IN THE SUPREME COURT OF BERMUDA

(COMMERCIAL COURT)

COMPANIES (WINDING-UP)

2016: No. 183

IN THE MATTER OF UP ENERGY DEVELOPMENT GROUP LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

(in Chambers)

Winding-up-creditor petition-application to appoint joint provisional liquidators to monitor implementation of insolvent restructuring by board of directors-opposition by company and majority of unsecured creditors-principles governing whether to grant or refuse application

Date of hearing: September 16, 2016
Date of Ruling: September 20, 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. Ltd. ("Baosteel"), a Supporting Creditor
Mr Kevin Taylor 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"). Its underlying assets in the People's Republic of China ("PRC"), held indirectly through two PRC subsidiaries, include a coal coking facility which is not yet operating at even 50% capacity, and three coal mines which are still at the pre-production developmental stage. The Company also has a substantial interest in a Canadian coal mining company the operations of which have been suspended and are not expected to resume soon. The Petitioner is the holder of Tranche A and Tranche B Convertible Notes with a principal value of HK$150 million which were issued by the Company and matured on January 18, 2016.

2. On January 19, 2016, the Company announced that it had defaulted on the said Notes. In a subsequent February 29, 2016 'UPDATE ON RECENT DEVELOPMENTS', the Company stated:

> "*The Company is currently negotiating robustly with the creditors, underwriters and financiers to explore different options of fund raising, issuing shares and debt restructuring. The Company endeavours to finalise a plan by the end of March.*"

3. On or about March 29, 2016, HEC Securities Limited as the holder of Notes valued at HK$230 million presented a winding-up petition against the Company in Hong Kong ("the Hong Kong Petition").

4. On April 1, 2016, the Petitioner served a Statutory Demand on the Company at its registered office in Bermuda in respect of the HK$150 million due under its Notes. On May 6, 2016 the Petitioner presented its Petition herein seeking to wind-up the Company on the grounds of non-payment of the debt which formed the subject of the Statutory Demand, pursuant to the provisions of section 162(a) of the Companies Act 1981. The Petition was issued returnable for July 1, 2016.

5. By a Summons dated June 30, 2016, also issued returnable for July 1, 2016 and supported by the Affidavit of Jason Epstein, the Petitioner sought to appoint joint provisional liquidators ("JPLs") to, inter alia:

> "*review …all issues relating to the feasibility of the Restructuring proposal exhibited to the Affirmation of Wang Dayong made on 28 June 2016…or any variation thereof*…[and]…*to monitor the continuation of the business of the Company by the existing board of directors of the Company*…[and]… *to monitor, consult with and otherwise liaise with the creditors and shareholders of the Company in determining whether any Restructuring Proposal will be successfully implemented*…"

6. The Petition and Summons were both adjourned to July 4, 2016 for a contested hearing of both applications. I granted the Company's application for an adjournment of the Petition until September 9, 2016 on the condition that the Company should use its best endeavours to establish a framework for communicating with creditors in relation to the restructuring. On this basis I adjourned the application to appoint JPLs to the same date.

7. The Company on July 4, 2016 opposed the appointment of JPLs referring to its retention that very day of independent restructuring advisers RSM Corporate Advisory (Hong Kong) Limited ("RSM"). It argued that deference ought to be given to the majority of the creditors' position. Mr Taylor supported the Company's position, in part because of the stigma that provisional liquidation carried in Asia. I felt the case for an immediate appointment had not been made out as there was no evidence of any misconduct on the part of management and a significant creditor constituency appeared to be supportive of there being no JPL appointment. I sought to fill the gap in independent monitoring by imposing as a condition of the adjournment Order a requirement that the Company attempt to form an informal creditors' committee.

8. However, I also expressed concern about the likely efficacy of the process without the insertion of JPLs into the process based on my recent experience in *Re Titan*

Petrochemicals case[1]. In that case, which also involved a Hong Kong listed company, the company contested a winding-up petition for approximately one year while pursuing an unsupervised restructuring. Three months after a creditor with standing was successfully substituted as petitioner, provisional liquidators were appointed to monitor the restructuring. The restructuring process in that case was successfully completed nearly three years after the provisional liquidation commenced and some four years after the creditor petition was presented.

