In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMPANIES (WINDING UP)
COMMERCIAL COURT
2020: No. 150

IN THE MATTER OF AGRITRADE RESOURCES LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

Before:	**Hon. Chief Justice Narinder Hargun**
Appearances:	**Kevin Taylor and Benjamin McCosker, Walkers (Bermuda) Limited Limited, for the Petitioners, TA Genco Limited and TA Private Debt III Limited**
	Lilla Zuill, Zuill & Co, for the Petitioner, Golden Equator Capital Pte. Ltd
	Christian Luthi and Rhys Williams, Conyers Dill & Pearman Limited, for Agritrade Resources Limited
Dates of Hearing:	**1 June 2020**
Date of Judgment:	**17 June 2020**

RULING

1. These proceedings concern the affairs of Agritrade Resources Limited (the **"Company"**), a company incorporated in Bermuda on 27 January 1997 and listed on the Main Board of

the Stock Exchange of Hong Kong Limited. Winding up proceedings have been commenced against the Company by three creditors in this Court and in the High Court of the Hong Kong Special Administrative Region. TA Genco Limited (**"TAG"**) and TA Private Debt III Limited (**"TAPD"**) (collectively, the **"TA Entities"**) have presented separate Petitions seeking the winding up of the Company and have issued summonses seeking the immediate appointment of joint provisional liquidators (the **"JPLs"**). Golden Equator Capital Pte. Ltd (**"GE"**) has also presented separate Petitions for the winding up of the Company both in this Court and in the High Court of Hong Kong.

2. The Company accepts that it is insolvent on a cash flow basis and accepts that JPLs should be appointed for the purposes of considering and implementing a restructuring of the Company. Indeed, all parties agree that the Company should be given the opportunity to explore whether it is feasible to restructure its financial affairs, and for that purpose they have also agreed that there should be an immediate appointment of JPLs to assist in that exercise. However, there is a dispute as to whether the JPLs appointed by this Court should have full powers and replace the existing Board of Directors, or whether their appointment should be on a "light touch" basis to supervise the management of the Company by the Board of Directors and assist in the formulation and implementation of any scheme of arrangement. There is also a dispute between the parties as to the identity of the JPLs.

3. On 1 June 2020, I heard arguments from Counsel in relation to these issues and the following day ordered that Ng Kian Kiat of RSM Corporate Advisory Pte Ltd in Singapore, Oon Su Sun of RSM Corporate Advisory Pte Ltd in Singapore and E. Alexander Whitaker of R&H Services Limited in Bermuda, be appointed as JPLs of the Company with immediate effect. I also ordered that the appointment of the JPLs was for restructuring purposes only and that their powers were limited to those powers typically provided in "soft touch" appointments. In accordance with the agreed position of the parties, I also ordered that Letters of Request be issued to the High Court of the Hong Kong Special Administrative Region and the Supreme Court of the Republic of Singapore, to enable the JPLs to be recognised in those jurisdictions and to have the assistance of those Courts in

the course of the proposed restructuring. I now give reasons for the decisions communicated to the parties on 2 June 2020.

The background

4. The material background facts appear to be uncontroversial and are taken from the First Affidavit of Sim Mingqing filed on behalf of the Company. The Company is an investment holding company, with substantial investments internationally in the coal mining, energy and shipping industries, which it holds through various subsidiaries. The Company has substantial valuable assets estimated at US$ 1,376,787,000 which is more than double that of its total liabilities estimated at US$ 533,129,103. However, the Company's finances have been heavily and adversely impacted by the serious financial difficulties of its major shareholder, Agritrade (International) Pte. Ltd (**"AIPL"**), because of the interconnectedness of the financial obligations between the companies in the Agritrade Group. AIPL's defaults had caused the share price of the Company to plunge, and also triggered a series of cross-defaults on the part of the Company, imposing a severe financial strain on the Company's finances and cash flow. The Company's short-term cash flow is insufficient to meet the cascade of cross-defaults.

