In The Supreme Court of Bermuda

COMMERCIAL COURT

COMPANIES (WINDING UP)

2021: No. 338

IN THE MATTER OF NEWOCEAN ENERGY HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Winding up petition, application for adjournment of petition to pursue restructuring, appointment of joint provisional liquidators, discretion of the Court, good reasons, exceptional circumstances

Date of Hearing: **19, 25 November, 9, 14 December 2021**
Date of Ruling: **4 March 2022**

Appearances: **Kevin Taylor, Walkers (Bermuda) Limited for the Petitioner**

Keith Robinson, Carey Olsen Bermuda Limited for the Company

RULING of Mussenden J

Introduction

1. The Hong Kong Shanghai Banking Corporation ("**HSBC**") filed a Petition on 22 October 2021 (the "**Petition**") for the purposes of winding up NewOcean Energy Holdings Limited

(the "**Company**") and to appoint Kenneth Fung, Roderick Sutton (Hong Kong) and Alexander Niles Whittaker (Bermuda) as joint and several provisional liquidators ("**JPLs**") of the Company. The hearing of the Petition was listed for 19 November 2021.

2. The Petition was supported by:

    a. The affidavit of Timothy Calvin Tse ("**Mr. Tse**") sworn on 27 October 2021 ("**TSE 1**") with Exhibit "**TCT-1**" and his Second Affidavit ("**TSE 2**") with Exhibit "**TCT-2**" which exhibited support letters from other creditors.
    b. The affidavit of Nicholas Howard sworn 19 November 2021 ("**Howard 1**") with Exhibit "NPH-1". His evidence was that he was a Registered Associate of Walkers and that the firm had received confirmation from three creditors the day before of their position in relation to the Petition.
    c. The First and Second Affirmations of Leung Ming Kai Melodie affirmed on 24 November 2021 and 8 December 2021 with Exhibits "**LMKM-1**" and "**LMKM-2**" respectively. Her evidence in her Second Affirmation was that creditors who supported the Petition had provided email confirmations that they still supported the making of a winding up order and opposed the appointment of the JPLS on a 'light touch' basis in order to restructure the Company.
    d. The First Affidavit of Chan Hiu Yan sworn on 13 December 2021 ("**Chan 1**").

3. The Company filed a Summons dated 17 November 2021 for a hearing also on 19 November 2021 for an application for an order as follows:
    a. Pursuant to section 170(2) of the Companies Act 1981 (the "**CA 1981**") for the appointment of Ms. Lee and Ms. Chan (Hong Kong) and Alexander Niles Whittaker (Bermuda) as JPLs of the Company with immediate effect on a "soft touch" basis to supervise and assist in the formulation and implementation of a scheme of arrangement, leaving the management of the day-to-day affairs of the Company in the hands of the Directors; and
    b. That the Winding Up Petition presented by the Petitioner be adjourned for 4 months.

4. The Company's application was supported by:
    a. The First Affirmation of Shum Chun, Lawrence ("**Shum 1**") dated 15 November 2021 with Exhibit "**SC-1**" and his Second Affirmation ("**Shum 2**") dated 18 November 2021 with Exhibit "**SC-2**".
    b. The affidavit of Kyle Masters sworn 25 November 2021 ("**Masters 1**"), a counsel of Carey Olsen who brought to the Court's attention letters dated 25 November 2021 received from substantial shareholders of the Company.
    c. The First Affirmation of Shum Siu Hung ("**Hung 1**") dated 9 December 2021 with Exhibit "**SSH-1**" and his Second Affirmation ("**Hung 2**") dated 14 December 2021 with Exhibit "**SSH-2**".

5. I held a consolidated hearing of the Petition and the Summons. On 14 December 2021, having heard detailed submissions, reviewed the affidavit evidence and noting that it was in effect the first return date of the Petition, I made several orders including that:
    a. The Petition be adjourned for 4 months to 8 April 2022 at 9:30 a.m.;
    b. Joint provisional liquidators be appointed as proposed by the Petitioner, namely, Kenneth Fung and Roderick Sutton of FTI Consulting (Hong Kong) Limited and Alexander Niles Whittaker of R&H Services Limited, Bermuda with immediate effect; and
    c. The powers of the JPLS will be on the soft touch basis as set out in the Company's Summons dated 17 November 2021 in the Draft Order at Annex A.

