IN THE SUPREME COURT OF BERMUDA
(COMMERCIAL COURT)
COMPANIES (WINDING UP)
2020 No. 310

IN THE MATTER OF PING AN SECURITIES GROUP (HOLDINGS) LIMITED

AND THE MATTER OF THE COMPANIES ACT 1981

Before:	**The Hon. Chief Justice Hargun**
Appearances:	**Mr Henry Tucker and Mr Kyle Masters of Carey Olsen Bermuda Limited, for the Joint Provisional Liquidators;** **Mr Nicholas Miles of Kennedy Chudleigh Ltd, for the Hong Kong Court-appointed Liquidators**
Date of Hearing:	**22 March 2022**
Date of Judgment:	**8 April 2022**

JUDGEMENT

Appointment of parallel liquidators in different jurisdictions; whether such appointments are conducive to the proper operation of the liquidation; whether such appointments are in conformity with the principles of comity and co-operation

Introduction

1. On 22 March 2022, the Court heard two applications in relation to the appointment of permanent liquidators of Ping An Securities Group (Holdings) Limited ("**the Company**") pursuant to section 171 of the Companies Act 1981. First, there is an application by Osman Mohammed Arab, Lai Wing Lun both of RSM Corporate Advisory and Edward Alexander Niles Whitaker of R&H Services Limited, the existing Joint Provisional Liquidators ("**JPLs**"), appointed by this Court, that they should be appointed permanent liquidators of the Company. This application is made by summons dated 4 February 2022. Secondly, there is an application by Yip Wa Ming and Lai Kar Yan of Deloitte Touche Tohmatsu, the liquidators of the Company appointed in Hong Kong by Regulating Order of the High Court of Hong Kong dated 19 August 2021 ("**the Hong Kong Liquidators**") for an order that Rachelle Ann Frisby of Deloitte Ltd and the Hong Kong Liquidators be appointed as the permanent liquidators of the Company. The issue for determination by the Court is who should be appointed the permanent liquidators of the Company pursuant to the Court's jurisdiction set out in section 171 of the Companies Act 1981.

Background

2. The Company was incorporated in Bermuda and its shares listed on the Stock Exchange of Hong Kong. The Company's key operating subsidiaries were incorporated in Hong Kong and they operate a licensed security brokerage and financial services business in Hong Kong.

3. On 2 October 2020, the Company's former management obtained an order from this Court appointing the JPLs on a soft touch basis for the purposes of restructuring of the Company. This application was supported by the First Affirmation of Cheung Kam Fai, an Executive Director and the Chief Executive Officer of the Company, dated 23 September 2020. In that Affirmation Mr Cheung advised the Court that:

(1) The Company is the holding company listed vehicle for itself and its subsidiaries ("**the Group**"), which is primarily involved in the business of financial advisory, loan financing, insurance brokerage, and property development.

(2) The Company finds itself in a position of acute financial distress. The unanticipated outbreak of Covid 19 has placed extraordinary demands on the Group's liquidity, and magnified pre-existing financial issues which the Group had already been grappling. All of these matters, taken together, have left the Company and the Group in a precipitous financial situation. The Group is currently insolvent on a cash flow and balance sheet basis. The Company is also insolvent on a cash flow and balance sheet basis.

(3) The Board of Directors of the Company ("**the Board**") believes that these challenges - although extremely serious - are surmountable and that a financial restructuring is in the best interests of the creditors given the intrinsic value of the Group's underlying assets and considerable goodwill in the market, built up to 50 years of continuous operations. As such, the Company is in the process of formulating a restructuring plan to extract it from its current financial difficulties, strengthen its capital base and permitted to continue trading as a going concern.

(4) The Company therefore seeks the appointment of the JPLs for the purpose of implementing a restructuring of the Companies financial liabilities. The Board anticipates that the restructuring proposal will ultimately be executed by way of a scheme of arrangement, potentially involving a fresh share issuance, the disposal of assets, a compromise of rescheduling of the Group's debts or, in all likelihood, a combination of some or all of these courses of action.

(5) It is proposed that the JPL's will be appointed on a "*light touch*" basis, with the directors remaining in office to assist the JPLs in their role. The involvement of

management of the Company in the restructuring process will be of paramount importance and will allow for the most efficient implementation of the restructuring proposal. The Board is of the firm view that the appointment of the JPL's, with the Board remaining in place to assist in creditor negotiations and the formulation of the restructuring proposal, will fortify investors' confidence in the Company and the Group.

4. On 2 October 2020, Subair Williams J appointed the JPLs on a "*light touch*" basis, as requested by the Company. The Court also issued a Letter of Request to the High Court of Hong Kong Special Administrative Region seeking its assistance and aid of the Court in recognising the appointment of the JPL's. The Hong Kong Court duly recognised the Order and the JPLs in accordance with the request made by this Court.