5. Since in or around February 2020, the TA Entities, who together are presently the Company's largest direct creditor; GE, who is presently the Company's second largest direct creditor, and a consortium of a white knight investors led by HC Holdings Limited, had been actively working together with the participation of the Company's Board, to agree on terms for the restructuring of AIPL's debts, which contemplates the injection of funds into the Company with a view towards, amongst other outcomes, sustaining the Company's business and operations and allowing the Company to work towards resolving its outstanding liabilities**.**

6. The negotiations culminated in a nonbinding term sheet dated 25 March 2020, which captured the broad agreed terms of the proposed restructuring, and under which the parties to the restructuring had agreed to use best endeavors to reach a definitive agreement by a

mutually extended deadline of 14 May 2020. In the weeks leading up to 14 May 2020, the parties to the restructuring were in the process of agreeing to an extension of the deadline. However, on 14 May 2020, the TA Entities, without any notice to any other party or the Company, filed winding up Petitions and sought the immediate appointment of JPLs with light touch powers with the aim of restructuring the Company. In the Petitions, TAPD claimed it was a creditor of the Company under a facility agreement dated 30 September 2019 in the amount of US $152,466,697. TAG claimed that it was a creditor of the Company under a facility agreement dated 25 February 2019 in the amount of US $50,773,327.

7. On 19 May 2020, GE filed winding up Petitions in the Supreme Court of Bermuda and the High Court of the Hong Kong Special Administrative Region in materially identical terms. GE also sought immediate appointment of JPLs with full powers and not for the purposes of any restructuring exercise. In the Petition filed in this Court, GE claimed that it was a creditor of the Company under a facility agreement in the amount of US $62,559,174.

8. The application by the TA Entities for the appointment of JPLs first came before the court on 15 May 2020. I was advised by Counsel for the TA Entities that notice of the application had been given to the Company's directors and the Company's secretary by way of email delivered at 4:47 PM, Singapore time, on 15 May 2020, approximately 5 hours before the scheduled hearing. Given the momentous nature of the application, I decided to adjourn the hearing to 20 May 2020 in order to allow the TA Entities to properly notify the Company in Singapore and in Bermuda of the impending application to appoint JPLs.

9. At the hearing on 20 May 2020, Counsel for the Company sought a further adjournment on the ground that the Company required further time to consider its position in relation to the proposed JPLs and to file any evidence in relation to that issue. Counsel also argued that in any event there was no obvious urgency for the immediate appointment of the JPLs. In order to allow the Company to consider its position and to file any relevant evidence, I adjourned the hearing to 1 June 2020.

10. At the hearing on 20 May 2020, Counsel for the Company advised the Court that the Company was surprised that the TA Entities had decided to present winding up petitions to this Court as the Company had expected that the deadline for agreeing a definitive agreement by 14 May 2020 would be extended. Counsel advised the Court that in a bid to preserve the possibility of the restructuring, on 20 May 2020, the Company filed an application in the Singapore High Court for a moratorium under section 211B of the Singapore Companies Act so as to provide the Company with sufficient time to propose and formulate a scheme of arrangement under section 210 of the Singapore Companies Act as a part of the proposed restructuring. Section 211B provides for an automatic 30 day moratorium on proceedings against the applicant pending a hearing of the application and thus provided the Company with immediate albeit temporary relief from further creditor action in Singapore.

Appointment of JPLs: Light touch vs full powers

11. I summarised the legal regime in Bermuda for the appointment of provisional liquidators generally in my Ruling in *Deepak Raswant v Centaur Ventures Ltd* [2019] SC (Bda) 55 Com (26 August 2019) in paragraphs 7-11:

> *"7. The statutory basis for the appointment of provisional liquidators is to be found in section 170(2) of the Act and rule 23(1) of the Companies (Winding-Up) Rules 1982.*
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> *8. Section 170(2) provides that:*
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> *"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."*
>
> *9. Rule 23(1) of the Companies (Winding-Up) Rules 1982 provides that:*

"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."