6. I stated that I would provide my reasons which I now do.

<u>Company Background</u>

7. The Company (formerly known as Sound International Limited and NewOcean Green Energy Holdings Limited) was incorporated in Bermuda on 19 November 1998 and has been listed on the Main Board of the Stock Exchange of Hong Kong Limited (the "**HKEx**" since 3 March 1993.

8. The Company is an investment holding company headquartered in Hong Kong and together with its subsidiaries (collectively, the "**Group**") principally engages in the sales of and distribution of liquefied petroleum gas and natural gas, sales of oil products, sales of electronic products and property dealing and development.

The Petition and Statutory Demand

9. The Petition set out that HSBC is a creditor of the Company as a result of several transactions as follows:
    a. A "**Facility Letter**" – dated 21 January 2020 related to a combined limit of US$80,000,000 made available to Sound Agents Limited (a wholly owned subsidiary of the Company "**SAL**") and NewOcean Resources (Singapore) Pte. Ltd. (a wholly owned subsidiary of the Company "**NRS**").
    b. An "**SAL Guarantee**" dated 20 September 2007 and an "**NRS Guarantee**" dated 23 January 2015 whereby the Company agreed to repay on demand all sums of monies and liabilities incurred and owing by:
        i. SAL to HSBC under banking facilities provided by HSBC to SAL including the Facility Letter; and
        ii. NRS to HSBC under the Facility Letter.
    c. A "**2016 Facility Agreement**" dated 25 August 2016 relating to a US$150,000,000 term loan facility; and
    d. A "**2018 Facility Agreement**" dated 28 May 2018 relating to HSBC's participation of US$30,000,000 of a term loan facility with an aggregate amount of US$340,000,000.

10. The Petition set out that over time, the Company defaulted under various circumstances to repay amounts owing to HSBC. On 30 September 2021, HSBC served a Statutory Demand (the "**Statutory Demand**") on the Company demanding the immediate repayment of the sum of HK$5,799,061.20 and US$70,646,036.85 (together, the "**Aggregate Outstanding Amount**"). By the 22 October 2021 date of the Petition, the Company had not made payment of the Aggregate Outstanding Amount in full or in part to HSBC, which had

engaged with the Company with a view to agreeing a repayment plan or restructuring agreement without success due to lack of cooperation by the Company. The Petition stated that pursuant to sections 162(a) and/or (c) of the CA 1981, the Company is deemed to be unable to pay its debts and should therefore be wound up. Further, or in the alternative, it was just and equitable that the Company should be wound up.

Submissions of the Petitioner

11. Mr. Taylor submitted that it was indisputable that the Company was insolvent pursuant to the CA 1981 and should be would up as it had failed to satisfy the Statutory Demand in accordance with section 162(a) and as such was unable to pay its debts in accordance with section 162(c).

12. Mr. Taylor submitted that the Court's discretion in whether to make a winding up order upon the hearing of a petition is set out in section 164(1) of the CA1981, namely:

    "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."

13. Mr. Taylor submitted that the Bermuda Court has repeatedly confirmed, for example, in *Re LAEP Investments Limited* [2014] Bda LR 35 that on an application for a winding up order:

    "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 …"

14. Mr. Taylor also submitted that a petitioning creditor is not required to demonstrate that the winding up order will result in the greatest return to creditors as a whole in order to establish his right to a winding up order. He cited Neuberger J (as he then was) who considered the test in *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 at 638a, 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 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."

15. Mr. Taylor's principal submission in light of the above-referenced cases was that in the absence of a good reason, a creditor of a company is entitled to a winding up order virtually as of right.

Views of the Creditors

16. Mr. Taylor referred to evidence that there were numerous supporting creditors who supported the winding of the Company and the appointment of the JPLs. Those creditors were owed a significant majority of the Company's total debt, around 65.37%. He relied further on Neuberger J in *Re Demaglass* at 638 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.'"

No exceptional circumstances

17. Mr. Taylor referred to Howard 1 and noted that three creditors confirmed their position for the Company to be wound up and that they opposed the appointment of the JPLs on a 'soft touch' basis. He submitted that there was no purpose served by an adjournment. On the other hand the creditors' funds would be used on legal fees whilst the Company tried to achieve a scheme that was impossible to achieve. He argued that the Court's discretion was restrained by reasonableness. Mr. Taylor submitted that the real reasons for the 'light touch' approach was to be found in Masters 1 where the documents showed that two of the significant shareholders were directors of the Company and it could be inferred that the reasons for the 'light touch' powers were about the Shum family rather than in the best interests of the Company.