9. At the renewed hearing of the Petition on September 9, 2016, I adjourned the Petition to November 18 2016, with minimal controversy, although the Petitioner sought a shorter return date. The Petitioner also vigorously renewed its application for the appointment of JPLs. Two broad grounds, as I perceived it, were relied upon. Firstly, since it had a right to seek a winding-up order, its wishes for independent supervision of the restructuring process should not be ignored. Secondly, and more substantively, the initial RSM Report demonstrated that the restructuring process was moving too slowly and that, having regard to conflicting interests among creditors and various information black holes about the Company's sources of financing, the best interests of truly independent creditors could only be served if JPLs were appointed. In addition, it was suggested that Harris J in adjourning the Hong Kong Petition to September 26, 2016 had indicated that he would be guided by the approach taken by this Court in the further conduct of those proceedings. Anxious about defaulting to a 'muddling through' approach uninformed by legal principle, and conscious that it was extremely unusual for a restructuring to be implemented without JPLs being appointed while a winding-up petition was before the Court, I adjourned the Petitioner's application for a special appointment and invited counsel to specifically address the governing legal principles.

10. The most vexing question to my mind was this. It was well settled that the views of the majority of unsecured creditors would ordinarily be given considerable weight, if not hold sway, when deciding whether or not to adjourn for restructuring purposes rather than immediately winding-up. Did it automatically follow that the majority view carried

[1] [2013] SC (Bda) 74 Com (18 October 2013); [2013] Bda LR 76.

similar weight when the Court was deciding the wholly distinct question of whether JPLs should be appointed to monitor the restructuring process as officers of this Court as well as representatives of the body of unsecured creditors as a whole?

Governing legal principles: appointment of provisional liquidators on the application of a petitioning creditor to monitor an insolvent restructuring pursued as an alternative to a traditional liquidation following a winding-up order

The context

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 focussed 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 *Discover Reinsurance Company-v- PEG Reinsurance Company Ltd* [2006] Bda LR 88, I described the practice in this area of Bermuda insolvency law as follows:

> "*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.*
>
> *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. Section 167(4) of the Companies Act 1981 provides as follows:

> *'(4) When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose."*

21. So in the restructuring context at least, this Court clearly possesses the jurisdiction to appoint provisional liquidators over companies which are not inevitably liable to be wound-up, and in circumstances where there is no need to displace the existing management altogether. It is true that this jurisdiction has, it seems to me, only ever been exercised with the company's explicit consent. But, for present purposes, it demonstrates beyond serious argument that the traditional test for the appointment of a provisional liquidator, as developed in the late 19th century, has undergone some refinement in recent years. These principles, after all, do not speak to the absolute jurisdiction of the Court as a matter of abstract law, but merely to how an unfettered statutory discretion should be exercised in practice. Section 170 of the Companies Act 1981 merely provides:

> *'**Power of Court to appoint liquidators***
> *170 (1) For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.*
>
> *(2) The Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.*
>
> *(3) When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him.'"*

12. In that case the JPLs were appointed ex parte to take urgent steps to preserve a cause of action which the company was not pursuing in circumstances where its insolvency was subject to doubt. I accepted the company's contention that the JPLs did not need to displace the management altogether, but should have their powers limited to ensuring that the cause of action they had preserved was properly pursued.