10. The appointment of provisional liquidators is an exercise of judicial discretion. In exercising that discretion, the courts in Bermuda (Re CTRAK Ltd [1994] Bda LR 37 (Ground J); Discover Reinsurance Co v PEG Reinsurance Co Ltd [2006] Bda LR 88 (Kawaley J); and BNY AIS Nominees Ltd v Stewardship Credit Arbitrage Fund Ltd [2008] Bda LR 67 (Bell J)), have followed the guidance given in the judgment of Sir Robert Megarry in Re Highfield Commodities Ltd [1984] 3 All ER 884, at 892-893 in following terms:

"At the outset let me say that I accept that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made: see Re Mercantile Bank of Australia [1892] 2 Ch 204 at 210, Re North Wales Gunpowder Co [1892] 2 QB 220 at 224. Founding himself on cases such as Re Cilfoden Benefit Building Society (1868) LR 3 Ch App 462(where the words 'in general' should be noted) and Re London and Manchester Industrial Association (1875) 1 Ch D 466, counsel for HCL contended that if the company opposed the application for the appointment of a provisional liquidator, no appointment would be made (and any ex parte appointment would be terminated) unless either the company was obviously insolvent or it was otherwise clear that it was bound to be wound up, or else the company's assets were in jeopardy, as seems to have been the case in Re Marseilles Extension Rly and Land Co [1867] WN 68.

.....

I do not think that the old authorities, properly read, had the effect of laying down any rule that the power to appoint a provisional liquidator is to be restricted in the

way for which counsel for HCL contends. No doubt a provisional liquidator can properly be appointed if the company is obviously insolvent or the assets are in jeopardy; but I do not think that the cases show that in no other case can a provisional liquidator be appointed over the company's objection. As the judge said, section 238 is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences. In particular, where the winding-up petition is presented because the Secretary of State considers that it is expedient in the public interest that the company should be wound up, the public interest must be given full weight, though it is not to be regarded as being conclusive."

11. I accept the submission that Highfield Commodities makes clear that the categories of cases in which it would be appropriate to appoint a provisional liquidator are not closed. Indeed this is demonstrated by the practice in this Court of appointing provisional liquidators to facilitate restructuring where the Company is in the "zone of insolvency" (see Discover Reinsurance, per Kawaley J at [18], [19])."

12. 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 court is bound to consider the commercial consequences of the decision whether to make the appointment. The Court will also consider the views expressed by creditors and the shareholders. In the ordinary case where the company is clearly insolvent, the clearly expressed views of the majority of the creditors in value are likely to be persuasive unless there are good reasons why those views should not be accepted and followed.

13. The Court has a similar discretion in relation to the issue of whether provisional liquidators should be appointed with full powers or whether they should be appointed with limited

"soft touch" powers. Again, the Court is bound to take into account the commercial consequences of the exercise of the discretion in relation to this issue. In the ordinary case, where the company is insolvent, the Court would be heavily influenced by the views of the majority of the creditors unless there are good reasons why in a particular case those views should not be accepted.

14. The practice of appointing provisional liquidators with "soft touch" powers in aid of restructuring a Bermuda incorporated company is now well established. In 1999 in *Re ICO Global Communications Holdings Ltd* [1999] Bda LR 69, counsel was able to submit that a Bermuda Court had no jurisdiction to appoint provisional liquidators with "soft touch" powers in aid of a Chapter 11 restructuring in the United States. However, Ward CJ rejected that submission as a matter of principle:

> *"6. An Order was made that Messrs Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court.*
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> *7. I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a US Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously."*

15. By 2016, the appointment of "soft touch" provisional liquidators had become an established procedure in Bermuda. In *Re Up Energy Development Group Ltd* [2016] Bda

LR 94, Kawaley CJ described the current practice of appointing "soft touch" provisional liquidators in aid of restructuring at [11] in following terms:

> *"11. The established practice of this Court in appointing JPLs to supervise a de facto debtor in-possession restructuring has typically arisen in the context of winding-up petitions presented by the company. The insolvent company's pre-emptive action in seeking the benefit of the stay of proceedings triggered by the appointment of a provisional liquidator combined with the independent oversight of the proposed restructuring by court officers focused on protecting creditor interests has never, to my knowledge, ever been opposed by creditor interests. The petitioning company has invariably commenced the provisional liquidation proceedings with the blessing of the main creditors concerned. A decade ago in* <u>*Discover Reinsurance Company-v-*</u> <u>*PEG Reinsurance Company Ltd*</u> *[2006] Bda LR 88, I described the practice in this area of Bermuda insolvency law as follows:*
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> *"18. There are circumstances in which, in England and Bermuda, provisional liquidators may be appointed when a winding-up order is not necessarily expected to be made, in early course at least. Since the last decade of the last century, many insolvent English insurers have been routinely placed into provisional liquidation and run-off under schemes of arrangement, essentially for regulatory reasons. Over the last ten years in this jurisdiction, a considerable number of companies, typically non-insurance companies, have been placed into provisional liquidation to facilitate a restructuring involving parallel proceedings in the United States commenced under Chapter 11 of the US Bankruptcy Code. These Bermudian winding-up proceedings have been almost invariably commenced by the company itself, and usually on the basis that the company will ultimately be wound–up in any event, when the restructuring process is completed.*
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> *19. The use of provisional liquidation to facilitate a restructuring has not always occurred in clear cases of insolvency. It has often been utilized when companies are in what has been referred to as the "zone of insolvency". Be that as it may, the Bermuda model of restructuring provisional liquidation has often kept the pre-*

