In The Supreme Court of Bermuda

COMMERCIAL COURT

2016: No. 183

IN THE MATTER OF UP ENERGY DEVELOPMENT GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

EX TEMPORE RULING ON AN APPLICATION TO ADJOURN THE PETITION

(in Court)

Winding-up petition-adjournment to pursue restructuring- petitioner seeking winding-up order-provisional liquidators recommending restructuring-governing principles-importance of demonstrating that a potential scheme of arrangement will likely attract the requisite support

Date of hearing: October 13, 2017

Mr John Wasty and Ms Hannah Tildesley, Appleby (Bermuda) Limited, for the Petitioner
Mr Kevin Taylor and Ms Nicole Tovey, Taylors, for the Joint Provisional Liquidators (the "JPLs")
Mr Andrew Martin and Ms Jennifer Haworth, MJM Limited, for Kaisun Energy Group Limited ("Kaisun"), a creditor supporting the adjournment application
Mr Mark Burrows, Zuill & Co, for Baosteel Resources International Company Limited ("Baosteel"), a creditor opposing the adjournment application

Introductory

1. The Petitioner in this matter seeks a winding-up order today and the JPLs, having been appointed in late April of this year, recommend to the Court that the petition

be adjourned until the last Friday in January 2018 to allow them to continue restructuring efforts.

2. The main tension that exists between the competing positions, which are supported on each side by creditors who seek a winding-up and who oppose a winding-up, is a commercial judgment as to whether or not a restructuring is in fact viable.

Applicable legal principles

3. The legal principles upon which Mr. Wasty for the Petitioner relies were set out at paragraphs 18 and 19 of his Skeleton Argument filed for the last hearing of the Petitioner filed on 22nd September 2017. He essentially relied on the classic principle that "*a petitioner who can prove that the debt is unpaid and that the company is insolvent is entitled to a winding-up order ex debito justitiae*": *Re LAEP Investments Limited* [2014] Bda LR 35 (Hellman J). That proposition was supported by reference to my own judgment in *Re Gerova Financial Group Limited* [2012] Bda LR 43.

4. Mr Wasty also relied on the statement of Neuberger J (as he then was) in *Re Demaglass Holdings Ltd* [2001] BCLC 633 at 638a:

> "*…the petitioning creditor has to establish the possibility of the prospect of some sort of benefit from a winding up. The test, however appears to be a low one. In Re Crigglestone Coal Company Limited [1906] 2 Ch 327 Collins, MR, appears to have thought that the petitioner need only show a reasonable possibility of some advantage (see 333A). The other two members of the Court of Appeal seem to have considered that the test was even lower than that. Romer LJ at 338 observed that he could not say that the prospect was "hopeless". At 339 Cozens-Hardy LJ said the evidence against the petitioners "did not support the contention that there is no possibility" of a dividend being paid to the unsecured creditors.*"

5. The principle which is really brought into play by the application for an adjournment is a very short one and that is that "*the Court is given a broad discretion to adjourn a petition for good reason*": *Re Z-OBEE Holdings Limited* [2017] Bda LR 19 at paragraph 10. And the question is whether or not good cause has been shown for adjourning this Petition.

The merits of the adjournment application

<u>The views of the majority of unsecured creditors</u>

6. It is broadly agreed that a petitioning creditor is petitioning not in pursuit of its individual interest but rather its class interest and so the best interests of unsecured creditors as a whole must be taken into account. And in that regard it is significant

that there is credible evidence before the Court that the majority of unsecured creditors support an adjournment of the Petition despite the concerns the Petitioner has raised.

The views of the JPLs

7. The judgment of the majority of the unsecured creditors does not stand alone. Because the JPLs, who have been appointed by this Court (as Mr Martin argued on behalf of Kaisun, the funding creditor) to be the eyes and ears of the Court, positively recommend that attempts to pursue a restructuring be pursued.

8. One of the concerns that I had during the last hearing was that insufficient progress had been made in investigating precisely what was likely to be a liquidation return and so that the Court and indeed the creditors could form an informed view, rather than a merely intuitive view, as to where their best interests lie.