18. Mr. Taylor submitted that there were no exceptional circumstances in this case to adjourn the Petition when the majority of creditors supported a winding up of the Company. He referred to the case of *Re HSH Cayman I GP Limited et al*, Grand Court, Cayman Islands [2010] (1) CILR 157 where it set out that:

    "*… petitioner would have a prima facie right to immediate court orders winding up the company on the grounds of their insolvency, unless there were exceptional circumstances justifying the refusal or stay. Also, neither the companies' claims to balance sheet insolvency; the possibility of an increase in the realizable value of their investments; nor their claims that the current management was best placed to retain their value would constitute special reasons justifying the refusal of the winding up orders. These were commercial matters for the company's creditors and not the court to determine* ...".

19. Mr. Taylor submitted that *Re HSH Cayman I GP Limited* had similarities with the present case in that there were no exceptional circumstances. Thus the Cayman Grand Court made orders to wind up the companies and it was upheld on appeal. Mr. Taylor also cited *Re Camburn Petroleum Products Ltd*. [1980] WLR (Ch) 86 for reliance on what did or did not amount to exceptional circumstances. He argued that in the present case, the issues of valuation of the Company's assets were not a reason to adjourn the Petition. Further, the evidence showed that the Company had been attempting restructuring for a considerable time and that the creditors no longer had confidence in the Company.

<u>Appointment of the JPLs</u>

20. Mr. Taylor submitted that if the Court was not minded to order that the Company be wound up but to appoint JPLS on a soft touch basis, then the JPLs suggested by HSBC should be appointed as Mr. Whittaker was not prepared to be appointed with the JPLs suggested by the Company.

Submissions of the Company

21. Mr. Robinson submitted that the Petition should be adjourned for a period of four months to allow the Company to pursue a proposal as set out in Shum 1 (the "**Current Proposal**") and if determined to be necessary and appropriate by the Court, to appoint the JPLs with immediate effect on a 'soft touch' basis in order to supervise the Board of the Company in implementing the Current Proposal. He noted that this was not a case where the Company was coming to the Court 'on a wing and a prayer' as it had come before the Court previously for a scheme that did not work out. Currently, the Company wanted an adjournment for a chance to implement another scheme.

22. Mr. Robinson relied on section 164(1) of the CA 1981 and further relied on section 170(2) of the CA 1981 and Rule 23(1) of the Companies (Winding Up) Rules 1982 as follows:

> *"170 (2) The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person."*

> *"23(1) After the presentation of a petition for the winding-up of a company by the Court, upon the application of a creditor, or of a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the Court, if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment."*

23. Mr. Robinson cited Kawaley CJ in *Up Energy Development Group Limited* [2016] Bda LR 94 at [24] where he described Bermuda's 'soft touch' provisional liquidation regime in the following terms:

> *"It is the involvement of JPLs, embedded with the restructuring troops, which relieves this Court of the burden shouldered by US Bankruptcy Court judges of resolving a myriad of disputes between the restructuring protagonists. A scheme of arrangement is approved in principle by this Court when leave is sought to promote it, typically on an ex parte basis. A scheme of arrangement is sanctioned, if it attracts the requisite support, in the overwhelming majority of cases at a perfunctory uncontested hearing. All conflicts are typically resolved before the scheme document is finalized, out of court, with the JPLs playing a generally unheralded but crucial mediating role. They bring a high degree of efficiency and economy to Bermudian restructuring proceedings which would likely be lost in a proceeding without the usual appointment."*

24. Mr. Robinson relied on the case of *Re Demaglass Holdings Ltd* which set out the correct approach listing seven points.

    a. He referred to the third point which stated that "*in the absence of a good reason a creditor of a company who has not been paid is entitled to a winding up order virtually as of right.*" However, he stated that the Company had good reasons *inter alia* that there was the Current Proposal to restructure the debt and it was a balance sheet solvent company with a current liquidity challenge. Mr. Robinson submitted that those good reasons applied throughout the seven points.