5. On 15 July 2020, prior to the presentation of the Petition in Bermuda on 23 September 2020, Ms Yang Xueli had presented a Petition, subsequently amended on 30 October 2020, to the Hong Kong Court seeking a winding up order in respect of the Company. There were a number of adjournments in relation to that Petition. The Petition came before Harris J of the High Court of Hong Kong on 10 May 2021 and on that occasion Harris J stated that in the exercise of his discretion, he would make the normal winding up order. Harris J further stated that "*the provision liquidators are not appointed by this court and therefore, the Official Receiver will become the first provisional liquidator in Hong Kong*."

6. In concluding that the appropriate order was to wind up the Company, Harris J expressed a number of concerns in the way the proposed restructuring had proceeded in Hong Kong:

> *"3. The expectation that is recorded in [decision of 10 May 2021] has not been realised, instead, matters have progressed as follows. The provisional liquidators have made no effort to contact the Petitioner and not provided her with any information at all about the progress of the restructuring until Ms Yang received a copy of the 2nd affirmation of Lai Wing Lun, one of the provisional liquidators, on*

Friday, 7 May 2021, in other words, the working day before the petition came back on for hearing before me…

5, Neither Ms Yang nor the Court, should have been put in the position of being given information which is manifestly incomplete, so close to the hearing that it was difficult to deal with. I have reached the stage at which I am increasingly concerned about the way soft touch provisional liquidation, and what is generally referred to as the Z-Obee technique is being used. I have explained this in a number of decisions and I have recently completed other decisions which will be handed down very shortly developing those concerns further. Soft touch provisional liquidation need close monitoring by the Court and I expect soft-touch provisional liquidators and their legal advisers to ensure that this is possible not, as in the present case, make representations to the court on which they know the court has relied and then ignore them."

7. Harris J had earlier expressed understandable concerns about the abuse of the *Z-Obee* technique in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622. This Court is bound to take these concerns into account in considering whether to sanction a "*light touch*" provisional liquidation in aid of a proposed restructuring of a company in financial difficulties.

8. Following the winding up order made by the Hong Kong Court, on 23 July 2021, the first creditors' meeting was held at which a majority in value of the creditors voted for Mr Osman Mohammed Arab and Mr Lai Wing Lun of RSM Corporate Advisory (Hong Kong) Limited, two of the JPL's appointed by the Bermuda Court.

9. The Official Receiver did not make an application to the Hong Kong Court to appoint Mr Arab and Mr Lai as the permanent liquidators but instead made an application under section

227A(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, for a Regulating Order.[1]

10. In support of the application for a Regulating Order, the Official Receiver submitted to the court report dated 13 August 2021. In that report the Official Receiver asserted:

    (1) The Official Receiver considers that there is a possible conflict of interest or question of partiality in relation to the proposed appointment of Mr Arab and Mr Lai. Liquidators should not only be independent and impartial, but they should also be seen to be so and any conflict of interest or even over familiarisation should be discouraged.

    (2) Mr Arab and Mr Lai's previous involvement in the soft touch provisional liquidation and that they have previously advised the Company, it is considered that it would give rise to a reasonable perception of conflict of bias on the part of the creditors.

    (3) Further, there are matters liquidators are required to investigate and functions they have to perform which may impact on the duties and activities of JPL's. In view that the JPL's were appointed upon the application of the Company, it is doubtful if the potential interests of Mr Arab and Mr Lai due to their prior office of JPL's could be effectively managed. It appears that it is inevitable that Mr Arab Mr Lai if so appointed as liquidators, would be required to undertake problematical tasks of "*self review*". The Official Receiver considers that the problems of conflict are legion and pervade the tasks of the liquidators.

[1] Section 227A(1) provides that where it appears to the court on application being made by the Official Receiver, liquidator or by any creditor at any time after the presentation of a winding up petition that by reason of the large number of creditors or contributories or for any other reason the interest of the creditors so requires, it may, on or after the making of a winding-up order, order that the winding up of the company by the court shall be regulated specially by the court, and such order shall be known as a regulating order.

(4) The Official Receiver does not support the appointment of Mr Arab and Mr Lai as liquidators of the Company in this case in view of the possible conflict of interest or possible partiality.

11. The application for a Regulating Order was considered by Linda Chan J in Chambers on 19 August 2021 and having regard to the report prepared by the Official Receiver, the learned judge declined to appoint Mr Arab and Mr Lai as liquidators of the Company, even though the creditors had voted for them to be appointed. Instead, Chan J appointed Mr Lai Kar Yan and Mr Yip Wa Ming, both of Deloitte Touche Tohmatsu as the joint and several liquidators of the Company.

