light Touch Order because the pledges were not made in the ordinary course of business – but, again. does not seem to have determined[22] whether the Company was in breach of the Order or, even if it was not, whether its conduct was unacceptable, and what significance that had for the appropriateness of any continuation of the Order. He was content to order that the Company should "*adhere strictly to the Amended [Light Touch] Order in respect of the dissipation and/or disposition of assets."*. I would accept the submission of the appellant that the maintenance of a light touch order calls for complete transparency and cooperation from the Company, and that the non-disclosure of the Hong Kong petition and the other breaches by the Company of the Order, was a strong factor (amongst others) in favour of winding up the Company.

Disposition

131. This is a discretionary area where there are no absolute rules. But in the light of the combination of matters to which I have referred in the preceding paragraphs it seemed to me that the judge erred in the exercise of his discretion; that we should exercise that discretion; and that, taking all those matters into account, we should make the winding-up order which we made. When the majorities (i) in favour of a winding up and (ii) required in order to avoid it are so large the views of the majority creditors are of preponderant weight, even though a different set of creditors might have taken a different view.

Postscript

132. The order appointing the provisional liquidators is one commonly characterised as a light or soft touch order. In the *Trinity* case Harris J said the following:

> "5…. *Although in the papers the provisional liquidators are described as having been appointed on a soft-touch basis it seems to me that certainly assessed by the criteria and principles applicable in Hong Kong this is also something of a misnomer. Management of Holdings has been left in the hands of Holdings' Board the provisional liquidators' role is more in the nature of an independent financial adviser, who can report to the court its view on the progress of the sale of Cerruti, which is a process managed by the Board. Essentially the procedure is in the nature of a debtor in possession process with a degree of court supervision assisted by the appointment of insolvency practitioners, who are not in any meaningful sense liquidators. Hong Kong*

[22] A judge is not, of course, bound to make findings about everything in issue: but this matter (and others) called for a decision.

> *does not favour debtor in possession processes. The reasons for this and its impact on restructuring of insolvent companies are matters to be considered in detail on another occasion, but I would note for the benefit of practitioners that the Hong Kong Court is likely to look carefully in future at recognition (which has not been sought in the present case, which is of itself indicative that what Holdings is attempting to achieve is not properly characterised as a restructuring) of foreign provisional liquidators appointed on such carefully circumscribed terms."*

133. It is apparent from that citation that the Hong Kong Court may well take a different view as to the appropriateness of a light touch order to that taken in Bermuda, and may not necessarily recognise provisional liquidators appointed in Bermuda. Now is not an appropriate moment to discuss the relative merits of light touch orders and compulsory liquidation; nor does Bermuda have to adopt the same approach as Hong Kong. It is, however material to observe that a light touch order may, in practice, not involve much decision making by the JPLs as to what steps shall be taken in the disposal of the company property in order to satisfy its debts. That is a good reason why creditors may genuinely wish to have a winding up order with liquidators appointed on a permanent basis to safeguard their interests, rather than be left in the hands of a company over which the JPLs have, in practice, very limited control, and such wishes should be given significant weight.

KAY J.A.

134. I agree.

BELL, J.A.

135. I, also, agree.