13. It is in my view an exceptional case where a creditor which (a) presents a winding-up petition against an admittedly insolvent company seeking to implement an out of court restructuring and (b) possesses the standing to seek a winding-up order but instead seeks to appoint JPLs to supervise the directors' implementation of a restructuring, has its JPL appointment application opposed by the company. Such an exceptional scenario arose in *Re Titan Petrochemicals Ltd.* [2013] Bda LR 76. In that case, in an ex tempore ruling without the benefit of considered legal analysis, I reached the following largely pragmatic conclusions:

> "*14. The application to appoint joint provisional liquidators with 'soft' powers is in fact based on the Court's powers under section 164 of the Companies Act 1981, in part. Section 164(1) provides:*
>
> > *'On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit…" [emphasis added]*
>
> *15. Those powers allow the Court to adjourn a winding-up petition to enable a restructuring to be considered and have been exercised in various cases by this Court for more than ten years.*
>
> *16. More narrowly, the provisions of section 170 of the Companies Act dealing with the power to appoint provisional liquidators and, when so appointing them to limit the liquidator's powers, gives the Court the power to appoint joint provisional liquidators or a single provisional liquidator with the power, rather than displacing the management of the Company, simply to monitor the management while a restructuring takes place.*
>
> *17. In this particular instance, the Court has already formed the view that there is the need for some form of independent verification by a representative creditor body of the restructuring process being carried out by the management. The idea of an informal committee was based on the Chapter 11 unsecured creditors' committee which is in the United States a statutory beast. It is clear as a matter of the experience of this Court in dealing with Chapter 11 proceedings in conjunction with Bermuda provisional liquidation proceedings, that not only are such committees solely made up of unsecured creditors. In practice, attempts are made to ensure that such committees are*

representative of the general body of unsecured creditors taking into account different categories of claim.

18. In this case (the best efforts of the Company notwithstanding), it has not been possible to constitute such a committee. Perhaps the Court was overly ambitious in suggesting this solution because whenever one is dealing with an insolvency proceeding, it is important that whatever structure is adopted to manage the insolvency process finds support in the legislative scheme. The Companies Act of Bermuda presently lacks any express 'administration' powers but the tried and tested approach in this Court has been to appoint provisional liquidators with 'soft' powers to monitor the restructuring process and to assess whether or not the process is in fact being carried out in the best interests of the creditors.

19. The advantages of such an approach are manifest in the present case because, while the Company may have difficulty in disclosing certain information to the Court by reason of confidentiality agreements, a liquidator appointed by the Court acting as both an officer of the Court and an agent of the Company would be able to gain access to all relevant information, filter it appropriately and report to the Court.

20. And so in these circumstances, having regard to the entire history of these proceedings, I am satisfied that the most prudent course to take in relation to a restructuring process which is extremely intangible and prone to unforeseen risks, is to make an order appointing joint provisional liquidators to monitor the restructuring process."

14. In summary, the Court has a broad discretionary jurisdiction to appoint JPLs before a winding-up order is made. Where the company is admittedly insolvent and seeking to implement a restructuring without the support of provisional liquidation proceedings in the face of a creditor seeking to commence those proceedings, there is no clear local guidance on how this Court should exercise its discretion. However, in broad terms, the approach adopted in *Re Titan Petrochemicals* was informed by the following guiding principle. Because Bermuda insolvency law lacked any explicit administration or restructuring regime, it was preferable for the restructuring to be supervised by JPLs possessing statutory powers rather than by an entirely ad hoc out of court company-directed process. The practical benefit of this was, most significantly in that case, that "*a liquidator appointed by the Court acting as both an officer of the Court and an agent of the Company would be able to gain access to all relevant information, filter it appropriately and report to the Court*".

The Petitioner's analysis

15. Mr Robinson submitted that the Court ought to be guided by the same principles which informed the discretion to adjourn a petition where the petitioner's right to obtain a

winding-up order was being interfered with. He argued in the 'Written Submissions of the Petitioner' as follows:

> "3.8 *It is submitted that the approach of the Court to the question of adjournment ought to be informed by the propositions set out by Neuberger J. in Re Demaglass Holdings Ltd [2001] BCLC 633 at 637.*
>
> *3.9 In summary, and in so far as are relevant to this case, these propositions are as follows:*
>
> - *At least in the case of an opposed petition, the petitioning creditor has to establish the possibility of some sort of benefit from a winding up. The test, however, appears to be a low one. [Second Proposition]*
>
> - *At least in the absence of a good reason a creditor of a company who has not been paid is entitled to a winding-up order virtually as of right. [Third Proposition]*
>
> - *Where the battle is between the creditors of the company, some in favour of a winding-up order being made and others against, there is authority for the proposition that a winding-up order will be made if the majority of creditors support the petitioner, and can only be refused if the majority support the opposition. [Fourth Proposition]*
>
> - *When considering the views of the creditors on the question of whether to wind up a company or not: (a) the court will give little, if any, weight to the views of the secured creditors, at least in so far as their debts are secured; (b) the court will have greater regard to the views of independent creditors as opposed to creditors connected with the company. [Fifth Proposition]*
>
> - *It is not enough if the majority of creditors oppose the making of a winding-up order in the normal case. The court must also be satisfied that they have good reason for refusing to wind up the company. [Sixth Proposition]*
>
> - *Where the court is satisfied that the opposition to the making of a winding-up order is supported by a majority and is justified, but that the desire of the petitioning creditor to have a winding-up order made is also justified, it has to carry out a balancing exercise. Once one gets to that point, it is impossible to lay down any general principles as to the correct approach. It must inevitably depend on all of the circumstances of, and arguments in relation to, a particular case. The court should in every case bear in mind the Third Proposition and also ask itself*

whether there are other procedures by which the petitioner or the opposers could be adequately protected rather than having the petition respectively dismissed or granted. [Seventh Proposition]

3.10 On the facts of Re Demaglass Holdings, the application was for an adjournment and Neuberger J. said this with respect to adjournment:

If a creditor of a company is entitled to a winding-up order and has good reason for seeking it, then, while an adjournment is not an outright denial of that right, it is a temporary refusal. It nonetheless seems to me that the court should be less reluctant to adjourn the hearing of a winding-up petition than it would be to dismiss the petition, in each case over the wishes of the petitioner, especially where the adjournment is for a relatively short period.

Adjourning as opposed to dismissing is a much less significant interference with, or denial of, a petitioner's rights or claim in a particular case. The longer the adjournment sought, the closer the case come to the more familiar type of case.

3.11 It is submitted that in a case where a relatively long adjournment has been sought and granted on the application of the Company so that the Company can develop and promote a restructuring by way of a scheme of arrangement the Seventh Proposition from Re Demaglass Holdings becomes particularly important. In other words, the Court having decided to adjourn the petition to allow the insolvent company time to develop a restructuring plan, ought to ask what measures can be put in place so that the rights of the petitioning creditor are adequately protected.

3.12 It is submitted that this is consistent with the following passage from the decision of Neuberger J. in Re Demaglass Holdings:

... dismissing the petition involves effectively a substantive decision. An adjournment involved the exercise of the court's administrative powers, a principle which is not affected by the fact that it may have substantive consequences; see in this connection Bristol City Council v. Lovell [1998] 1 AER 775. At 782J-783D Lord Hoffman said this:

'The court has an inherent jurisdiction to regulate its business.

...Obviously the discretion must be exercised judicially and not for the purpose of defeating the policy of the statute or the rights which it confers'.

3.13 In the absence of any express statutory provision under Bermuda law which provides for restructuring by adjournment (or other mechanism) the clear

policy of the statute (as borne out in previously mentioned cases) is that a creditor whose debt is due and undisputed is entitled to the appointment of a liquidator and the protection that it confers. Accordingly, the Seventh Proposition in Re Demaglass Holdings ought to be considered a threshold issue in the Bermuda statutory context (which predates the modern understanding of corporate recovery) because otherwise the power to adjourn would risk defeating the policy of the statute. It is submitted that a long period of adjournment of a petition without putting in place any measures to protect the petitioning creditor is, in effect, an abrogation of the petitioning creditor's prima facie right to have a winding up order."