12. In his Second Affirmation, Mr Lai (Derek) of Deloitte Touche states that it is his understanding (and he has been so advised), that the JPL's had standing to make an application to the Hong Kong Court to set aside the Regulating Order. However, it appears that the JPL's elected not to do so.

13. On 1 October 2021, this Court also made a winding up order on the basis of the representations made to the Court. The winding up order was made on the basis of a report presented to the Court by the JPL's dated 30 September 2021 and "*upon counsel for the Company informing the Court that they have no instructions from the Company due to the displacement of the Board of Directors as a result of the Company being the subject winding up order in Hong Kong dated 10 May 2021*." By that order the Court directed that:

(1) Mr Arab, Mr Lai and Mr Whitaker be appointed JPLs of the Company.

(2) The JPLs convene the first meeting of the creditors pursuant to section 171 of the Companies Act 1981 for the purposes of electing the Joint Liquidators of the Company in Bermuda.

(3) The JPL shall give notice of the meeting to the Hong Kong Liquidators and the Official Receiver of Hong Kong.

14. The First Affirmation of Mr Lai advises that a meeting of the creditors of the Company was held on 12 November 2021. At that meeting, the creditors were presented with a choice of permanent liquidators of the company in the form of either the JPL's or the Hong Kong Liquidators. The creditors approved the appointment of the JPLs with votes representing HK$ 444,305,433 in value or 54.2% of the votes cast. The Hong Kong Liquidators received HK$ 102,027,471 in value or 12.46% of the votes cast. The remaining 33.27% abstained.

Rival contentions

15. The first point taken on behalf of the JPL's is that having regard to the votes cast by the creditors of the Company, this Court has no jurisdiction or discretion to appoint other persons such as the Hong Kong Liquidators. In the written submissions filed on behalf of the JPL's it is said that the relevant provisions dealing with the appointment of permanent liquidators are to be found in section 171 (b) and (c) which provide:

> *(b) the provisional liquidator shall summon separate meetings of the creditors and conservatories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the provisional liquidator;*
>
> *(c) the Court may make any appointment and order required to give effect to any such termination and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matters aforesaid, the Court shall decide the difference and make such order thereon as it thinks fit.*

16. Relying upon certain passages in *Re Loral Space & Communications Ltd* [2007] Bda LR 26 (Kawaley J) and *C&J Energy Services Ltd* [2017] Bda LR 22, it is contended in the written submissions that there is no discretion to appoint liquidators not resolved to be appointed (and in this case positively rejected) by the creditors can be read into section 171 of the Act by implication. In the written submissions, the JPLs argue in categorical terms that:

> *"[The Hong Kong Liquidators] appeal to the discretion of the Court which is not provided for or identified anywhere in the Act and Rules. In aid of this discretion, [the Hong Kong Liquidators] asked that certain matters be taken into account when considering the JPL's appointment as permanent liquidators*. ***There is no discretion under the Act****."* (emphasis added)

17. Secondly, the JPLs contend that the Hong Kong Liquidators have no standing to make any representations to this Court in relation to who should be the permanent liquidators of the Company. The JPLs argue that the Hong Kong liquidators have no interest by the winding up of the Company. They argue that the Hong Kong liquidators are not creditors, contributories or JPLs appointed or recognised by the Bermuda Court. The creditors of the Company have clearly indicated their satisfaction with the appointment of the JPLs, both in Hong Kong and in Bermuda. The JPLs further contend that the Hong Kong Liquidators are "*strangers*" to these proceedings and, on this basis alone, their application to the Court should be rejected.

18. The JPLs concede that the Hong Kong Liquidators may wish to argue that they have a legitimate interest in the outcome of the winding up of the Company in Bermuda, by virtue of their appointment as joint and several liquidators by the Hong Kong Court. Whilst not accepting that their status as appointees by the Hong Kong Court would provide them with the necessary grounding to meet the test in *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605, the JPLs argue that even if the test could be met, the Hong Kong Liquidators would be required to apply for a recognition order before laying a claim to such an interest.

19. Thirdly, the JPLs do not accept that there are disadvantages in two sets of liquidators of parallel proceedings. They argue that the Hong Kong Liquidators have provided no evidence for the assertion that there are economic disadvantages to having the liquidators from the same firm appointed across jurisdictions. The JPLs contend that the additional costs incurred by the Hong Kong Liquidators in cooperating with the primary insolvency proceedings in Bermuda would be minimal.

20. The JPLs also point out that they have been in office for over a year. Significant work has been carried out in support of the restructuring. A change in appointees at this stage would almost inevitably result in the state incurring additional costs.

