In The Supreme Court of Bermuda

COMMERCIAL COURT

COMPANIES (WINDING UP)

2022: No. 46

IN THE MATTER OF FULLSUN INTERNATIONAL HOLDINGS GROUP CO., LTD.

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Date of Hearing: **16 May 2022**
Date of Ruling: **9 June 2022**

Appearances: **Henry Tucker and Kyle Masters, Carey Olsen Bermuda Limited for the Petitioner**

Nicholas Miles, Kennedys Chudleigh Ltd. for the Company

Lilla Zuill, Harneys (Bermuda) Limited, for Profound Success Investment Limited, a creditor of the Company

RULING of Mussenden J

Introduction

1. Harbor Sure (HK) Investments Limited (the "**Petitioner**") filed a Petition on 24 February 2022 (the "**Petition**") for the purposes of winding up Fullsun International Holdings Group

Co., Limited (the "**Company**") and to appoint provisional liquidators ("**JPLs**") of the Company. The hearing of the Petition was listed for 22 April 2022 but eventually came on for hearing on 16 May 2022.

2. The Company filed a Summons dated 20 April 2022 seeking a two-month adjournment of the Petition.

3. Profound Success Investment Limited (the "**Supporting Creditor**" or "**Opposing Creditor**") filed a Notice of Intention to Appear dated 20 April 2022 as a creditor for US$215 million of the Company and to oppose the Petition.

The Petition

4. The Petition relates to the leveraged acquisition in March 2018 of certain British Virgin Islands ("**BVI**") companies owning the 41st, 42nd, 43rd, 45th and 46th floors, 16 car parking spaces and 3 external signage areas of "Enterprise Square Three", No. 39 Wang Chiu Road, Kowloon, Hong Kong by the Company via its former indirect wholly-owned subsidiary, Splendor Keen Limited.

5. The Petition set out that by a facility agreement dated 22 March 2018 (the "**Agreement**") made between, amongst others, Vivalink Limited, a BVI company, (the "**Borrower**") as borrower and the Petitioner as lender, the Petitioner agreed to make available to the Borrower a term loan facility of HK$400,000,000 (the "**Facility**") upon and subject to the terms and conditions for the purposes set out in the Agreement.

6. The Petitioner subsequently provided a consent in connection with the Agreement in favour of the Borrower, that the Company (the "**Guarantor**") would enter into a guarantee dated 21 August 2019 (the "**Guarantee**") as Guarantor in favour of the Petitioner.

7. An agreement dated 18 May 2021 supplemented and amended the Agreement for the Facility of HK$400,000,000 and upon the Effective Date, defined as 25 March 2021, the principal amount of the loan was stated to be HK$380,000,000. As of the date of the

Petition, the principal amount of the loan which was outstanding was HK$47,580,000 (the "**Outstanding Principal Amount**").

8. The Petition set out the terms of the Guarantee, in particular clauses 2(a), 2(b), 2(c) and 3.

9. The Petition set out the details of non-payment. On 21 September 2021, a Notice of Default (the "**Notice of Default**") was issued to the Borrower, and to other obligors, stating that the Borrower was obliged to pay on 20 September 2021 a sum of HK$20,000,000 (the "**Relevant Interim Payment**") towards the repayment of the principal due and unpaid pro rata for the Loan. On 21 and 22 October 2021, the Borrower had partially repaid the Relevant Interim Payment in the sum of HK$2,420,000, however, as of the date of the Petition, the balance of the Relevant Interim Payment was still overdue and outstanding thus becoming a non-payment event. The Notice of Default also entitled the Petitioner to charge default interest (the "**Default Interest**") on the entire amount of the outstanding loan according to various dates.

10. On 5 October 2021 Notices of Demand were sent to each of the Borrower and Guarantor. The Notice of Demand to the Borrower demanded that the entire loan be immediately due and payable at its principal amount together with various amounts including with accrued interest, default interest and all other amounts outstanding and to be paid by 8 October 2021.

11. Under the terms of the Guarantee, each guarantor had undertaken that whenever the Borrower does not pay any amount when due, they shall immediately on demand pay that amount as if they were the principal debtor in respect of that amount. Therefore, the Petitioner demanded that each guarantor immediately pay all amounts referred to in the Notice of Demand no later than 8 October 2021.

12. On 7 January 2022 Carey Olsen Bermuda Limited, on behalf of the Petitioner, served a statutory demand (the "**Statutory Demand**") on the Company requiring the Company to pay the sum of HK$70,733,122.19 (the "**Statutory Demand Amount**") consisting of the Outstanding Principal Amount in the amount of HK$47,580,000 and the Default Interest in the amount of HK$23,153,122.19.

13. As at the date of the Petition, the Company had neglected to pay the Statutory Demand Amount or to secure or compound for it to the reasonable satisfaction of the Petitioner.

14. As at 23 February 2022, the Borrower or the Company had not paid either in whole or part the total amounts due under the Agreement of HK$71,483,973.70 (the "**Total Amount**") consisting of HK$47,580,000 and the Default Interest in the amount of HK$23,903,973.70.

15. The Petition set out that the Company is unable to pay its debts as they fall due pursuant to section 161(e) of the Companies Act 1981 and therefore should be wound up. Further, or in the alternative, it is just and equitable that the Company should be wound up.

