

IN THE SUPREME COURT OF BERMUDA
(COMMERCIAL COURT)
COMPANIES (WINDING-UP)
2016: No. 183

IN THE MATTER OF UP ENERGY DEVELOPMENT GROUP LIMITED-IN
PROVISIONAL LIQUIDATION (FOR RESTRUCTURING PURPOSES)
AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS

(in Chambers)

Winding-up-creditor petition-appointment joint provisional liquidators to monitor implementation of insolvent restructuring by board of directors-identity of liquidators-competing appointees nominated by petitioner and company

Date of hearing: October 7, 28, 2016

Date of Ruling: November 4, 2016

Mr. Keith Robinson, Appleby (Bermuda) Limited, for Credit Suisse AG, Singapore Branch (“the Petitioner”)

Mr Christian Luthi, Conyers Dill & Pearman Limited, for the Company

Ms Alsha Wilson, Harneys Bermuda Limited, for Baosteel Resources International Co. Limited (“Baosteel”), a Supporting Creditor¹

Mr Kevin Taylor² and Ms Nicole Tovey, Taylors, for China Minsheng Banking Corp Ltd Hong Kong Branch (“China Minsheng”), an Opposing Creditor

Introductory

1. The Company is incorporated in Bermuda and listed on the Hong Kong Stock Exchange (“HKSX”). While the Company was seeking to implement an out-of-court restructuring to resolve its admitted solvency difficulties, separate creditors presented winding-up petitions in Hong Kong on (March 29, 2016, HEC Securities Limited as the holder of Notes valued at HK\$230 million) and then Bermuda (on May 6, 2016, the Petitioner in respect of the HK\$150 million due under its Notes).

¹ Ms Wilson only appeared at the October 28, 2016 hearing.

² Mr Taylor only appeared at the October 7, 2016 hearing.

2. In response, on the adjourned date for the hearing of the Petition (July 4, 2016), the Company belatedly appointed its own independent restructuring consultants RSM Corporate Advisory (Hong Kong) Limited (“RSM”), following the first return date of the present Petition and the Petitioner’s application to appoint joint provisional liquidators (“JPLs”), July 1, 2016.
3. On September 20, 2016, following a contested hearing on September 16, 2016, I granted the Petitioner’s application to appoint JPLs to monitor the restructuring in a judgment which concluded as follows:

“32. There is, however (as I found on September 9, 2016), no urgent need for the appointment to be made forthwith. I find that the time which has been spent by RSM on information-gathering and preliminary consultations thus far to be unremarkable given the complexities of the Company’s affairs. I mention the time element because the Company has asked to be heard on the identity of the JPLs and I consider that this issue is worthy of careful consideration. Even at this late stage, it would clearly be preferable for JPLs acceptable to the Company to be appointed, if possible, to smooth the course of the restructuring process. The Petitioner’s candidates are, it must be said, eminently qualified and I have not applied my mind at all at this stage to the merits of the Company’s conflict concerns.

33. In these circumstances I see no reason why the identity of the JPLs cannot be resolved by this Court (if it is not agreed in the interim) in early October (as I am unavailable before then) and I would adjourn the matter of the terms of the appointment Order to a date to be fixed convenient to counsel and the Court.

34. I also confirm the provisional view I expressed at the hearing that all Court and other documents created after the JPLs are formally appointed (and indeed the Order itself) could potentially refer to the Company along the following lines: “-in Provisional Liquidation (for Restructuring Purposes)”. This might mitigate any genuine concerns about the risk that a Bermudian ‘soft touch’ provisional liquidation might be misunderstood as a ‘full-blown’ provisional liquidation.”

4. On October 7, 2016 the Petitioner sought the appointment of its nominees, John C. McKenna of Finance & Risk Services Limited in Bermuda and Fok Hei Yu and John Howard Batchelor of FTI Consulting in Hong Kong. The Company proposed Mr Matthew Clingerman of Krys Global Bermuda and Mr Osman Mohammed Arab and Mr Lai Wing Lun of RSM in Hong Kong. I appointed Mr John McKenna, the

Petitioner's Bermuda-based nominee alongside the Company's Hong Kong nominees, subject to Mr McKenna confirming that he was willing to act alongside the RSM appointees. In the event he declined to accept the appointment and so the JPL appointment Order of October 7, 2016 was amended on October 28, 2016 to appoint the Petitioner's alternative Bermuda-based nominee, Mr Roy Bailey of Ernst & Young.