existing management in place, and merely given the provisional liquidators "soft" monitoring powers. In theory, these monitoring powers are designed to reassure both creditors and the Court that assets are not dissipated, on the implicit assumption that the management that has run the company into difficulties can hardly be trusted to have the creditors' best interests at heart.

20. In practice, however, in circumstances where no suspicions about the integrity of the directors really exist, the provisional liquidator is appointed as part of legal quid pro quo for receiving the benefit of the stay on proceedings that the appointment guarantees, Bermuda law presently lacking a formal equivalent of the US Chapter 11 regime or the English administration proceedings. It will be anomalous if a Bermuda company files for Chapter 11 protection and cannot be sued by creditors in the US, but is still vulnerable to suit in its own place of incorporation. Proceedings against a company will not be stayed merely by the filing of a winding-up petition, but only if either (a) a provisional liquidator is appointed, or (b) a winding-up order is made."

16. The filing of the Petitions by the TA Entities, was accompanied by ex parte summons seeking the immediate appointment of provisional liquidators with "soft touch" powers for the purposes of implementing a restructuring proposal for the benefit of the Company's creditors and for the issuance of Letters of Request to the Hong Kong Court and the Singapore Court in aid of the proposed provisional liquidators' recognition in those jurisdictions. The ex parte application was supported by the First Affidavit of Mark Andrew Glossoti sworn on 14 May 2020. In that affidavit Mr. Glossoti set out the TA Entities' position in relation to the viability of the restructuring; the appointment and the role of provisional liquidators, and the continuing role of the Board of Directors, in the following terms:

    (a) The TA Entities believe that a successful restructuring of the Company is possible. However, given the Company's present difficulties, including the fact that its parent company has been placed into judicial

administration in Singapore and that allegations of fraud have been levelled against the management of that company, the TA Entities are concerned to ensure that any financial restructuring of the Company is not tainted by the affairs of its parent.

(b) The TA entities believe that the involvement of professional, independent JPLs will facilitate the development and implementation of a restructuring proposal which advances the interests of the Company's general body of creditors.

(c) At present, the TA Entities believe that the existing Board of Directors of the Company should remain in place, with the JPLs' appointment to be on a "light touch" basis, albeit with the provision that the JPLs may suspend or remove the Board of Directors (or any one of them) should it appear that they are no longer acting in the best interests of the Company's creditors.

(d) The TA Entities currently have confidence in the current Board of Directors of the Company and wish for them to be involved in the development and implementation of a restructuring proposal.

(e) While the restructuring negotiations have been on foot, the TA Entities have become concerned of the potential contagion effect that findings in connection with fraud perpetrated by certain executives at the AIPL level could have on the Company's financial position and the prospects of a successful restructuring. It is crucial that a restructuring proposal be achieved without delay, in order to avoid further erosion of value of the Company's assets. For this reason, the TA Entities consider that the appointment of "light touch" provisional liquidators should be effected on an urgent basis, to preserve the existing value in the Company for the benefit of all creditors, and to persist with the development of a restructuring proposal which would be in the creditors' best interests.

17. In the written submissions dated 15 May 2020 filed on behalf of TA Entities, it is emphasised that the TA Entities have confidence in the remaining Board of Directors of the Company and believe that while the Company has collapsed due to it being overleveraged in a depressed commodities market, the underlying assets of the Company are valuable and if properly managed the Company can emerge from insolvency and continue as a profitable going concern.