Petitioner's Submissions to wind up the Company

Issues to be resolved on the Petition

16. Mr. Tucker submitted that in order to establish a right to an immediate winding-up order, the Petitioner must demonstrate that the following questions can be answered in the affirmative:
    a. Does the Petitioner have an unpaid debt?
    b. Is the Company unable to pay its debts as they fall due?
    c. Has the Petitioner established that there is a possibility of some advantage in making a winding-up order (i.e. that the prospect of a return to creditors in winding up is not hopeless?)

Issues to be resolved on the Adjournment Application

17. Mr. Tucker submitted that if the Petitioner establishes that it has a right to an immediate winding-up order, the Court retains a residual discretion to suspend the Petitioner's right by way of an adjournment. In order to determine whether or not to exercise this discretion to adjourn the Petition, the Court must make findings on the following issues:

a. Has the Company established that a majority of unsecured creditors oppose the Petition?
b. If so, are there any matters which affect the independence of the unsecured creditors who oppose the Petition?
c. If so, has the Company established that there is a good reason for refusing to wind up the Company?
d. Where the reason for the adjournment is in pursuit of a prospective restructuring:
    i. Is the prospective restructuring and continuation of the Company's business as a going concern likely to more beneficial to the creditors than a liquidation realisation of the company's assets?
    ii. Has the Company established there is a real prospect of the prospective restructuring and the continuation of the Company's business as a going concern being affected for the benefit of the general body of creditors?

The Law – The Petition

18. Mr. Tucker made the following submissions about the law in respect of petitions.

19. Section 163 of the Companies Act 1981 (the "**1981 CA**") provides that any creditor of the Company may petition for the winding up of the Company.

20. Section 161(e) of the 1981 CA provides that a company may be wound up on the petition by the Court if the Company is unable to pay its debts.

21. Section 162(a) of the 1981 CA provides that a company shall be deemed to be unable to pay its debts if it fails to satisfy a statutory demand served under that section.

22. A petitioner must also establish that there is a possibility of a prospect of a benefit to a winding-up order. In the leading case of *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 Neuberger J (as he then was) considered the test stating:

    "… 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

Criggleston Coal Co Limited …Collins MR appears to have thought the petitioner need only show a reasonable possibility of some advantage. The other two members of the Court of Appeal seem to have considered that the test was even lower than that. Romer LJ observed that he could not say that the prospect was 'hopeless'. 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."

23. Where these circumstances are made out, a creditor of an insolvent company is entitled to a winding-up order under the 1981 CA as of right. As stated in *Re LAEP Investments Limited* [2014] BDA LR 35 and cited in the ruling in *In the Matter of NewOcean Energy Holdings Limited* [2022] SC (Bda) 15 Comm:

"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."

Does the Petitioner have an unpaid debt?

24. Mr. Tucker submitted that the Company had admitted the Petition debt (the "**Petition Debt**") up to the amount of approximately HK$48 million (approximately US$6 million).

Is the Company unable to pay its debts?

25. Mr. Tucker submitted that the Company failed to satisfy the Statutory Demand in respect of the Petition Debt.

Is there a reasonable prospect of a benefit of a winding up?

26. Mr. Tucker stated that the Company's liquidation analysis estimated a return to creditors arising from a winding up of HK$138,822.

27. Mr. Tucker submitted that if the Company is wound up the Petitioner has established a reasonable prospect of the Company having the benefit of a set off recovery (HK$510

million), debt recovery (HK$220 million) and equity recovery (RMB826 million) which vastly exceed the best-case scenario put forward by the Company in the alternative scenario being HK$23.2 million.

The Law – The Adjournment Application

28. Mr. Tucker submitted that it is beyond doubt that the Petitioner is entitled *ex debito justitiae* to a winding-up order. Thus, the Court must consider whether the Company has met the test for an adjournment, noting that the start point is that an adjournment will not be granted and the burden is on the Company to establish these facts on a balance of probabilities.

29. Mr. Tucker submitted that *Demaglass* establishes that in the absence of exceptional circumstances, the Company must establish that there is a majority of creditors in support of an adjournment. He relied further on Neuberger J where he stated:

> *"... there is 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 support the opposition. In this connection see the discussion in the judgment of Brightman J in Re Southard & Co Ltd [1979] 1 All ER 582 at 585-586, [1979] 1 WLR 546 at 550 where he said:*
>
> > *'As has often been said, the decision in a case such as the 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 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.'"*

30. Mr. Tucker submitted that *Demaglass* clarified that the creditors with whom the Company is concerned are those who do not have security for their debts:

"the Court will give little, if any, weight to the views of the secured creditors, at least in so far as their debts are secured (see Bell Group Finance Ltd v Bell Group Holdings Ltd [1996] 1 BCLC 304). This is because the secured creditors are protected in any event, at least to the value of their security, and to that extent they have no interest in whether the company is wound up or not, save perhaps in unusual circumstances, for instance, if the value of the security would be affected by the making up of a winding-up order."

31. Mr. Tucker submitted that the Court must give less weight to the views of the creditors connected to the Company when establishing majorities. He relied further on Neuberger J where he stated:

"the court will have greater regard to the views of independent creditors as opposed to creditors connected with the company (see Re Palmer Marine Surveys Ltd [1986] BCLC 106)."