16. It is true that the present JPL application, like all JPL applications made in the restructuring context, is linked closely to an adjournment application. But the discretionary power to adjourn is conferred in one section (section 164(1)) and the power to appoint a provisional liquidator by another (section 170(2)). In my judgment the present concern is the following discrete question. Subject to what conditions the appointment power conferred by section 170(2) ought properly to be exercised, in circumstances where it is common ground that the petition ought to be adjourned to explore the feasibility of or facilitate an insolvent restructuring? The following submissions advanced by the Petitioner's counsel were more to the point:

> "*3.16…In Discover Reinsurance Co v. P.E.G. Reinsurance, Kawaley J. considered in detail the principles governing the appointment of provisional liquidators in Bermuda and it is submitted that the following passage sums up why, as a matter of principle, JPLs ought to be appointed in respect of the Company:*
>
> > *… 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 the creditors and the Court that assets are not dissipated, on the implicit assumption <u>that the management that has run the company into difficulties can hardly be trusted to have the creditor's best interests at heart</u>. (emphasis added)*
>
> *3.17 There are a number of English authorities which support the analysis of the Bermuda court in Re Titan Petrochemicals and Discover Reinsurance Co v P.E.G. Reinsurance. While unlike England and Wales, Bermuda has no administration procedure, it was formerly the position in England and Wales that administration was not available for insurance companies. In the English High Court in Smith & Ors v. UIC Insurance Co. Ltd [2001] B.C.C. 11, His Honour Judge Dean QC said this (at page 10):*

> *Historically, appointing of a provisional liquidator was by way of a temporary and very often urgent appointment for the purpose of preserving the assets, for the purposes of preserving priorities of creditors pending the completion of the winding-up proceedings. The effect of the appointment is immediately to prevent parties commencing or continuing proceedings against the company or its property with the leave of the court…*
>
> *It appears, however… that the appointment of a provisional liquidator can be used for far wider purposes… in the case particularly of insurance companies the procedure of appointing a provisional liquidator is frequently, if not inevitably, made not for the purpose of safeguarding rival priorities or protecting assets in a pending full blown liquidation, but in order to enable a form of administration of the company with a view to resolving the financial difficulties, not necessarily by a winding up but by a scheme of arrangement…*
>
> *3.18 There is thus support in the English authorities that provisional liquidators can be employed as part of a flexible court supervised restructuring exercise that may result in a scheme of arrangement. However, there is no support in any of the authorities for the proposition that the Court can rightly adjourn a petition to permit a restructuring to take place but leave the promotion and supervision of such a scheme entirely to the company in face of opposition from a petitioning creditor who has raised legitimate and serious concerns about the conduct of the management of the company.*"

17. In short, it was rightly argued that the usual practice where a winding-up petition has been presented and the debtor wishes to implement a restructuring through a scheme of arrangement which will be ultimately approved by the Court is as follows. The company is not ordinarily allowed to develop the proposed scheme itself without oversight by liquidators appointed by this Court.

The Company's analysis

18. Mr Luthi's broad submission was entirely correct in an abstract sense. The same general test for appointing JPLs applies whether one is displacing management altogether, appointing JPLs with 'soft' powers, and irrespective of whether it was a company or creditor petition:

> "13. *Historically a distinction has been drawn between applications to appoint provisional liquidators which are made by the Company and applications which are made by creditors. If the Company makes or consents to the application or is*

shown not to oppose the application the appointment is 'almost a matter of course'. (see re Union Accident Insurance page 6 (Tab a) where Plowman J referring to the passage in Palmers Company Law. See also In re United Medical Protection [20021ACSR 623 (Tab 6) at 16 where it was held that the fact that the company itself is seeking an application is a relevant and often 'persuasive consideration'. See also French, Applications to Wind Up Companies, Paragraph 11.5.2 (Tab 7). It is in the context of company applications in which the 'soft-touch' jurisdiction has developed. Applications are made by companies themselves seeking to restructure and avail themselves of the protection of the automatic stay of proceedings. What has been described as the "quid pro quo" of gaining the benefit of the stay is that a PL is appointed.

14. This court has recently recognised and reaffirmed that it has jurisdiction to make orders on the application of the Company under in, Re Energy XXI 12016l SC (Bda) 79 Com (18 August 2016) (Tab 8).

15. Here, however, we are dealing with an application for the appointment of a soft touch provisional liquidator at the insistence of a creditor which is opposed by the Company.

16. The Court has alluded to the obvious tension where a PL engaged by a creditor is forced upon a board, but is charged with the responsibility of working with the board. The potential friction is clearly a relevant consideration. <u>However, the test is the same. There is no different legal test</u>. It is respectfully submitted therefore that the correct approach to be adopted by the Court is the traditional test for the appointment of a PL by a creditor as formulated in Union Accident (Tab 4) as modified by the Court of Appeal in Rochdale (Tab 3). The Bermuda Court has affirmed and applied the Union Accident Test (Tab 3) in numerous cases. See CTRAK Ltd [1994] Bda LR 37, Bermuda SC. (Tab 9) and Discover Re Company v PEG Reinsurance Company Ltd [2006]Bda LR 88 (Tab 10).

17. The same general approach is also adopted in the Cayman Islands in the recently decided case in the Grand Court of In Re Grant TG Gold Holdings 21 August 2016 (Tab11) a case with striking similarities to this case and which is referred to below. The Court considered the likelihood of a winding up order and then considered the circumstances of the case giving weight to those circumstances as it considered appropriate. In doing so, it declined to make an order appointing a PL. In order to allow the Company space to restructure." [Emphasis added]

19. I agree that the same <u>general</u> legal test applies whenever the Court is invited to exercise its discretion under section 170(2) of the Companies Act 1981 in the sense that the statute itself confers a broad discretion without spelling out in terms the conditions for the exercise of that power. This is classical 'common law' drafting style, leaving it to the

courts to develop through judge-made law guidelines for the exercise of a power which Parliament did not feel it was desirable to limit. More detailed modern drafting approaches, perhaps influenced by European legislative codification traditions, have arguably impeded the ability of litigants and the courts to develop the law in a commercially pragmatic manner. Accordingly, while the same general and very broad test applies under section 170(2), how the power to appoint should be exercised or withheld is obviously (and inevitably) a fact-specific and context-driven determination. This explains why Plowman J in *Re Union Accident Co. Ltd.* [1972] 1 All ER 1105 at 1109, after formulating the narrower test upon which the Company's counsel relied, sagely made the following important qualification:

> "*I am not prepared to accept that those examples of cases in which the provisional liquidator would be appointed are the only cases in which an appointment may be made. There is no such limitation in s.238 of the Companies Act 1948, which confers a quite general power on the court to appoint a provisional liquidator and depending on the circumstances of each particular case, there may be other matters which may be relevant*…"

20. None of the cases Mr Luthi relied upon involved a decision by an insolvency court to decline to appoint a provisional liquidator to oversee a restructuring on the application of a petitioning creditor. The main basic criterion for the appointment is that a *prima facie* case be made out for a winding-up. As Ground J observed in *Re C Track Ltd et al* [1994] Bda LR 37:

> "*…I am most acutely aware that I am only considering whether or not there is at least a 'good prima facie case' for the winding up of the respective companies, and not deciding whether or not they should be wound up*…"

21. This demonstrates that in the restructuring context, the JPL applicant need only show that a good *prima facie* case for potentially winding-up the company exists, a burden which the Petitioner in the present case has clearly discharged. The substantive test proposed by Mr Luthi was the following:

> "*It being the case that a winding up order is likely (but for a restructuring). The Court is then bound to ask whether in the circumstances of the case PLs should be appointed. The Court should consider all relevant circumstances. There are of course the classic factors, such as a need to preserve assets or the need to take management out of the hands of directors. Both these factors are not present in this case. There are others. In considering the circumstances of the case, the Court should adopt to 'the course likely to cause the least irremediable prejudice to one party or the other.' See Lewison LJ page 780, paragraph 109 (Tab 3).*"

22. Mr Luthi's submission that the "*Court should consider all relevant circumstances*" is, however, an apt test, far more so for present purposes than the quoted words of Lewison LJ in *Revenue and Customs Commissioners –v-Rochdale Drinks Distributors Ltd.* [2012] 1 BCLC 748, which were expressed in the entirely different context of a petition presented against a trading company. In that context "*a need to preserve assets or the need to take management out of the hands of directors"* are indeed "*classic factors*". The present restructuring context, I find, is materially different.

Findings: test for appointing JPLs to monitor a restructuring on the application of a petitioning creditor

23. In my judgment the factors which are material to the decision of whether or not to appoint JPLs on a creditors' petition can best be identified through elucidating what practical function the office-holders typically serve. The most obviously significant functions are the following:

(a) the appointment of a provisional liquidator triggers the statutory stay of actions against the insolvent company under section 167(4) of the Act;

(b) a 'soft touch' provisional liquidator is a restructuring expert who is responsible ultimately to the Court for ensuring that the restructuring process is fair to the general body of unsecured creditors. A restructuring consultant engaged by the company and answerable to the company is an entirely different beast;

(c) JPLs exercise commercial judgment on a dizzying array of matters, after interfacing between management and creditors, including proposing validating orders[2] for operating expenses (in the case of a holding company, these will admittedly probably be limited to restructuring costs), the merits of the restructuring, a comparison between the scheme of arrangement return and the likely liquidation scenario and the constitution of classes;

(d) JPLs are able to view and report on confidential documents avoiding the need for the Company to enter into multiple confidentiality agreements with individual creditors;

(e) JPLs prepare reports to the Court, enabling the Court to approve their actions (and key elements of the restructuring process) with an even lighter touch;

[2] If a winding-up order is eventually made, the winding-up is deemed to commence on the date the petition is presented (section 167(2)). Section 166 of the Act provides as follows:

"*(1) In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void.*"

(f) JPLs have statutory powers and duties which informal committees of creditors lack.

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

25. In the course of argument I put to Mr Luthi that I could not remember a single insolvent scheme of arrangement approved by this Court which had not been promoted, in part at least, by provisional liquidators. He was unable to contradict my assertion that it was unprecedented for an insolvent restructuring to be promoted by a Bermudian company without the appointment of provisional liquidators. This is not, of course, the real point, as schemes of arrangement can theoretically be implemented in respect of an insolvent company without commencing winding-up proceedings as sections 99-100 of the Act fall entirely outside the winding-up regime of Part XIII of the Act. The real questions are (a) why should this Court depart from its established practice of managing insolvent restructuring proceedings, and (b) is deference to the wishes of the majority creditors and/or anxieties about how provisional liquidation proceedings might be misunderstood sufficient justification for departing from the usual practice?

26. While I accepted Mr Taylor's suggestion on the first return date of the Petition that provisional liquidation may be misunderstood in Asia, Mr Luthi placed before the Court two authorities which demonstrated that the Hong Kong courts have long recognised the concept of provisional liquidation proceedings being used for restructuring purposes: *Re Keview Technology (BVI) Limited (Provisional Liquidators Appointed) HCCW 1123/2001*, Judgment dated May 21, 2002 (Yuen J, at paragraph 20); *Re Luen Cheong Tai International Holdings Limited*, CACV 378/2002, Judgment dated January 8, 2003 (Rogers VP, at paragraphs 10-11). There have been numerous provisional liquidation proceedings in Bermuda involving Hong Kong listed companies and no dire consequences flowed from appointing JPLs. This does not mean that ordinary commercial actors in Asia may not respond negatively to the news that the Company has been placed into provisional liquidation. Rather it is an indicator that the challenges of overcoming any such initial anxieties ought not to be insurmountable because the restructuring provisional liquidation is an established insolvency law concept in both Bermuda and Hong Kong.

27. The crucial point is that JPLs play a central role in insolvent restructurings, a role which pivotally shapes the character of the related court proceedings and the role played by this Court. This practice is so deeply entrenched in Bermudian insolvency law practice (and, I

suspect, throughout most of the common law world), that all stakeholders have a legitimate expectation that JPLs will be appointed to monitor an insolvent restructuring, if not in all cases, then certainly when a winding-up petition has been presented by a creditor and is still before the Court. Those advising companies which are insolvent or in the zone of insolvency (and/or their creditors) deserve a legal approach which is predictable and firmly grounded rather than an approach which is as shifting as the sands. As Lord Neuberger, speaking extra-judicially, recently observed:

> "19…*common law judges are not simply deciding the case before them. Their decisions represent part of the law of the land, at least unless and until they are reversed. So, when deciding a point of law, a judge should remember all the potential future litigants going to see their lawyers for advice. The need for certainty and clarity in the interests of many potential future litigants can be said with force to be more important than the need for a merits-based result in the particular case before the judge.*"[3]

28. The law and practice in my judgment both is and ought to be as follows. If a company becomes insolvent or experiences a liquidity crunch which necessitates a debt restructuring, the company has two choices. Either it presents its own winding-up petition and appoints JPLs to retain maximum control of the process or, alternatively, it dillies and dallies and allows a creditor to petition and place the company into provisional liquidation. 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.

29. In short, there is a strong starting assumption in favour of the appointment of JPLs, and the burden of displacing that assumption will be heavy one. The Court has no obligation to blindly follow the wishes of the majority of the creditors. In this context at least, as Mr Robinson argued in reply, democracy does not rule.

Findings: should JPLs be appointed to supervise the restructuring?

30. Having identified the governing appointment principles and the crucial role played by the provisional liquidator in Bermudian insolvent restructurings, and bearing in mind this Court's duty to actively manage cases under Order 1A of this Court's rules, I am bound to find that JPLs should be appointed. I reach this conclusion applying a combination of Mr Robinson's test grounded in the established practice of this Court and Mr Luthi's test of having regard to all the relevant circumstances of the case. I accept that the Company has used its best endeavours to progress the matter through RSM and that RSM has added

[3] '*The Role of a Judge: Umpire in a Contest, Seeker of the Truth, or Something in Between*', Singapore Panel on Judicial Ethics and Dilemmas on the Bench: Opening Remarks, August 19, 2016.

value to the process by providing a level of independence which the Company's Board would lack. The Company has, as I directed, attempted to form an Informal Creditors Committee. But RSM, try as it might, is no substitute for JPLs. This is the fundamental and pivotal merits point of principle which was advanced by the Petitioner which I am ultimately swayed by.

31. There may well be cases where the nature of the restructuring is so well-defined and uncontroversial that JPLs are not required and there is a coherent and cogent basis for concluding that they will add no value to the process. One hypothetical example of such a case is the following. If by the time the application to appoint JPLs was made the scheme meetings were already convened and the final scheme document mailed to creditors, the most sensible course might well be to simply allow the scheme meetings to proceed. If the requisite majorities (75% in value and a majority in number) approved the scheme, the dissenting minority would be left with the remedy of opposing the scheme at the sanction hearing. Other comparable scenarios can easily be imagined. The present case is far removed from such exceptional cases. Complicating factors which emerge from the Company's own evidence (principally the RSM Report) include the following:

    (a) conflicting interests between creditor groups which need to be independently identified and resolved. For example, Mr Taylor's client (China Minsheng) opposed the JPL application, but it was partially secured. Ms Wilson's client (Baosteel) supported the application but it was, like the Petitioner, wholly unsecured;

    (b) opaqueness surrounding the sources of funding for the restructuring, both operationally and in substantive capital terms;

    (c) uncertainties surrounding the future financial prospects of the Company's key operating subsidiaries which make it important that a credibly independent analysis be prepared of the likely return on any proposed restructuring contrasted with the liquidation scenario;

    (d) the resignation of the independent director who swore the Affidavit on behalf of the Company supporting the initial adjournment of the Petition;

    (e) the lack of unanimity on the desirability of leaving the Company to manage the process without supervision. Winding-up proceedings have been commenced in Bermuda and Hong Kong, with possibly 30% of unsecured and unrelated creditors favouring independent supervision.

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.

Summary

35. The Petitioner's application to appoint JPLs is granted, subject to hearing counsel on the identity of the proposed officeholders and the terms of the Order to a date to be fixed in October, 2016. I will of course also hear counsel if necessary as to costs.

Dated this 20th day of September, 2016 _____
IAN RC KAWALEY CJ