18. In his oral submissions at the hearing on 29 May 2020, Counsel for the TA Entities submitted that a "light touch" appointment was appropriate because management had intrinsic knowledge of the Company and its operations. Having the Board of Directors involved was a good thing for all creditors as, TA Entities believe, the Board's involvement will save money.

19. In the First Affidavit of Sim Mingqing, a director of the Company, filed on 27 May 2020, Mr. Mingqing states that the Company's position is that it supports the appointment of "soft touch" JPLs in aid of restructuring of the Company, as sought by the TA Entities in the ex parte summons and the supporting affidavit of Mr. Glossoti filed on 14 May 2020. Mr. Mingqing expresses his belief that the implementation of the restructuring facilitated by the appointment of the JPLs in Bermuda on a "light touch" basis would most effectively allow the Company to rehabilitate and maximise creditors' recovery. He points out that in the event of a formal liquidation, based on the Company's experience in the relevant industries, the Company is of the view that the Company's assets would very likely yield only a fraction of their valuation, especially in the present economic climate.

20. Mr. Mingqing refers to the issues faced by the main assets of the Company, the Merge Mine and the SKS Power Plant. He expresses the view that the current management of the Company has been involved in the acquisition, business and operations of the Merge Mine and the SKS Power Plant, and are taking active steps to resolve the various issues faced in respect of these assets. He states that the Company's efforts have already seen significant and positive progress.

21. GE's position in relation to the Company's application for the appointment of provisional liquidators with "light touch" powers in aid of restructuring of the Company is set out in a letter dated 27 May 2020. GE's position, as set out in that letter, is that it has "*no objection"* to the relief sought by the Company in these proceedings.

22. At the hearing on 1 June 2020, the TA Entities changed their position that the Court should appoint provisional liquidators with "soft touch" powers. The TA Entities no longer supported the position that provisional liquidators should be appointed and that their powers should be limited. Counsel for the TA Entities submitted that the Court should appoint provisional liquidators and should do so with full powers so that the Board of Directors would cease to have any power in relation to the business operations of the Company, or any formal role in the restructuring of the Company. The rationale for this reversal of position is set out in the Third Affidavit of Mr. Glossoti dated 29 May 2020. At paragraph 8 of that Affidavit, Mr. Glossoti states that the TA Entities no longer have confidence in the Board of Directors. The reasons for this loss of confidence in the Board are set out in paragraph 7 of his affidavit which states as follows:

> *"Unfortunately, in the time which has elapsed since I swore my First Affidavit, the Company has acted in a manner which seeks to protect the interests of its directors and/or its majority shareholder AIPL, rather than the interests of its creditors, of whom the TA Entities are by far the largest, followed by Golden Equator. I understand that in the context of an insolvent company (and the Company is unquestionably insolvent), it is the creditors' interests which are paramount. I do not believe that the Company's decision to seek "urgent" relief from the Singapore Court (which is only of domestic effect in any event) on the very same day that the TA Entities' application for the appointment of the JPLs was before this Court shows that the Company is acting in the best interests of its creditors. Rather, it would appear to me that the board is looking after its own interests, seeking to retain control notwithstanding the majority creditors' very clear wishes to the contrary, and engaging in jurisdictional maneuvering / forum shopping in order to*

deprive this Honourable Court of its jurisdiction to appoint provisional liquidators to protect the interests of the Company's creditors."

23. It seemed to me that that this rationale advanced by Mr. Glossoti made little sense in the circumstances of this case. First, counsel for the TA Entities complained at the hearing on 1 June 2020 that the application by the Company to the Singapore Court was made without any notice to TA Entities or any other creditor of the Company. However, as I pointed out at the hearing, the filing of the Petitions and ancillary applications by TA Entities and GE were also made without any notice to the Company. Indeed, the Company complains that in the weeks leading up to 14 May 2020, the parties were in the process of agreeing to an extension of the deadline to reach a definitive agreement by 14 May 2020. However, on 14 May 2020, the TA Entities unexpectedly and unilaterally made the application to the Bermuda Court for the appointment of provisional liquidators on the basis that the TA Entities wanted greater oversight into the Company's management, and to protect their charged assets which they say are at risk. This triggered GE to commence the winding up proceedings in Hong Kong and in Bermuda in a bid to protect its own interests, and in particular to also register strong objections to one of the JPLs nominated by the TA Entities, Mr. Roderick Sutton of FTI Consulting (Hong Kong) on the basis of potential conflicts of interest.