32. Mr. Tucker submitted that even with a majority of unsecured, independent creditors in support of an adjournment, the Company must establish that there is a good reason for refusing to wind up the Company. In *Demaglass* it was stated:

"it is not enough if the majority of creditors oppose the making of a winding-up order in the normal case. The court must also be satisfied that they have a good reason for refusing to wind up the company. The requirement of there being good reasons is emphasised by the decision of the Court of Appeal in Re P & J Macrae Ltd [1961] 1 All ER 302, ... especially per Wilmer LJ in a passage which includes the following [at 307]....

'... 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. So to hold would be to leave the court with virtually no judicial function to perform, and to take away from it the discretion which the words of the Act plainly confer.'"

33. Mr. Tucker submitted that the standard of evidence that should be required where the company seeks an adjournment without the invitation of "restructuring troops" of the JPLs

is set out in Hong Kong cases where "light touch" provisional liquidation is not available. He referred to the case of *Founder Information (Hong Kong) Limited* [2021] HKCFI 311 where Justice Harris stated that the principles that guide the court in determining applications by a company seeking an adjournment to progress a restructuring of its debt were well established citing the case of *Re Lerthai Group Limited* [2021] HKCFI 207 where he cited his judgment in *SMI Corporation Limited* where he explained that an important consideration is the views of the creditors, the reasons for supporting or opposing the petition and the feasibility of the proposed restructuring highlighting the necessity for evidence to be put before the court to allow the court to make an informed decision whether or not to agree an adjournment. Further, in *Re Lerthai Group Limited* he stated that the court will expect the evidence in support of an application to give time to allow a restructuring to progress to be consistent with the character and nature of the business and the debt. In *Founder Information* he stated that generally unless there is a substantial body of creditors opposing a petition for sensible reasons, the Court will defer to a petitioner's wishes.

34. In *In the Matter of China Bozza Development Holdings Limited* [2021] HKCFI 1235 Justice Harris explained where the restructuring plan contemplated a scheme, the company must show that the scheme will in fact address its financial difficulties and is likely to achieve sufficient majorities of each class to pass the scheme:

> *"As I explained in Lamtex the Hong Kong Court will grant an adjournment if it is demonstrated by a company that it has a proposal to address its financial difficulties that is in the best interests of the general body of unsecured creditors, particularly if there is in principle support from sufficient of the creditors in terms of value of the unsecured debt to suggest that if a scheme of arrangement is introduced it is likely to achieve the necessary statutory majority in value (75%) to engage the court's discretionary power to sanction the scheme."*

The Facts – The Supporting Creditor should be treated as fully or substantially secured for its debts

35. Mr. Tucker submitted that the Company's foundation for their case for an adjournment is that there is a restructuring proposal for a Scheme (the "**Proposal**") that will allow the Company to continue on a going concern basis and that the Supporting Creditor agreed. However, he argues that neither the Company nor the Supporting Creditor have submitted evidence to show that on a going concern basis that the Supporting Creditor is not fully secured. Thus, the effect of the Proposal, upon which the adjournment is based, would be to allow the Supporting Creditor to receive full value for their debts under the Supporting Creditor's Facility Agreement while the Petitioner's security remains worthless and receives virtually nothing under the Petitioner's Facility Agreement. In these circumstances, the Court should not consider the Supporting Creditor an unsecured creditor for determining majorities required to order an adjournment.

The Facts – There is reason to give less weight to the Supporting Creditor's views as they are connected to the Company

36. Mr. Tucker submitted that the Company and the Supporting Creditor admitted that the Company granted security to the Supporting Creditor in the form of the LaSalle Mortgage and that it improved the position of the Supporting Creditor over the Petitioner. This was a breach of the Petitioner's agreement with the Company which has not been substantially controverted by the Company or the Supporting Creditor. Thus, this grant of security breached the rights of an unsecured creditor and reduced the amount available to the unsecured creditors generally in a winding up. Therefore, their joint conduct to breach the rights of an unsecured creditor is an undisputable reason to regard them as connected, with the result that the views of the Supporting Creditor should be given less weight when considering the application for an adjournment.

37. Mr. Tucker submitted that the Company has granted the Supporting Creditor extensive joint control over the Company in the operations, business plans, sales and cash flow of a large proportion of the Company's assets over which the Supporting Creditor has security

through powers of appointment, control of Company chops, seals and other powers. Therefore, they are closely connected and jointly managing the Company's affairs, such that the only outsider of the Company who requires protection of the winding up is the Petitioner.

The Facts – The Company has not established that the prospective restructuring and the continuation of the Companies business as a going concern is likely to be more beneficial to the creditors than a liquidation realization of the Company's assets

38. Mr. Tucker submitted that the Company had not provided any opinion of an independent financial advisor to support their factual conclusion that the underlying assets of the Company which are currently on the balance sheet at US$140 million would be worth nothing in the event the Company was wound up. He highlighted that Deloitte's opinions were premised on a restructuring and liquidation analysis conducted by the Company (the "**Analysis**") and that Deloitte has not stated that it conducted any independent scrutiny of the Analysis.