9. The credibility of the JPLs' initial assessment is, to my mind, fortified by the fact that they have not adopted the simplistic approach of merely saying there will be a nil recovery. Rather they have predicted, subject to various *caveats* (understandably at this point) that there could be as low a recovery as 0.62 percent and as high a recovery as 3.77 percent. That careful assessment to my mind demonstrates that, contrary to the concerns of the Petitioner that the JPLs are somehow in the thrall of the Company and not in fact playing the independent role that they should be, the JPLs are in fact acting independently. And the broad point that they make is that while there could be some recovery, on the other hand there may well be next to nothing.

10. So in broad commercial terms the picture is that the majority of creditors have formed a view, without it has to be said any concrete evidence of a particular restructuring proposal on the table, that something is likely to be better than nothing; and that they are willing to run the risk of proceeding, on a 'wing and a prayer' as it were, towards a restructuring which has yet to take any solid form.

The need to demonstrate that a restructuring will attract the requite support

11. One very fundamental point that Mr Wasty raises against the adjournment is the fact that a restructuring can only take place through a scheme arrangement which is approved by a majority in number representing three-quarters in value of the unsecured creditors. At present, looking at the list of creditors and taking into account those who have let their present views be known, that threshold cannot clearly be reached.

12. This is I have to say the most concerning part of this restructuring process because, typically, a restructuring process in my experience is not seriously pursued without there being at the outset a core body of key creditors who are 'onside'. And to that extent I am concerned that the JPLs do not yet seem to have focused their attentions on trying to garner the critical support, at the earliest possible stage, which can demonstrate that a scheme of arrangement of some sort is likely to be approved.

13. The response in the 'restructuring camp', if I can describe the JPLs, the supporting creditors and the Company as a whole for present purposes thus, is the proposal that the largest single creditor (which is a related entity which is presently secured) will give up its security. That, it is said, should give the Court comfort at this stage that the scheme of arrangement that it is hoped will be proposed will attract the requisite support. For present purposes I am prepared to assume that that is conceptually possible.

14. But I do sound a warning that it is not likely to be entirely straightforward to persuade a court that a party related to the Company can convert itself into an unsecured creditor and be regarded as properly having the necessary common characteristics with other unsecured creditors who are completely unconnected with the Company.

15. So really, the viability of this scheme despite the support which the proposal of a restructuring presently has reflecting majority support, hangs by a very thin thread indeed. Nevertheless, on balance it seems to me that I am bound to give considerable weight to the judgment of the JPLs and their recommendation.

Disposition of adjournment application

16. And in these circumstances I decide to grant the adjournment sought. Clearly, by the next hearing of the Petition some progress will have to be demonstrated. That progress will it seems to me involve certain significant ingredients. One ingredient will be that the funder who has been identified anonymously as an interested investor in substantial dollar terms should have 'progressed' their commitment to a level that is far more tangible than it understandably is today. Secondly it seems to me that the JPLs will have to make further progress in demonstrating that they are likely to have the necessary support for the scheme.

17. It may well be that if it is impossible, for example, to buy out the opposing creditors that the Court may have to determine as a preliminary issue before funds are expended on a potentially expensive scheme whether or not it is possible for Up Energy Group Limited ("UEGL") to vote in the same class as the other unsecured creditors. Because looking at the respective stakes that the various unsecured creditors have, it seems to me that it would be impossible for the Court to be persuaded that there is requisite support for potentially passing a scheme without UEGL being eligible to vote. They at present represent just over 50% of the creditors' total claims and are presently discounted on the basis of being secured.

18. If they do give up their security and can vote then they should be capable of carrying the day. That still leaves some measure of uncertainty because of those creditors whose views are not known. But the concerns that have been so forcefully expressed on behalf of the petitioning creditor and Baosteel are sufficiently credible that it seems to me that it would be rash for the Court to allow a restructuring process to proceed in circumstances where there is no solid

evidence that there is a reasonable prospect of a scheme attracting the requisite support.

Conclusion

19. And so for those reasons the Petition is adjourned until the last Friday in January 2018 (January 26, 2018).

Dated the 13th day of October, 2017 _____

IAN RC KAWALEY CJ