24. Second, given the circumstances, it was entirely reasonable for the Company to make the application to the Singapore Court on the 20 May 2020. As Mr. Mingqing explains, the application for a moratorium under section 211B of the Singapore Companies Act was made in a bid to preserve the possibility of the restructuring which provided the Company with sufficient time to propose and formulate a scheme of arrangement under section 210 of the Singapore Companies Act. The Company asserts that its centre of main interests is in Singapore and that the application under section 211B provided an automatic 30 day moratorium on proceedings against the Company pending a hearing of the application, providing the Company with immediate albeit temporary relief from further creditor action. The need for a moratorium was emphasised by Counsel for the TA Entities at the hearing

before the Bermuda Court on 20 May 2020, when he sought the immediate appointment of the JPLs.

25. Third, I do not consider that the application to the Singapore Court under section 211B was in the nature of jurisdictional maneuvering / forum shopping in order to deprive this Court of its jurisdiction to appoint provisional liquidators to protect the interests of the Company's creditors. As Mr. Glossoti himself notes in paragraph 7, the relief under section 211B of the Singapore Companies Act is *"only of domestic effect*". The decision of Kannan Ramesh J in *IM Skaugen* [2018] SGHC 259 explains and confirms, at [37] to [39], that the moratorium under section 211B could only be extended to restrain conduct outside the jurisdiction if the party sought to be enjoined was in Singapore or within the jurisdiction of the court. Given that the TA Entities are two companies registered in the Cayman Islands it is not suggested that they are subject to the jurisdiction of the Singapore Court. In any event, it is clear, beyond any reasonable argument, that the Company is not seeking to avoid the jurisdiction of this Court to appoint provisional liquidators given that the Company is in fact making an application to this Court for the immediate appointment of provisional liquidators with "soft touch" powers.

26. Fourth, the application by the TA Entities for the appointment of provisional liquidators with "soft touch" powers was justified, in part, on the basis that the management possesses *"intrinsic knowledge of the Company and its operations*" and that the management's involvement in any restructuring would be necessary and in the interests of all creditors. Nothing had changed in relation to this aspect of the matter between the filing of the Petitions on 14 May 2020 and the hearing of the application to appoint JPLs on 1 June 2020.

27. It was for these reasons I decided on 1 June 2020 that at the JPLs be appointed with "soft touch" powers and the management remaining in place. It seemed to me that the appointment of JPLs with "soft touch" powers was likely to be more effective in the implementation of any restructuring and in the interests of the creditors and the Company.

28. The ex parte summons filed by the TA Entities on 14 May 2020 sought the appointment of provisional liquidators with "soft touch" powers but contained a provision that the directors could be removed by the JPLs in their discretion. The power sought was in the following terms:

> *"... provided always that should the JPLs consider at any time that any officer or member of the Board is or has not been acting in the best interests of the Company and its creditors (including for the avoidance of doubt acting in compliance with the terms of this Order), the JPLs shall have the power to remove such officer or member of the Board or suspend the powers of such officer or member of the Board (by the delivery of the notice to such officer or member of the Board referring this specific order) as JPLs deemed to be appropriate."*

29. In the end, the legal basis for including such a provision was not subject to any argument as the TA Entities argued for appointment of provisional liquidators with full powers. Whilst the Court appointed provisional liquidators with "soft touch" powers, the Court did not include the power on the part of the JPLs to remove directors. I took that view on the basis that it is doubtful whether the scheme of Part XIII of the Companies Act 1981 contemplates provisional liquidators having such a power. Subject to further argument, it seems to me that the Court is able to appoint provisional liquidators with "soft touch" powers by *limiting* their powers under section 170 (3) which allows the court to "*limit his powers by the order appointing him*". The Court is given the power to *limit* the powers which would ordinarily be given to the provisional liquidators. It does not appear that the Act contemplates that the Court may *enlarge* the powers of the provisional liquidators as suggested in the ex parte summons filed by TA Entities on 14 May 2020.