39. Mr. Tucker submitted that there were several matters identified in the annual report of the Company that need to be addressed for the Company to continue as a going concern. However, the Company has admitted that the Proposal will not resolve them. Assuming the Proposal will take six to twelve months to implement, at the rate that the Company is losing money, the capital received in the Proposal will be lost before it is received. Thus, the Proposal will not allow the Company to continue as a going concern.

40. Mr. Tucker submitted that there is no evidence that is sufficient to show that the Petitioner should accept a Scheme which would eliminate virtually all of the Petitioner's debt for pennies on the dollar where the Company's Audited Report show the Company carrying an equity value of HK$1.1 billion. Thus, the result of the Scheme is not likely to be more beneficial than a winding up.

The Facts – The Company has not established there is any realistic prospect of the prospective restructuring being consummated

41. Mr. Tucker submitted that the Company admitted that the Supporting Creditor and the Petitioner hold different security interests in the subsidiaries and assets of the group and the proceeds of the Scheme would be contributed to those onshore subsidiaries. The positive case put forward by the Company and the Supporting Creditor is that the effect of the Scheme would be to preserve the value of the Supporting Creditor's security allowing it to receive full or substantial payment for its debt. However, the Company had not put forward any evidence that the value of the Petitioner's security would likewise be increased and/or be sufficient in value after the Scheme to meet the amount of liabilities owed to it under the Agreement. Thus, there was no arguable case that the Petitioner and the Supporting Creditor would vote in the same class in a Scheme. Further, the Petitioner would not vote for the Scheme because it does not consider it to be in the best interests of the general body of unsecured creditors. Therefore, the Company has not established there is a reasonable prospect the Scheme will be passed if an adjournment is granted. On the contrary, the Petitioner has established that that there is no arguable case, much less a realistic prospect that the latest Non-Binding Term Sheet is capable of implementation.

42. Mr. Tucker submitted that Tongda Enterprises and a Mr. Pan Haoran, the majority shareholder of the Company, cannot agree to a change of control of the Company without the consent of the Petitioner, pursuant to the Agreement. Under the terms of the latest Non-Binding Term Sheet and the Bye-Laws, a majority of shareholders are required to support the share subscription in order for the Proposal to be implemented. However, there is no evidence put forward by the Company to suggest that the shareholders of the Company, excluding Tongda Enterprises or Mr. Pan Haoran, would vote in favour of the share subscription. Thus, the Company has not established there is a realistic prospect that the Proposal under the Non-Binding Term Sheet is capable of implementation, even if an adjournment is granted and the Scheme is passed.

Company's Submissions for an Adjournment of the Petition for Two Months

43. The Company opposes the Petition and seeks an adjournment of the Petition for two months to allow time to finalise the terms of and potentially to begin to implement a "**Proposed Restructuring**" which was the subject of a term-sheet with China Top Grade Wealth Management Company Limited ("**China Top Grade**").

44. The Company's ground for opposing the Petition was that with the Proposed Restructuring, including a creditor's Scheme of Arrangement, the Petition Debt would be discharged and the Petition will be liable to be dismissed.

45. Mr. Miles submitted that the Petitioner had failed to identify a benefit from the winding-up order as it must do when there are opposing creditors. Equally, it had failed to identify any prejudice that it would suffer as a result of an adjournment.

The Petition Debt, the Restructuring Proposal and the Liquidation Scenario

46. Mr. Miles referred to the First, Second and Third Affirmations of Xie WanWen, Deputy General Manager of the Company, dated 20 and 28 April 2022 and 13 May 2022 respectively ("**Wanwen1**", "**Wanwen2**", "**Wanwen3**") and where he made various statements as follows:
    a. The Petitioner's unsecured debt was HK$68,404,000 (per Wanwen1), adjusted to HK$68,403,973.70 (per Wanwen2).
    b. The Analysis showed that in a liquidation, the Company estimated a recovery for unsecured claims was HK$128,000 or 0.006%.
    c. The Analysis showed that in a liquidation, in respect of the Petitioner, the recovery at 0.006% would be approximately HK$40,000 (approximately US$5,000).
    d. The Analysis showed that in the Proposed Restructuring, with an equity injection and upon completion of the restructuring, 10% of issued share capital allotted to unsecured creditors represents a value of about HK$134 million resulting, with the HK$5 million cash consideration, a dividend of approximately 6.51%.
    e. Thus the Proposed Restructuring of 6.51% is far superior to the liquidation analysis recovery of 0.006%, in actuality about 1,000 times better.

f. Deloitte Financial Advisory had advised that according to the Analysis (prepared by the Company), the return from the subsidiaries would be zero, all PRC subsidiaries would be placed into bankruptcy proceedings and the forced sale of onshore assets is unlikely to contribute any value to the Company.

The majority of creditors oppose the Petition for good reason

47. Mr. Miles submitted that the Opposing Creditor holding about 72% by value of the Company's unsecured creditor debt supported the Proposed Restructuring and opposes the Petition. It is likely that a further 23%, taking the total to 95% have the same views. Additionally, there are tangible and realistic prospects of success for the Proposed Restructuring. The Analysis expected recovery for unsecured creditors in the Proposed Restructuring to be 1,000 times more than that in liquidation.