    b. In respect of the fourth point about the battle where a majority of creditors want to wind up a company, Mr. Robinson cited the passage that "*... the discretion of the court is to be regarded as untrammeled by any absolute rule."* He also submitted that the present case was an exceptional case in respects of the organisational structure of the Company, the regulations that it operated under and the significant assets that it held. In reply, Mr. Taylor submitted that there was nothing exceptional about these circumstances in the context of commercial circumstances adding that

exceptional circumstances would be cases involving fraud or similar examples. He cited the case of *Re Camburn Petroleum Products Ltd*.

c. In respect of the fifth point about considering the views of creditors, Mr. Robinson cited the passage where it was stated that "*the exercise of the Court's discretion will not, as was pointed out by Brightman J in Re Southard & Co. Ltd. [1979] 1 All ER 582, normally be dependent on mathematical niceties.*" In reply, Mr. Taylor submitted that two thirds of the creditors wanted the Company wound up.

25. Mr. Robinson argued that the specific approach of the Court on the hearing of a winding up petition presented against a HKEx Listed Company are well settled:

 a. If a company experiences a liquidity crunch which necessitates a debt restructuring then the company either presents its own application to appoint JPLs to retain maximum control of the process, or alternatively, it 'dillies and dallies' and allows a creditor to petition and place the company in provisional liquidation. That step will provide the benefit of a statutory stay of proceedings against the company and limits the disputes which have to be resolved in court, giving confidence to both creditors and the court that the restructuring process that emerges is a credible one. Per *Re Up Energy Development Group Ltd* at [28].

 b. If the Company makes or consents to the application or is shown not to oppose the application the appointment is 'almost a matter of course'; Per *Re Up Energy Development Group Ltd* at [18].

 c. The Court is bound to take into account all relevant considerations in making the decision whether or not to appoint provisional liquidators, in particular the commercial consequences of the decision whether to make the appointment. Per *Agritrade Resources Limited* [2020] Bda LR 35.

 d. Where a petitioning creditor seeks a winding up order in opposition to an application to appoint provisional liquidators, the petitioning creditor has to establish the possibility of the prospect of some sort of benefit from a winding up. Per *Up Energy citing Re Demaglass Holdings Ltd*. at [15].

26. Mr. Robinson submitted that in applying these principles, the Bermuda Court will almost invariably first give the Company an opportunity to attempt to resolve its financial difficulties by way of adjournment, or with the Company's consent, appointment of provisional liquidators for restructuring purposes. Per *Re Z-Obee Holdings Limited* [2017] Bda LR 116 and *Re North Mining Shares Company Limited* [2020] Bda LR 8.

<u>The Facts – Present position of the Company and the Current Proposal</u>

27. Mr. Robinson presented specific facts about the Company as follows:
    a. The Company is listed on the HKEx. It is a holding company for a broad group of companies involved in business as described above. It is a business of considerable scale with total key assets of approximately US$1.092 billion;
    b. The Company currently finds itself in a difficult financial position. Although its total assets far exceed its total liabilities (US$124 million net assets) and it continues to be profitable, it is experiencing a severe maturity mismatch – or liquidity crunch – with respect to certain of its debt facilities;
    c. In order to restore the Company's solvency, the Company has embarked upon a determined process to improve liquidity and enable the Company to pay its debts as and when they fall due; and
    d. The Company has (i) entered into a Letter of Intent for the sale of certain key assets, which will see the Company receive net proceeds of approximately US$270 million to US$450 million; and (ii) formalized negotiations for the payment of existing debt in the form of an updated scheme document reflecting the Current Proposal, which will see the Company pay down all of the Lender's debt by 30 September 2022 or alternatively 31 March 2023;

28. Mr. Robinson argued that the Company seeks the appointment of the JPLs in order to give it time it needs to complete the orderly disposal of certain of the Company's key assets and restructure its debt obligations thus securing its solvency going forward. Further, the appointment of the JPLs would stop HSBC from pursuing proceedings outside the jurisdiction that may interfere with the orderly disposal of the Company's key assets.

Additionally, the appointment of the JPLs would provide creditors with significant comfort that the Company is conducting its affairs in the interest of all stakeholders during the process of negotiating the Current Proposal and the disposal of key assets.