The objections to the identity of the provisional liquidators

30. In the ex parte summons seeking the appointment of the JPLs with immediate effect, the TA Entities proposed that the Court should appoint Roderick Sutton of FTI Consulting (Hong Kong) Limited and John McKenna of Finance & Risk Services Limited in Bermuda.

In the First Affidavit of Mr. Glossoti, it was explained that FTI Singapore was instructed on 15 January 2020 to act as an independent financial advisor for AIPL. It was further explained that during the course of this engagement, FTI Singapore engaged in a number of meetings and discussions with the creditors of AIPL and during the course of those discussions, a number of creditors requested a thorough investigation in relation to the recoverability of AIPL's outstanding receivable balances and the validity or otherwise of the underlying trades. FTI Singapore prepared a detailed report on its findings dated 10 February 2020, and the report was adduced as evidence in the proceedings in Singapore in relation to an application by a creditor to appoint judicial managers over AIPL.

31. GE, the second-largest creditor of the Company, vehemently objects to the appointment of Mr. Sutton of FTI Hong Kong. In his affidavit dated 29 May 2020, Mr. Sutton confirms that he was jointly responsible for the overall planning and coordination of the FTI Singapore engagement alongside a senior managing director employed by FTI Singapore. Mr. Sutton states that this role included (among other things) overseeing the investigations performed by FTI Singapore and the reviewing/assisting with the preparation of the FTI Singapore interim report to AIPL's creditors setting out FTI Singapore's findings following completion of its investigation work. This interim report was provided to the Singapore Court.

32. In his Second Affirmation filed on behalf of GE, Mr. Ji Won Kim opposes the appointment of Mr. Sutton as a provisional liquidator on the ground that, due to the insider knowledge acquired between 15 January 2020 to 26 March 2020, the appointment of Mr. Sutton may:

    (a) unnecessarily complicate the ongoing restructuring process at AIPL's level (which may or may not include the Company);

    (b) lead to issues in relation to the investigations which are being undertaken by judicial managers of AIPL in the context of the Company;

(c) consciously or subconsciously result in the implementation of a restructuring process at the Company by relying on prior knowledge.

33. Mr. Ji Won Kim contends that, in the absence of informed consent from AIPL, the judicial managers of AIPL and the creditors of AIPL, Mr. Sutton and FTI Singapore and FTI Hong Kong are conflicted by knowledge that they possess from their prior engagement. Thus, he argues, that if appointed as a JPL of the Company, armed with confidential information obtained from AIPL and in the absence of a continuing duty to act in the interests of the creditors of AIPL, issues of conflict of interest may arise should decisions be made in the interest of the creditors of the Company to the exclusion or detriment of the creditors of AIPL. One consequence of this potential conflict may be a cross-border insolvency disputes between stakeholders of AIPL and stakeholders of the Company. Counsel for the TA Entities responds that it is unlikely that Mr. Sutton received any information from AIPL which he would not receive from the Company as an officeholder.

34. GE proposes that the Court should appoint Wei Cheong Tan, of the Deloitte Singapore office, and Rachelle Frisby, of the Deloitte Bermuda office, as the JPLs of the Company. In response to that proposal, the TA Entities, in the Second Glossoti Affidavit, contend that partners of Deloitte should not be appointed as JPLs given the previous association of Deloitte with the Company. Mr. Glossoti points out that Deloitte has previously been engaged by the Company (and remunerated) in relation to (a) the acquisition of the electricity Company SKS Power Generation Chhattisgarth Limited, one of the Agritrade Group's most substantial assets; and (b) the tax implications of a proposed transaction the Group was considering entering into in India. He also points out that it is his understanding that Deloitte have historically been the auditors of the Group, but are not currently acting in that role.

35. Given the profound disagreement between the two largest creditors of the Company over the identity of the proposed JPLs, the Company has proposed that the Court should appoint Ng Kian Kiat and Oon Su Sun of RSM Corporate Advisory Singapore and E. Alexander Whittaker of R&H Services Limited. They have been proposed on the basis that their

appointment cannot be objected to based upon any past association with the Company. Since the hearing, the Court has received further correspondence from the TA Entities, in the form of a letter from Walkers dated 11 June 2020, asserting that the appointed JPLs may indeed be conflicted. The Court will deal with any such application if formally pursued.