48. Mr. Miles referred to *McPherson and Keay* on the *Law of Company Liquidation (Sweet & Maxwell, 5th Ed)* where it stated 'a 'good reason' to adjourn is '*that winding up will deprive creditors of the benefit of a proposed compromise, or will endanger a scheme for reconstruction.*" Mr. Miles argued that there is a proposed compromise in place. He also argued that the recent events where the last white knight, who pulled out because of concerns about the Petition proceedings, demonstrate that a reasonable period for adjournment, specifically to permit the Company to pursue the Proposed Restructuring is essential if creditors are not to be deprived of the benefit of the scheme of restructuring.

49. Mr. Miles argued that the authorities regarding the exercise of the Court's discretion are clear that the Court should have regard to the wishes of the majority of the creditors because those wishes, though not conclusive, possess great weight and, if they are reasonable the Court should follow them in the absence of special circumstances, citing *Re ABC Coupler & Engineering Co Ltd* [1961] 1 All ER 354. Further, he also submitted that the same case stated that a reasonable ground for adjournment is the presence of at least "*prospects that a company will be able to continue*".

50. Mr. Miles also relied on the case of *Re Dollar Land (Feltham) Ltd* [1995] 2 BCLC 370 where Blackburne J held that the court needed to be satisfied that there was a *"real prospect that proposals can be formulated which will command the necessary approvals"*. He found that in that case that since a "*credible draft document embodying proposals for submission to creditors*" had been prepared and "*a significant body in value of the companies' creditors appeared and were in favour*" the court should grant a 28 day adjournment. Mr. Miles highlighted that in the present case, there was a restructuring term sheet and between 72% and 95% of supporting creditors, sufficient to secure the necessary approvals, along with the well-regarded firm of restructuring experts Deloitte. Thus, there was a real prospect of the restructuring succeeding.

51. Mr. Miles submitted that the Court should be slow to substitute its own evaluation of the prospects of success for those of the overwhelming majority of creditors. He cited *ABC Coupler Engineering* where it stated "*Those prospects appear sufficiently good to the considerable number of creditors who oppose this petition for them to prefer that the company should be carried on rather than be wound up and it seems to me that they are the best judges of that.*" Mr. Miles argued that it was irrelevant if the Petitioner has doubts about the viability of the restructure if the overwhelming majority of creditors, acting rationally and impartially, consider that it is sufficiently viable to warrant the adjournment.

52. Mr. Miles submitted that a good reason for majority creditors to support an adjournment is also that there is a greater prospect of being paid more, with the adjournment. He relied on *Demaglass* where the Court concluded that that it was definitely more likely than not that with a ten week adjournment a higher realization of secured property would be achieved, meaning a greater prospect of a surplus for unsecured creditors and less chance of the secured creditor having an unsecured portion of its debt that would merely reduce the pro rata division of assets among unsecured creditors.

<u>There are no special reasons not to give effect to the majority view</u>

53. Mr. Miles submitted that the authorities are clear that where: (a) the majority of creditors oppose a winding up because they want the benefit of a restructure which has reasonable prospects of attaining the necessary approvals; or (b) on the balance of probabilities

unsecured creditors will be paid more with the adjournment, the Court will adjourn the Petition in the absence of special reasons.

54. Mr. Miles submitted that the Petitioner, which hold approximately 3.2% of the debt, has failed to identify any special reasons. He argued that there are no special reasons not to give effect to the majority view. He noted that the objections of the Petitioner to the adjournment are based on the following:
    a. Misapprehension about the Proposed Restructuring which is now corrected;
    b. Allegations about the Company's ability to negotiate a restructuring which are:
        i. Based on factually inaccurate premises noting that contrary to what the Petitioner says, the Company did try to negotiate with it;
        ii. Controverted by the facts, particularly given that a Term Sheet has now been executed, a timeline provided and 95% of creditors say they will approve a Scheme of Arrangement; and
        iii. Generally insubstantial and unsupported by evidence; and
    c. An incorrect legal theory about a change of control pre-payment trigger in a contract between the Petitioner and a subsidiary of the Company;
    d. Wholly unsupported allegations of collusion with the Opposing Creditor;
    e. Wholly unrealistic expectations about the realization of PRC property and development assets in the midst of extremely poor market conditions; and
    f. Numerous fallacious arguments about the preparation of the Company's 2021 annual report.

55. Mr. Miles submitted that the management of the Company has determined that with the restructuring, the Company can address the uncertainties referred to in its 2021 annual report. He noted that the Opposing Creditor and potentially 23% additional creditors by value are comfortable placing their trust in the judgment of management. Also, the white knight is also comfortable with the potential for the capital injection to save the group. He argued that the Court does not need to examine and be satisfied on the balance of probabilities about every single detail of the Proposal and its ramifications or every single

detail about the Company's financial statements. Stressing that the supporting creditors are the best judges of what is viable and their wishes should in the circumstances prevail.

No additional measures are necessary to protect creditors

56. Mr. Miles submitted that the Proposed Restructuring is well-defined and is prima facie very likely to attain the necessary majorities in a Scheme. The Company has the benefit of advice of Deloitte as restructuring adviser. Thus, a provisional appointment would not add value. Mr. Miles argued that the period of the proposed adjournment is limited.