29. Mr. Robinson stressed that the ‘soft touch’ aspects will ensure that the Company maintains the value of its key assets by avoiding the massively value destructive impacts of the winding up order sought by the HSBC, including: (a) the loss of the value of the potential sale of the LPG Assets to China Huaneng; (b) the loss of the Company’s listing status on the HKEx; (c) the revocation of the Group’s business licenses for the operation of the LPG Asset by the PRC government; and (d) the departure of approximately 115 members of critical staff necessary to maintain the safety and value of the key assets of the Group.

<u>The facts of the present Creditor Position</u>

30. Mr. Robinson submitted that as at the date of Shum 2, the Company understood the creditor’s position was as follows;
    a. Approximately US$170 million, representing 20% of all creditors by value, expressly support the appointment of ‘soft touch’ JPLs;
    b. Approximately US$58.5 million, representing 6.9% of all creditors by value, are still considering whether to support the appointment;
    c. HSBC, representing approximately 8.1% of all creditors by value, wish to see the winding up order made; and
    d. The position of the remaining creditors is unknown.

31. Mr. Robinson cautioned the Court about the pro forma letters provided by certain creditors who supported the Petition to wind up the Company. He noted that the letters did not state that the creditors had considered the Current Proposal and the letters did not go into any detail of the creditors views. Thus the Court was not aware of their actual position. He referred to the Leung Affidavit which exhibited these letters as a crude showing of hands which the Court should treat with some skepticism. On the other hand, Mr. Robinson

submitted that the JPLs, as officers of the Court, with light touch powers could assist the Court to see if the creditors will come on board and support the Current Proposal.

Discretion of the Court and views of the creditors

32. Mr. Robinson submitted that the Bermuda Courts have a wide discretion to appoint JPLs on a 'soft touch' basis. He cited *Re Up Energy* where Kawaley CJ spoke of the "restructuring troops". He submitted that in the present case the evidence showed that the Company had made significant efforts to restructure but on the basis of the appointment of the JPLs with "soft touch" powers and the "restructuring troops", the creditors nor the Court can say that there is no prospect of restructuring or that it was hopeless. He noted that the Company's request was for a short adjournment, not for a stay of the Petition adding that in *Re Demaglass Ltd Holdings* the request was for an adjournment of ten weeks where in the present case it was four months which was still not a long time.

33. Mr. Robinson referred to the case of *Re P. & J. Macrae Ltd*. [1961] 1 WLR 229 where a petition was opposed by a majority of creditors in number and value of the creditors. It was held that "*... the court had a complete and unfettered discretion in determining whether to make a winding up order… and the Court of Appeal would only interfere where the judge had exercised his discretion on the wrong principles …"*

    a. Willmer LJ [at 231] spoke of the discretion of the court rather than "*the mere counting of heads.*"
    b. Upjohn LJ [at 237] spoke of the complete and unfettered [statutory] discretion of the court. He stated [at 238] 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."*
    c. Further, Upjohn LJ stated [at 240] "*When the judge has 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 but with the judge."

34. Mr. Robinson referred to the case of *Re Southard & Co Ltd* [1979] 1 WLR 1198 where in the headnote it stated that the views of the majority could not be the deciding factor because it would then constitute a fetter on the statutory discretion and the judge had to consider other relevant circumstances in exercising his discretion. Buckley LJ stated [at 1203] that the court has an unfettered [statutory] discretion. He added [at 1205] that where a discretion is conferred upon the court, no judge can fetter any other judge in a later case in the exercise of it; so no judge, or court, can lay down rules binding others in the exercise of the discretion.

35. Mr. Robinson submitted that although Mr. Taylor had relied heavily on *Re HSH Cayman I GP Limited et al*, the discretion of this Court was not to be fettered by that court per *In Re P. & J. Macrae*. Further, he submitted that this Court was not obliged to follow a first instance case of the Cayman Grand Court. In any event, he submitted that the *Re HSH Cayman I GP Limited et al* case was vastly different from the present case, in particular in that case there were four companies, no employees, they were not trading, they were not listed and there were passive investors. However, in the present case, the Company was listed on the HKEx. Also, the Cayman case was for an adjournment to allow for a US restructuring where in present case the adjournment is to allow for the Court's own officers, the JPLs, to assist with the restructuring.

36. Mr. Robinson accepted that the shareholders' views are secondary to the creditors' views although he rejected the contention that the application for an adjournment was about protecting the Shum family wealth. However, he reiterated that there were two important exceptional circumstances as follows: (a) the Company has not come at the last moment in that the evidence shows that there were previous efforts at restructuring. Therefore, it was not a knee-jerk reaction but a meritorious application in light of the mainland China business and the issue of licenses where a winding up order would be destructive; and (b) the Letter of Intent demonstrates a realistic plan to address the current liquidity issues in

circumstances where the Company is balance sheet solvent, a fact that was unchallenged by HSBC.

Analysis

37. I adjourned the Petition and appointed JPLs for several reasons. First, I accepted that the Company has not come to the Court at the last moment "on a wing and prayer". It had come before this Court previously for an order in reference to a scheme to restructure as it was balance sheet solvent company but with a liquidity issue. In my view, this shows that the Company has engaged in significant efforts for some time to restructure in order to address its financial position and its debts owed to its creditors. I consider the early engagement of the Court to be an exceptional reason to grant an adjournment.

38. Second, I accept that there is a Current Proposal put forward by the Company which details a restructuring plan and which includes a Letter of Intent with a plan to address the current liquidity issues. In my view the Company should be granted some time to pursue the Current Proposal. To that point, I am of the view that the appointment of the JPLs amount to engaging the "restructuring troops" as envisaged by Kawaley CJ in *Re Up Energy Development Group Limited* as officers of the Court to assist the Company in efforts to restructure. The JPLs can assist the process by dealing with the creditors to determine if there is merit in the Current Proposal. As Mr. Robinson submitted, there is no evidence from the creditors that they have given consideration to the Current Proposal. Thus, an adjournment will allow for the JPLs to engage the creditors on the Current Proposal. I consider this to be an exceptional reason to grant an adjournment.

39. Third, I am satisfied that the approach that should be taken is what Mr. Robinson submitted was the appropriate approach taken for a HKEx listed company and for the reasons he stated. The first step is to appoint JPLs at the request of the Company rather than it "dillies and dallies" and allows a creditor to petition and place the company in provisional liquidation. As stated in *Agritrade Resources Limited* I am bound to take into account all relevant considerations in making the decision whether or not to appoint JPLs, in particular

the commercial consequences. I am satisfied by the submissions that there is the potential for value destructive consequences in making an order to wind up the Company. However, I am also satisfied that the appointment of JPLs with "soft touch" powers will assist in ensuring that the Company maintains the value of its key assets by avoiding such value destructive impacts and the negative impacts of continuing to operate in the PRC under a winding up order. I consider this to be an exceptional reason to grant an adjournment.

40. Fourth, I have accepted that the majority of the creditors want to have the Company wound up and I have given consideration to their position. On the one hand, HSBC and the other creditors indicate that there is no useful purpose in granting an adjournment as they do not support the appointment of JPLs with "soft touch" powers. There have been previous attempts to restructure and they have not been successful. Their position is: 'why put off the inevitable?' On the other hand, the Company has a Current Proposal in which they seek creditor support, the effects of a winding up has the potential of a value destructive effect and the Company is a balance sheet solvent Company with a current liquidity issue. It prays for a short adjournment to attempt a restructuring.

41. I am guided by the *Re Demaglass Holdings Ltd.* reference to Brightman J in *Re Southard & Co. Ltd.* that the exercise of the Court's discretion will not be dependent on mathematical niceties or the counting of heads. Thus, in light of these several reasons set out above and having considered all the relevant circumstances in the case, including that the requested adjournment is not for a long period of time, I am satisfied that I should exercise my discretion to grant the adjournment of the Petition and appoint JPLs with "soft touch" powers for restructuring.

<u>Conclusion</u>

42. In summary:
    a. I declined to make an immediate winding up order;
    b. I granted the Company's application to adjourn the Petition for four months to 8 April 2022 at 9:30am and to appoint JPLs with "soft touch" powers for restructuring;

c. I granted the application for the appointment of JPLs as proposed by the Petitioner, namely, Kenneth Fung and Roderick Sutton of FTI Consulting (Hong Kong) Limited and Alexander Niles Whittaker of R&H Services Limited, Bermuda with immediate effect. I preferred this grouping of JPLs which was one in which Mr. Whittaker had no objection to work with Mr. Fung and Mr. Sutton.

43. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall be in the petition.

Dated 4 March 2022

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