36. Counsel referred to Bermuda, English and Hong Kong cases dealing with the essential qualities which a liquidator should possess. These qualities can be summarised as follows:

(a) A liquidator should, as the officer of the Court, maintain an even and impartial hand between all individuals whose interests are involved in the winding up (*In re Contract Corporation (Gooch's Case)* [1871-1872] 7 Ch App 207).

(b) A liquidator should not be a person known to be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. He should in particular not be the nominee of a person against whom the company has hostile or conflicting claims or whose conduct in relation to the affairs of the company is under investigation (HH Judge *Maddocks in Fieldings v Seery* [2004] BCC 315 Ch D [33], cited with approval in *Re Opus Offshore Limited* {2017] Bda LR 14 at [67]).

(c) A liquidator is not only required to act impartially but must be seen to act impartially (Ward CJ in *Akai Holdings Limited* [2001] Bda LR 31, p36; *Re Opus Offshore Limited* [37]; and *Re China City Construction (International) Co Ltd* [2019] 3 HKLRD 491).

(d) It is normal in the case of large companies with sizable financial debt owed to sophisticated creditors for those creditors to require the appointment of independent insolvency specialists as independent financial advisers on the financial state of the company. Given that the independent financial advisers will acquire useful knowledge of the

company's affairs, it is common and normally acceptable for them to be appointed liquidators if the company goes into liquidation (Harris J in *Re China City Construction* following David Richards J in *Bank of Scotland Plc v Targetfollow Property Holdings Ltd* [2010] EWHC 3606 (Ch)).

(e) The efficiency of any restructuring within a provisional liquidation depends in large part upon goodwill and collegiality between the management and JPLs. It is essential that the proposed JPLs be able to form a close and effective working relationship with the company's management. In the ordinary case the proposed JPLs should be acceptable to the management of the company (*Re Up Energy Development Group Limited* [2016] Bda LR 94, Kawaley CJ at [11] and *Re Opus Offshore Limited* [2017] Bda LR 14, Hellman J at [73]).

37. In the present case whilst FTI Singapore and Mr. Sutton were appointed as independent financial advisers and gained useful knowledge, they were appointed as independent financial advisers for AIPL and not for the Company. As noted, GE contends that this has the consequence that Mr. Sutton is in possession of confidential information belonging to AIPL and the possibility must exist of potential litigation by AIPL or its creditors alleging misuse of that confidential information. Whilst it is said that Mr. Sutton is likely to obtain the same information from the Company, the Court is not in a position to entirely rule out the possibility that there may be some information where that is not the case. Given the risk of unnecessary future litigation, it is not appropriate that the Company and its creditors should be burdened with that risk when there are other candidates for the office of the JPLs who do not present these potential difficulties.

38. Secondly, in considering who should be appointed as provisional liquidator with "soft touch" powers to implement the restructuring, the court must keep firmly in mind that the object of the exercise is to achieve the successful reconstruction of the Company. Furthermore, the exercise of selecting JPLs should be determined by the Court on a

summary basis and the Court should not allow the parties to conduct a minitrial of each and every allegation made against the proposed officeholders. In that context, I accept the Company's submission that the provisional liquidators nominated by the TA Entities would fail to achieve the desired outcomes for the simple reason that GE (the second largest direct creditor) does not have confidence in their ability to carry out the role with the requisite neutrality, and in the best interests of the Company's creditors. The lack of confidence by GE in the provisional liquidators nominated by the TA Entities would impair the provisional liquidators' ability to carry out their work effectively.

39. For these reasons the Court ordered that the provisional liquidators nominated by the Company should be appointed JPLs, namely, Ng Kian Kiat and Oon Su Sun of RSM Corporate Advisory Singapore and E. Alexander Whittaker of R&H Services Limited of Bermuda.

Letters of Request

40. Having appointed JPLs, I accepted the submission made on behalf of all parties that Letters of Request be issued by the Court to the Hong Kong Court and the Singapore Court, to enable the JPLs to be recognised in those jurisdictions and to have the assistance of those Courts in the course of the proposed restructuring.

41. I will hear any application in relation to the issue of costs if such an application is made within the next 6 weeks.

Dated this 17th day of June 2020

NARINDER K HARGUN

CHIEF JUSTICE