57. Mr. Miles argued that in the circumstances, the majority creditors are prima facie entitled to expect that their wishes will prevail and thus it is appropriate for the Court to exercise its discretion to adjourn.

58. Mr. Miles requested that in the course of the Proposed Restructuring, directions will be necessary for the Company to make payments of fees for restructuring advisors, lawyers, employees, critical service and incur costs of and incidental to the Petition.

Opposing Creditor's Submissions

59. The Opposing Creditor is a creditor for US$215 million of the Company and opposes the Petition. Ms. Zuill submitted that the Opposing Creditor is the largest unsecured creditor by an overwhelming margin and supports the Company's restructuring efforts and the application for an adjournment. It understood that the since 2020 the Company experienced severe financial distress caused by first the Covid-19 pandemic and more recently by the general downturn affecting the property market in mainland China.

60. Ms. Zuill explained that the Opposing Creditor is a Company incorporated in the BVI and it is a special purpose vehicle incorporated for the purpose of entering into a loan transaction guaranteed by the Company. She noted that the vast majority of the debt originally owed to the Petitioner under the facility has been repaid to it. According to the

Opposing Creditor, it calculated that the Petitioner has received repayment of a total of approximately 88% of the principal due to it, such that the Petition Debt constitutes a relatively small portion of the overall debt due to the Petitioner over the years since it entered into the facility, a position which is in stark contrast to the Opposing Creditor's position.

The debt owed to the Opposing Creditor

61. Ms. Zuill submitted that the debt due to the Opposing Creditor similarly arises under a facility agreement under which it made available facilities in the total sum of US$238 million to an indirect wholly-owned subsidiary of the Company. The borrower drew down a total of approximately US$156 million under the facilities which it was obliged to repay to the Opposing Creditor. The Company guaranteed the obligations of the borrower under the facility, including as to repayment. Following two repayments bringing the total principal outstanding down to US$139.01 million, the borrower defaulted on its repayment obligations under its facilities with the Opposing Creditor. The Company then defaulted on its obligations as guarantor.

62. Ms. Zuill submitted that as of 20 April 2022 the debt due from the Company to the Opposing Creditor as a result of its default under the terms of its guarantee amount to a total of approximately US$215 million (equivalent to HK$1.677 billion). Accounting for the value of security held by the Opposing Creditor, the value of the unsecured portion of the debt is approximately US$197 million (the "**Unsecured Debt**"). Ms. Zuill argued that the Petitioner takes issue with the calculation and contends that the Opposing Creditor holds additional security in respect the Unsecured Debt. She stated that that was a misapprehension in that, to the extent that the Opposing Creditor does hold such security, the calculations of the Company indicate that it has no economic value. Ms. Zuill stated that Opposing Creditor believes, and the Company's calculations show, that the Opposing Creditor is by far the largest unsecured creditor of the Company. The Unsecured Debt accounts for 95% of the total unsecured debt of the Company. In contrast, the value of the Petition Debt is less than 5% of the Unsecured Debt, making the Petitioner a far less significant creditor of the Company than the Opposing Creditor.

The Proposed Restructuring

63. Ms. Zuill submitted that the Opposing Creditor understands from discussion with the Company that it is in the process of seeking to agree and implement a debt restructuring which contemplates:
    a. The acquisition of a controlling stake in the Company by China Top Grade at a consideration of HK$163 million. After payment of the cash allocated to unsecured creditors the money will be invested in the Company and used as working capital; and
    b. As a term of China Top Grade's investment, the Company will restructure its debt by effecting a Scheme of Arrangement which currently contemplates a capital restructuring with the allocation of 10% of the Company's fully diluted equity and HK$5 million in cash to creditors.

64. Ms. Zuill submitted that the Company estimates a return of 0.006% to creditors in a liquidated scenario as against an estimated return of 6.51% should the Scheme be passed. She argued that this presents a far better return for unsecured creditors than on the Company's liquidation scenario. She highlighted that even on the Petitioner's incorrect analysis of the benefits of the intended scheme, the return to unsecured creditors, which appears to range from 0.2% on a worst case scenario to 1.6% on an alternative scenario, far exceeds the returns in the Company's liquidation scenario.

65. Ms. Zuill also highlighted that in furtherance of the proposed restructuring, the Company intends to engage Deloitte as financial advisor to the board to formulate and implement the restructuring plan.

66. Ms. Zuill submitted that the Opposing Creditor seeks to maximize its return from the Company and therefore as the largest unsecured creditor supports the proposed restructuring out of rational commercial self-interest.