21. Fourthly, the JPLs complain that the present position is created as a result of the Hong Kong Court assuming jurisdiction when it should not have been done. The JPLs argue that the Hong Kong Liquidators appointment as JPLs was permitted by a winding up order made contrary to the ordinary principles of private international law because it was made in the face of a valid and subsisting recognition order by the Hong Kong Court. In addition to giving rise to issues of standing in Bermuda, the Hong Kong Liquidators' appointment would not be recognised in BVI or be effective any place other than Hong Kong.

22. The JPLs contend that the issue here is not the fact that there are parallel proceedings, rather, it is a refusal on the part of the Hong Kong Liquidators to operate in accordance with well-established principles and yield the JPLs' appointment. They argue that it is the Hong Kong Liquidators' actions which have caused this dilemma and the way out should not be to appoint over the express wishes of the creditors of the Company.

23. The Hong Kong Liquidators take issue with all the submissions made on behalf of the JPLs. They maintain that the Court not only has the discretion not to appoint the JPLs, but the Court has the discretion to appoint any person the Court considers appropriate in the circumstances.

24. Secondly, as the court appointed liquidators in Hong Kong, they have the necessary standing to make representations to this Court as to the identity of the liquidators to be appointed by this Court.

25. Thirdly, having regard to the fact that the Hong Kong Court has "ruled out" appointment of the JPLs as liquidators in Hong Kong, their appointment as liquidators by this Court will not be conducive to the proper operation of the process of liquidation.

26. Fourthly, to have two sets of liquidators in parallel proceedings is wasteful of resources in relation to a company which is already hopelessly insolvent.

Discussion

The discretion under section 171

27. Mr Tucker, for the JPLs, in his written submissions, contends that this Court has confirmed that section 171(c) provides an express limit on its power to appoint a provisional liquidator, relying on *Re Loral Space & Communications Ltd* [2017] Bda LR 26 (Kawaley J) at [7]:

> *"The Court is **only** empowered to decide any difference between the first meeting of contributories and creditors as to who the permanent liquidators should be. **The choice of the liquidator is a power vested in the contributories and creditors, it being implicit that the creditors' views will prevail in an insolvent winding up because shareholders have no economic interest in the liquidation**."*

28. Mr Tucker submits that no discretion to appoint permanent liquidators not resolved to be appointed (and in this case positively rejected) by the creditors can be read into section 171 of the Act by implication. He submits *Loral Space & Communications* confirms that there is no freestanding common law power to exercise a general discretion as regards appointment, it confirms the opposite.

29. The statement relied upon in *Loral Space & Communications* obviously represents the position in the ordinary case. However, it is to be noted that the court was not concerned with laying down the precise limits of its discretion under section 171. The precise issue, the scope of the discretion under section 171, was in fact raised as long ago as 1892 in *In re Johannisberg Land and Gold Trust Company* (1892) 1 Ch 583. In relation to materially identical wording in section 6(1)(a) of the Companies (Winding Up) Act 1890. Mr

Whinney, for the contributories, made the same submission as made by Mr Tucker on behalf of the JPLs in this case:

> *"The Court "may" make any appointment required to give effect to the "determination of the meetings"; the word "may" gives the Court a power to appoint, but not a discretion, except in the case of a difference between the determinations of the meetings."*

30. That submission was emphatically rejected by Chitty J at page 586:

> *"The first question is as to the force of the word "may" in the 6th section of the Act. The sentence runs thus: "The Court may make any appointment and order required to give effect to any such determination," and so on. Now it is contended by Mr. Whinney that the word "may" there means "must." This argument is really disposed of by the judgment of the Court of Appeal in In re Baker (1). For all substantial purposes, the nature of the enactment in that case, and in this case, is identical. To my mind it would be an absurdity to suppose that the Legislature intended that the Court should merely register the determination of the meetings. I am satisfied that the intention of the Legislature was to give the Court a discretion as to making the appointment and order. In the 4th section there is a similar expression. The 5th sub-section is, "The Official Receiver may be appointed by the Court provisional liquidator of the company at any time after the presentation of the petition and before a winding-up order has been made." It would be absurd to suggest that "may" in that section means "must." I think, therefore, that the word "may" here confers a discretion on the Court, to be exercised, as all judicial discretions are to be exercised, according to the judicial rule; and consequently that the Court in the present case has a discretion whether it will accept or not the person who has obtained the majority of votes at the meeting of contributories and of creditors. If the Court, in the exercise of its discretion, declines to appoint this gentleman or some other person liquidator, then the 3rd sub-section of the 6th section takes effect."*

31. And then at page 588:

> *"Then I go back to the substance of the matter. In my opinion, both the Legislature, and those who framed the Rules, intended to leave a discretionary power in the Court to be exercised in a proper manner, where the resolutions at the two meetings are carried by majorities, but there are still some dissentients; I have had such a case in Chambers myself, where for certain reasons which I thought sufficient, I declined to accept the opinion of the majority."*