5. I now give reasons for these decisions.

The broad role of the JPLs when supervising a 'debtor in possession'-style restructuring generally

6. In my Ruling of September 20, 2016, I described the primary broad function of JPLs in the context of insolvent restructurings as follows:

*"28...What the provisional liquidation will in most cases contribute to the process will not just be the benefit of the statutory stay of proceedings against the company. It will also limit the number of disputes which have to be resolved in court and also give confidence to both creditors and the Court that the restructuring process which emerges is a credible one."*³

The specific role of JPLs in the present case

7. This broad function had particular relevance in the present case where there are sharp divisions between an apparent majority of creditors who trust the Company and its proposed JPLs and the significant minority of creditors, including the Petitioner, who do not. The difference of approach appears likely to be in part because of genuinely conflicting interests between creditors who are partially secured (e.g. China Minsheng, supportive of the Company's position throughout) and those which are not (e.g. the Petitioner, and supporting creditor Baosteel).
8. Such divisions in the creditor constituency brought into sharp focus the need for JPLs who were not only actually but also apparently independent of the Company and any particular creditor faction. However, this consideration did not extinguish the importance of ensuring that the JPLs also would be able to form a functional relationship with the Company's management as well.
9. Typically, in this sort of soft-touch provisional liquidation, the company's management approaches potential office-holders and the company itself nominates the proposed appointees. Although its nominees are of course required to be

³ *Re Up Energy Development Group Limited* [2016] SC (Bda) 83 Com (20 September, 2016).

completely independent, the fact that the company itself has chosen the officeholders, in human chemistry terms, quite obviously enhances the quality of the working relationship. Appointing JPLs to supervise the implementation of an insolvent restructuring while management remains in place against the wishes of the management is akin to a ‘shotgun marriage’.

The importance of appointing JPLs capable of winning the confidence of both creditors and the Company

10. In my judgment it was difficult if not impossible to achieve a credible restructuring process if the JPLs were solely officeholders whose firm was initially retained before their appointment by the Company as independent restructuring advisers. Bearing in mind that the creditor constituency was divided and only one segment supported the Company’s original plea for an out-of-court restructuring, as well as the fall-back position that RSM representatives should be appointed as JPLs, there would be an appearance of partiality if the Company’s nominees alone were appointed.
11. Despite various criticisms being made of RSM’s role thus far by Mr Robinson on behalf of the Petitioner, I found that concerns about RSM’s performance to date were more perceptual than real. There would potentially be a waste of costs if RSM was to be replaced altogether combined with a real risk of tension between the new appointees and the Company’s management. Such tension would create the risk of a further wastage of costs; because the efficiency of any restructuring within a provisional liquidation, unavoidable disputes of substance apart, depends in large part on good will and collegiality reigning across the JPL and management restructuring teams. These practical considerations trumped the suggestion, which had some force on superficial analysis, that FTI Consulting had more specialist experience in relation to the coal mining industry.
12. Although the concerns about the independence of RSM also appeared to be more perceptual than real, perceptions are often as important as reality when it comes to deciding whether an officeholder is sufficiently independent. “*A liquidator must be independent and must be seen to be independent*”: LA. Ward CJ (as he then was) in *Re Akai Holdings Limited (formally known as Semi-Tech (Global) Company Limited) Re Kong Wah Holdings Limited* [2001] Bda LR 31.
13. Having regard to the distinctive fact-pattern in the present case, it appeared to me to be important to:
 - (1) appoint at least one JPL who was unquestionably independent of RSM and the Company; and
 - (2) avoid creating a precedent for insolvent companies seeking to have their cake and eating it too. The normal practice is that JPLs are appointed on the application of the petitioner, be it the company or a creditor. Having opposed the appointment of JPLs altogether, it seemed wrong in principle for the Company’s nominees alone to be ultimately appointed. This would potentially encourage companies to seek to avoid when they should be engaging with the winding-up jurisdiction of this Court.

14. In these circumstances I decided to appoint the Petitioner's nominee as the Bermuda-based liquidator even though the Company's proposed local liquidator was in general terms sufficiently independent and eminently qualified. On October 28, 2016, I amended the October 7, 2016 Order to appoint the Petitioner's alternative nominee to Mr McKenna (who declined to accept the appointment), Mr Roy Bailey of Ernst & Young.

Division of labour between the JPLs

15. The normal scenario in a cross-border restructuring (with or without parallel proceedings) is that JPLs from the same accounting firm are jointly appointed. Exceptions usually occur to resolve serious conflict of interest issues. Mr Luthi very fairly expressed concern about the need to ensure that Mr Bailey did not duplicate costs by creating a large Hong Kong team replicating the work being done by the RSM appointees. Mr Robinson rightly responded that Mr Bailey would inevitably have to delegate some of his functions to Hong Kong agents.
16. As I indicated in the course of the hearing, the appropriate way to resolve these concerns is for the JPLs to devise a plan of work and to seek directions from this Court, which can furnish approval for any agreed plan of action and resolve any irreconcilable differences. The division of labour should, however, be guided by the following overarching principles:
- (a) the Hong Kong office-holders should have primary carriage of the Hong Kong-based work;
 - (b) the Bermuda office-holder should have primary carriage of the Bermuda-based work;
 - (c) the primary function of the Bermuda-based office-holder is to serve as an independent filter within the JPL team ensuring that the restructuring process (which is presently expected to result in a scheme of arrangement) does not, as the minority wholly unsecured creditors fear, impermissibly prejudice their interests and favour the interests of those with distinct interests.

Conclusion

17. For these reasons I appointed one of the Petitioner's nominees and two of the Company's nominees as JPLs by Order dated October 7, 2016, as amended on October 28, 2016.

Dated this 4th day of November, 2016 _____
IAN RC KAWALEY CJ