The Law

67. Ms. Zuill noted that a company's proposal for a debt restructuring must be more than a mere statement of intent or 'very speculative'. However she submitted that it is not necessary for the Company to present a full, comprehensive restructuring plan at this stage. She cited the case *In re Up Energy Developments* [2018] SC (Bda) 76 Civ where Subair Williams J adopted a practical approach to assessing creditor support for a proposed restructuring:

> *"47. However, in assessing and ascertaining the majority position, the Court will have regard to the nature and value of each creditor's debt. So, the meaning of a majority position, in the context of whether the Court will adjourn a winding-up order in exercise of its unfettered discretion, will not necessarily find parity with the meaning of 'majority' as defined by s.99 of the Companies Act when having regard to the rules for sanctioning a scheme of arrangements.*
>
> *48. In my judgment, the Court need not at this stage satisfy itself on the certainty of success of a scheme of arrangement in order to adjourn the petition. A reasonable prospect of success will do. It is sufficient to establish, in deciding whether to adjourn the petition, that a majority (even if not yet up to 75%) of unsecured creditors are desirous of adjourning in order to support the JPLs further attempts for a restructuring. If the current majority (51% plus) of unsecured creditors are reasonably optimistic that a scheme of arrangement at 75% majority of voting creditors' claims is attainable, the Court will usually decide in favour of the wishes of the unsecured creditors who are the real stakeholders."*

68. Ms. Zuill submitted that when a scheme is put to general creditors for approval, it must be such that a man of business would reasonably approve. She argued that thus the Court would recognise that creditors are normally the best judge of what is in their commercial interest. She cited the case of *Re App China Group, Ltd* [2003] Bda L.R where Kawaley J (as he then was) stated:

"The whole object of section 99 schemes is to allow a significant majority of creditors or members of a company (or a particular class thereof) to vary not only their own pre-existing rights with a company, but the rights all similar positioned persons as well. The rationale underlying the scheme framework is that if an overwhelming majority of a class of persons dealing with a company form the view that a particular course is in the interests of them all, an obstinate minority should not be entitled to sink the ship on which the majority have decided to sail. The relevant creditors or members will have founded a relationship with the company with an essentially common goal in mind: to profit from those dealings. They are assumed to be the best judges of what their commercial best interests are; accordingly, assuming the scheme is not promoted for fraudulent purposes and those who vote are adequately informed and not materially misled, if the majority in number representing 75% in value support the scheme, it is not for the court to "second-guess" them and tell them what their best interests are."

69. Ms. Zuill submitted that in circumstances, as there in the present case, where there is majority creditor support for an adjournment, in the interests of a restructuring being promulgated, the Court would be right to exercise its discretion under section 164(1) of the 1981 CA and adjourn the Petition for the limited period sought by the Company.

Discussion and Analysis

70. In my view, I will exercise my discretion to adjourn the Petition for the time period requested by the Company for several reasons.

The Petition

71. First, there is no dispute that the Petition Debt exists and that the Company failed to satisfy the Statutory Demand in respect of the Petition Debt. In my view, the Petitioner is entitled to a winding-up order *ex debito justitiae* as an unpaid creditor for the amount of the Petition Debt.

72. Second, in light of the test in *Demaglass*, which sets a low bar for the Petitioner to establish the possibility of the prospect of some sort of benefit from a winding, I am not satisfied that the Petitioner has done so, even to the low bar. I agree with Mr. Miles that the Petitioner has failed to identify a benefit of a winding up. The parties disagreed about whether there is a reasonable prospect of a benefit of a winding up. The Petitioner's submissions discredited the Analysis as it was prepared by the Company with no independent scrutiny and it provided its own liquidation scenario in respect of various recoveries which it argued exceeded the Company's best case scenario. However, Mr. Miles described the Petitioner's analysis as purely speculative about the current markets especially when the onshore assets are subject to forced sales. On the contrary, the Company has stated that, on its Analysis, the Proposal outcome with the executed Term Sheet is about 1,000 times better than the liquidation scenario. On that basis, I am not satisfied that the Petitioner has established that there is a possibility of some advantage of making a winding-up order when the restructuring outcomes would be 1,000 times better.

The Application to adjourn the Petition

Whether a majority of creditors oppose the Petition and support the Adjournment

73. Third, in my view the Company has established that the adjournment has the support of the majority of the unsecured creditors of the Company. I am satisfied that the Opposing Creditor holds about 72% by value of the Company's unsecured creditor debt and it is clear that it supports the Proposed Restructuring and an adjournment and opposes the winding up. I also accept the Company's position that it is likely that a further 23% have the same views, taking the total to 95%. Thus, in following *Demaglass*, I am guided by Neuberger J that in the exercise of my discretion, I should heed the wishes of the majority of the creditors, which in this case is for an adjournment.

74. Fourth, in my view, I cannot discount or give little or no weight to the views of the Opposing Credit for a variety of reasons. Mr. Tucker relied on *Demaglass* again and argued that the Opposing Creditor should be treated as fully or substantially secured for its debts. However, Ms. Zuill argued that the evidence showed that of the total debt of US$215 million owed by the Company to the Opposing Creditor, the value of the Unsecured Debt

is approximately US$197 million. On that basis, I am satisfied that it is not appropriate to treat the Opposing Creditor as fully or substantially secured as it is clear that on the contrary they are substantially unsecured. Thus, on this point, my view is that I should give proper consideration to the views of the Opposing Creditor.

75. Mr. Tucker argued that the Opposing Creditor is a connected creditor and thus little weight should be attached to its views. Ms. Zuill clarified that that was a misapprehension as the Company had calculated that any such security has no economic value. Further, she pointed to the evidence in Henry Chan's Third Affirmation that the Opposing Creditor did not hold security over the entity described only in Chinese.