32. The Court accepts Mr Miles' submission, on behalf of the Hong Kong Liquidators, that the Court is not bound to appoint as liquidator the person(s) nominated by the majority at the first meetings, and instead may appoint another person (including a person nominated by minority creditors at the meeting), was recognised by Kawaley CJ in *Re C & J Energy Services Ltd* [2017] Bda LR 40 at [42]:

> *"In practice, where first statutory meetings are convened, the report is made to the court by the provisional liquidator and an order is made appointing either the nominee of the first meetings* ***or some other private liquidator*** *or the Official receiver as liquidator"* (emphasis added).

33. The Court's jurisdiction to appoint a permanent liquidator under section 171 is to be exercised by reference to certain identifiable principles. These principles are summarised in the judgment of Hellman J in *Re Opus Offshore Limited* [2017] Bda LR 22 at [67] – [69]:

> *"67. The principles applicable to the appointment of a liquidator were helpfully identified by HH Judge Maddocks in Fielding v Seery [2004] BCC 315 Ch D at para 33. As summarised in Stanley International Betting Ltd v Stanleybet UK Investments Ltd [2011] BCC 691 Ch D by Stuart Isaacs QC, sitting as a Deputy High Court Judge, they include:*

'(1) The test in relation to the appointment of a liquidator is whether it will be conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation.

(2) Although the majority vote of the creditors will in the normal course prevail, creditors holding the majority vote do not have an absolute right to the choice of liquidator.

(3) A liquidator should not be a person nor 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.

That is, except where before the presentation of the petition the company has passed a resolution for voluntary winding up, in which case the winding up will be deemed to have commenced at the time of the passing of the resolution.

(4) By contrast, it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator.'

68. *Fielding v Seery* concerned *an application to remove a liquidator appointed by the creditors in a creditors' voluntary liquidation and to replace him with an independent liquidator appointed by the court. However, I accept the submission of Christian Luthi, who appeared for Songa, that mutatis mutandis the principles are applicable to a compulsory winding up by the Court. They were approved by Lewison J in Re Power Builders (Surrey) Ltd Power v Petrus Estates Ltd [2010] BCC 11, Ch D, another case about a creditors' voluntary liquidation, and have been applied by analogy in a line of cases concerning the appointment of*

administrators, including the above-mentioned Stanley International Betting Ltd case.

69. The administrator cases include Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd [2013] BCC 47, Ch D. At para 14, Lewison J added an important gloss to what is meant by: 'conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation':

> *"There is a public interest in office-holders charged with the administration of an insolvent estate not only acting but being seen to be acting in the best interest of the creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated. This is a reflection of a more general principle that justice must not only be done but must be seen to be done. The importance of the principle is reflected, amongst other ways, in the fact that applications for recusal are almost always made not on the ground of actual bias but on the ground of appearance of bias."*

34. The application of these principles may in a particular case result in the Court appointing a person as permanent liquidator other than the person selected by the majority of creditors. This was again recognised by Kawaley CJ in *Re Cumulus Eastern European Property Fund Limited* [2018] Bda LR 40 at [18]:

> *"18. It was very properly conceded that the local and English case law supporting the principle that the views of the majority of creditors* ***normally prevail*** *dealt with insolvent companies. Accordingly, the JPLs did not rely solely on the presumption that creditors wishes will normally prevail. Reliance was also placed on the fact Mr Lucas was the only person seeking to nominate alternative liquidators and he was someone against whom the liquidators might have to make an adverse claim. Such a person ought not, according to the third principle articulated by Stuart Isaacs QC in Stanley International Betting Ltd v Stanleybet UK Investments Ltd [2011] BCC 691, to be nominating permanent liquidators."*

35. In the circumstances, the Court concludes that, in exercising its jurisdiction to appoint a liquidator under section 171, the Court is not bound to accept the views of the majority of the creditors. No doubt the views of the majority of the creditors will normally prevail. However, the Court's decision to appoint a permanent liquidator will be informed by the principles identified by HH Judge Maddocks in *Fielding v Seery*. Applying those principles may lead the Court not to accept the views of the majority of the creditors and the Court may appoint some other suitable person and that may, in a particular case, include the person supported by the minority of the creditors. Accordingly, the Court is unable to accept the submission advanced on behalf of the JPLs that this Court simply does not have the jurisdiction or the discretion to appoint the Hong Kong Liquidators as permanent liquidators of the Company.

Standing of the Hong Kong Liquidators

36. Mr Tucker contends that the Hong Kong Liquidators do not have the requisite standing either make representations or an application to this Court in relation to the appointment of a permanent liquidators**.** He relies upon in *Re Aneco Reinsurance Underwriting Co Ltd v Mitchell (Liquidator)* [2002] Bda LR 15, where the Court considered the question of locus standi in the context of insolvency proceedings finding that in the context of an insolvent company, "*… the only person with legitimate interest in the winding up of the company of the creditors were entitled to participate in the ultimate distribution of the company's assets*."

37. Mr Tucker also relies upon the Privy Council *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605, where Lord Millett, giving the judgment of the Board, considered that in principle where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only, as a matter of judicial restraint, on the application of the party with a sufficient interest to make it. Lord Millett explained at 1611B:

> *"In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court.*

The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. ***The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint.*** *Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.*

Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. ***He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest in the relief sought.*** *Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see In re Corbenstoke Ltd. (No. 2) [1990] B.C.L.C. 60. This case was criticised by the plaintiff: their Lordships consider that it was correctly decided.*

...

The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors

have taken no step to remove them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders." (emphasis added)

38. The Court held in *Aneco* that Mr Hardy, a contributory holding one share in the company, did not have standing to challenge the decision of the liquidator to admit a particular claim of a creditor in circumstances where the company had liabilities of over $100 million and was hopelessly insolvent. In the circumstances, Mr Hardy could have no tangible interest in the relief sought.

39. In *Deloitte & Touche* the issue was whether the defendants (Deloitte & Touche) to the proceedings commenced against them alleging negligence by the liquidator (Mr Johnson) had the standing to seek the removal of the liquidator on the ground of conflict of interest. Lord Millett held that the defendant to the proceedings commenced by a liquidator had no interest in the relief sought since "*the only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors."*

40. Here, the Hong Kong Liquidators are engaged in ancillary winding up proceedings in Hong Kong, having been appointed by the Hong Kong Court. They have a legitimate interest in the proper operation of the liquidation of the Company. To the extent that the identity of the liquidators appointed by this Court may have a bearing on the proper operation of the liquidation of the Company, the Hong Kong Liquidators have legitimate interest in the relief sought and are entitled to make representations to this Court.

41. That the views of the Hong Kong Liquidators are relevant to the appointment of permanent liquidators was appreciated by this Court when it made the winding up Order dated 1 October 2021. The Court, on its own motion, directed that the JPLs notify the Hong Kong

Liquidators and the Hong Kong Official Receiver of the first meeting of creditors for the purposes of electing the Joint Liquidators of the Company in Bermuda. Paragraph 4 of the Order dated 1 October 2021 provides:

> *"4. In addition to the requirements under the Act and the Companies (Winding Up) Rules 1982 ("the Rules"), the JPLs shall give notice of the Meeting to the following parties;*
>
> *a. Mr Lai Kar Yan (Derek) and Mr Yip Wa Ming (Ben) both of Deloitte Touche Tohmatsu, the Joint and Several liquidators of the Company appointed by the High Court of the Hong Kong Court Special Administrative Region Court of First Instance; and*
>
> *b. Official Receiver of Hong Kong."*

42. In the circumstances, the Court is satisfied that the Hong Kong Liquidators have legitimate interest in the relief sought by application. The Court has already implicitly recognise the Hong Kong Liquidators when it provided in terms of paragraph 4 of the Order dated 1 October 2021.

Would the appointment of the JPLs as permanent liquidators be conducive to the proper operation of the process of liquidation?

43. The Petition filed in the Bermuda proceedings was supported by the First Affirmation of Mr Cheung Kam Fai dated 23 September 2020. In that affirmation, Mr Cheung stated at [97] that the Company and the proposed JPLs consider that the effective exercise of the proposed JPLs powers as conferred by the draft Order requires that their appointment be recognised by the Hong Kong Court for *inter-alia* the following reasons:

    (1) The company is listed on the Hong Kong Stock Exchange.

(2) The Company's business office is in Hong Kong and its books and records are kept in Hong Kong.

(3) The Company's current directors - with whom the Proposed JPLs are to work in close co-operation with, in accordance with the "*light touch*" nature of the appointment - are based in Hong Kong.

(4) The Company's current auditors are based in Hong Kong.

(5) The majority of the Group's creditors are based in or are approximate in Hong Kong, the governing law of much of the Group's debts is primarily Hong Kong law or the law of PRC, and the security granted to secure the Group's debts include security over assets situated in Hong Kong and PRC.

(6) Many of the Group's bank accounts are in Hong Kong.

44. At [99] Mr Cheung explained that to enable the proposed JPLs to deal effectively with the Company, together with the Company's creditors and shareholders, and to reassure persons dealing with the proposed JPLs that they have full authority to act for and deal with the Company and its affairs in Hong Kong, the Company seeks orders to allow the proposed JPLs to seek a recognition order from the Hong Kong Court.

45. In his Second Affirmation, Mr Lai (Derek) states at [19] that based on the information available to the Hong Kong Liquidators at this stage, the realisable value of the assets of the Company lies in certain operating subsidiaries based in Hong Kong. In particular, the subsidiaries are Ping An Securities Limited ("**PASL**") and Super Harvest Insurance Broker Limited ("**SHIBL**"), incorporated in Hong Kong.

46. PASL was incorporated in Hong Kong on 2 March 1993, and is a company licensed with the Hong Kong Securities and Futures Commission to carry out dealing in securities, advising on securities, advising on corporate finance, and asset management. These are all

regulated activities in Hong Kong. PASL's directors are residents and subject to the Hong Kong Court's personal jurisdiction.

47. SHIBL was incorporated in Hong Kong on 5 February 2015 and Mr Cheung is the sole director of this company. Its principal activity is the provision of insurance brokering services.

48. It is readily apparent therefore that the Company is firmly rooted in Hong Kong. It appears to the Court that the proper operation of the process of liquidation requires that any liquidator appointed by this Court needs to be recognised by the Hong Kong Court and receive the necessary assistance required from the Hong Kong Court. No doubt it was for this reason that paragraph 22 of the Order of this Court dated 2 October 2020 provided that a Letter of Request be issued and directed to the Hong Kong Court seeking its assistance in aid of the Court in this proceeding. As noted earlier, the Hong Kong Court (Harris J) gave effect to the Letter of Request and recognised the JPLs appointed by this Court.

49. However, the picture radically changed with the Order of Harris J dated 10 May 2021 and Order of Linda Chan J dated 19 August 2021. Despite the Hong Kong first creditors meeting nominating the JPLs as liquidators in Hong Kong, the current Companies Judge (Linda Chan J) nevertheless made the Regulating Order and refused to appoint JPLs as the permanent liquidators and instead appointed the Hong Kong Liquidators. The Court accepts Mr Miles' submission that the Regulating Order is a serious hurdle for the JPLs to surmount in obtaining recognition in Hong Kong as it goes directly to their suitability to act as liquidators in Hong Kong.

50. The Court accepts that paragraph 16 of Second Affirmation of Lai Kar Yan captures the correct position in Hong Kong when he states:

> *"In paragraphs 60 to 62 of his Second Affirmation, Lai Wing Lun, and suggests that recognition is likely. These paragraphs ignore the fact that the Honourable Madam Justice Linda Chan, the current Companies Judge, has already made the*

*Regulating Order on 19 August 2021. As things stand, the Hong Kong Court has by way of the Regulating Order already ruled on the suitability of the JPLs to act as liquidators in Hong Kong. The fact that the Honourable Mr Justice Harris made a recognition order on 12 March 2021 is superseded by events. The Hong Kong Court's reservations as to the appointment of the JPLs as liquidators in Hong Kong is fully reflected in the Hong Kong Regulating Order appointing the Hong Kong Liquidators in place of the JPLs, as it is evident from the fact that the Regulating Order was made on the basis of application of the Hong Kong Official Receiver ("**HKOR**") and its views expressed in the HKOR's report about the JPLs suitability."*

51. As noted by Mr Lai (Derek) in paragraph 16 of his Second Affirmation, that the JPLs had standing to make an application to the Hong Kong Court to set aside the Regulating Order. The JPLs could, if they so desired, have raised the criticisms made of the Official Receiver's report in the Second Affirmation of Lai Wing Lun in an application to set aside the Regulating Order. However, the JPLs elected not to do so.

52. In the circumstances, the Court is bound to conclude that it is unlikely or that there is an appreciable risk that the Hong Kong Court would recognise the JPLs, if appointed by this Court, given that the Hong Kong Court has, by Order of Linda Chan J dated 19 August 2021, already considered and determined the suitability of the JPLs as permanent liquidators of the Company in Hong Kong.

53. Mr Tucker, on behalf of the JPLs, invites the Court to look at the underlining objections in the Official Receiver's report, which formed the basis of the Order of Linda Chan J dated 19 August 2021, and conclude that those objections are baseless.

54. The Court does not consider that it is appropriate for this Court to start considering afresh whether the objections which led to the Order of Linda Chan J of 19 August 2021 have any validity. In the Court's view, if the JPLs wished to challenge the objections set out in the

Official Receiver's report or the conclusions underpinning the Order of Linda Chan J, the appropriate course for the JPLs to take was to appeal that decision in Hong Kong.

55. Secondly, barring exceptional circumstances, this Court will give due deference to the orders made by the Hong Kong Court, in relation to the same matter. As noted in the Cayman judgment of Doyle J *In the matter of GTI Holdings Ltd* FSD 102 of 2020 at [68]-[74] comity and co-operation is particularly important in the field of cross-border insolvency. This Court will always take great care to avoid potential conflicts with the courts of a friendly jurisdiction such as Hong Kong bearing in mind the strong links between the two jurisdictions over the past 40 years.

56. Mr Tucker invites the Court to (i) reject the factual basis which led to Linda Chan J making the Regulating Order and rejecting the JPLs as suitable candidates as permanent liquidators of the Company in Hong Kong; and (ii) appoint the JPLs as permanent liquidators in Bermuda despite the fact that they have been deemed unsuitable by the Hong Kong Court. The Court declines to accept this invitation on the grounds that (i) such an approach is contrary to the fundamental notions of comity and co-operation between courts of friendly nations; and (ii) such a course is unlikely to be conducive to the proper operation of the process of liquidation as, if the Court appointed the JPLs as permanent liquidators, the Hong Kong Court may not recognise such an appointment. The Court should seek to avoid such an outcome.

57. Finally, in his supplementary submissions contained in a letter from Carey Olsen dated 31 March 2022, Mr Tucker invites "*the Court to take particular note of the decision in GTI Holdings Ltd…which…authoritatively sets out the position adopted by the Grand Court of the Cayman Islands in respect of similar issues and circumstances of fundamental importance to that jurisdiction*." The Court has carefully considered the insightful judgment of Doyle J in that case and gratefully adopts that analysis. In the present case, the Court is merely deciding that it is not conducive to the proper operation of the liquidation of the Company to appoint the JPLs as permanent liquidators on the basis that they are unlikely to be recognised by the Hong Kong Court, since the Hong Kong Court has already

made a Regulating Order reflecting, in the eyes of the Hong Kong Court, the suitability of the JPLs to act as permanent liquidators.

The undesirability of parallel appointments

58. The Hong Kong Liquidators contend that there are economic advantages to having the liquidators from the same firm appointed across jurisdictions and their appointment would mitigate the costs of parallel proceedings.

59. At paragraph 5(9) of his First Affirmation, Mr Lai (Derek) states that the Statement of Affairs as at 10 May 2021 affirmed by Mr Cheung shows that the Company to have assets with total estimated net realisable value of HK$13,077,552 and with estimated total liabilities of HK$1,011,317,649 representing a deficiency of HK$998,240,097. The net realisable value of HK$11,649,523 represents the total value due to the Company by its subsidiaries. So far, the total value of claims submitted by the creditors in the winding up of the Company stands at HK$779,686,436 and US$686,016. Funds of around HK$600,000 have been realised to 30 August 2021.

60. Mr Lai further states that the realisation of the amounts due to the Company from its subsidiaries depends on the availability of funds in the relevant subsidiaries and the ability of the Hong Kong Liquidators to take control of the subsidiaries, failing which the Hong Kong Liquidators would likely have limited recovery in this regard.

61. Mr Lai states that the Hong Kong Liquidators are concerned about these circumstances and their adverse impact on the efficiency of the winding up and regulating orders in the Hong Kong. It is Mr Lai's position that parallel liquidations are highly undesirable in terms of the resultant increase in costs.

62. In his Second Affirmation Mr Lai (Derek) states that [22] that as noted above, the available assets for recovery within the Group are limited. In particular PASL's net asset position is expected to reduce over time. Swift action from the Company's liquidators is needed. Mr

Lai contends that the existence of parallel appointments of liquidators in the circumstances is unlikely to be beneficial to the interests of the Company's creditors and the administration of its liquidation.

63. The Court accepts Mr Lai's evidence in this regard. Given the overwhelming insolvency of this Company and the limited resources available to the liquidators, it is clearly not in the interests of the creditors and the administration of the liquidation that there be parallel appointments of liquidators in Bermuda and Hong Kong. Such an outcome is likely lead to duplication of work and result in waste of limited resources. It may also potentially lead to conflict between the two sets of liquidators. Such an outcome is clearly not in the interests of the creditors or the efficient operation of the liquidation process and should be avoided.

Conclusion

64. Accordingly, in the exceptional circumstances of this case, the Court, exercising its jurisdiction under section 171 of the Companies Act 1981, declines to appoint the JPLs as the permanent liquidators of the Company and instead appoints Yip Wa Ming and Lai Kar Yan of Deloitte Touche Tohmatsu Hong Kong and Rachelle Ann Frisby of Deloitte Ltd Bermuda as joint liquidators of the Company.

65. The Court will hear further submissions in relation to the composition of the Committee of Inspection and in relation to the issue of costs, if required.

Dated this 8th day of April 2022

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NARINDER K HARGUN

CHIEF JUSTICE