76. Ms. Zuill sought to address the myriad issues raised by Mr. Tucker that the Opposing Creditor had control over the Company. In respect of the LaSalle Mortgage, Henry Chan had denied that there was collusion between the Company and the Opposing Creditor as the Petitioner was well aware of the Opposing Creditor's involvement and there was no intention to conceal it from the Petitioner. In respect of the control of the "chops" (described as company 'seals' or 'stamps'), it was typical for lenders to ensure that borrowers do not release assets, so controlling the chops is standard. I am satisfied that I should accept these positions and thus I reject the submission that I should give little or no weight to the Opposing Creditor's wishes.

77. In respect of the Opposing Creditor having control over parts of the Company and sharing information with it, I agree with Mr. Miles when he noted that Mr. Tucker had not cited any authorities on what was meant by 'connected parties'. In any event, he argued that as a senior lender, the Opposing Creditor would want information about the Company but that did not mean it was a 'connected party'. In my view, Mr. Miles and Ms. Zuill have persuaded me that I should not give little or no weight to the views of the Opposing Creditor on the basis that it is a 'connected creditor' as that they have countered the Petitioner's allegations with evidence as stated above on the independence of the Opposing Creditor.

Whether there are good reasons to oppose the Petition

78. Fifth, I am satisfied that there are good reasons to adjourn the Petition. My start point is the extract in *McPherson and Keay* which stated that a good reason to adjourn is that a winding up will deprive creditors of the benefit of a proposed compromise or will endanger a scheme for reconstruction. I accept the Company's evidence that there is a proposed compromise and a restructuring Term Sheet in place along with restructuring experts in the form of Deloitte coming on board to advise the Company. In my view, with all these factors in place, the Company should not be deprived of the opportunity to restructure and the creditors should not be deprived of the benefit of a proposed compromise. Thus, an adjournment will give it time to pursue the Proposed Restructuring.

79. Additionally, I agree with Mr. Miles that another good reason for the majority creditors to support an adjournment is that there is a greater prospect of being paid more with the adjournment, based on the Analysis of the Company.

80. Sixth, the Company has indicated that it has prospects that it will be able to continue with the assistance of the white knight and the Proposal. I rely on the case of *ABC Coupler Engineering* which set out that this was a reasonable ground for an adjournment. The Petitioner poured scorn on this contention. However, I am satisfied that I should rely on the Company's submissions that it has a reasonable prospect of continuing.

81. Seventh, I am satisfied that I should not substitute my own evaluation of the prospects for success. I rely on *ABC Coupler Engineering* where it set out that that the creditors are the best judges to decide on the prospects for success as to whether the company should carry on rather than be wound up. The Opposing Creditor has given its support to the adjournment and the evidence indicates that other unsecured creditors will do the same. They are indeed the best judges to make that decision and it is clear that they have taken into account that with an adjournment it is likely that there is a greater prospect to be paid more based on the Analysis. Again, I am satisfied that I should give considerable weight to the wishes of the majority of the unsecured creditors.

82. Eighth, I am not satisfied that there is evidence at this stage that a Scheme will not be approved. I rely on *Re Dollar Land* that for the time being, there is a Restructuring Term Sheet with 72% to 95% of supporting creditors which will be sufficient to secure the necessary approvals. I do not accept Mr. Tucker's assertions at this stage that circumstances exist such that the Petitioner and the Opposing Creditor will not vote in the same class in a scheme because they hold different rights. In fact, the Company and the Opposing Creditor disagree with that contention. I rely on the reasoning of Subair Williams J as set out in *In Re Up Energy Developments* where she stated that the Court need not at this stage satisfy itself on the certainty of success of a scheme or arrangement in order to adjourn the petition.

83. Ninth, I am satisfied that there are no special reasons not to give effect to the majority view. Mr. Miles and Ms. Zuill countered the myriad objections of the Petitioner such that in my view those objections do not present as special reasons. I am persuaded by Mr. Miles that the Opposing Creditor and the other unsecured creditors with similar views are intelligent and sophisticated creditors who are the best judges of what is viable. I rely on the case of *Re App China Group, Ltd* where Kawaley J stated that an obstinate minority should not be entitled to sink the ship that on which the majority have decided to sail. Also, I am persuaded that the Court does not need to examine and be satisfied about every single detail of the Proposal, a process that would require an enormous amount of time and resources in a case such as the present with a multitude of companies, relationships, agreements, financial positions and other circumstances.

84. Tenth, I have considered that the Petitioner was owed a significant sum of money in this matter and it has been repaid the majority of the sums owed to it by the Company. It now has a relatively small unpaid balance of the debt owed to it. I accept that the Opposing Creditor has far more to lose than the Petitioner by the grant of the Petition. Thus, I accept that the Opposing Creditor clearly has a greater interest than the Petitioner in preserving the value in the Company via a Proposed Restructuring for the purpose of maximizing recoveries by unsecured creditors. On this basis, I am of the view that an adjournment would be appropriate in all the circumstances.

Conclusion

85. In light of all the evidence and the submissions, my view is that I should have regard to the wishes of the majority of the creditors which I find to be reasonable and not undermined by any special reasons. Therefore, I am satisfied that I should exercise my discretion that the Petition should be adjourned as requested.

86. I will hear the parties on an expedited basis in respect of further directions on fees payable to advisors and other service provider during the adjournment.

Dated 9 June 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT