IN THE SUPREME COURT OF BERMUDA

(COMMERCIAL COURT)

COMPANIES (WINDING-UP)

2016: No. 183

IN THE MATTER OF Z-OBEE HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS

(in Chambers)

Winding-up-company petition-appointment joint provisional liquidators to monitor implementation of insolvent restructuring by board of directors- whether jurisdiction exists to utilize provisional liquidation proceedings in aid of a restructuring which is designed to result in the petition being ultimately dismissed-Companies Act 1981, sections 164 and 170

Date of hearing: February 17, 2017
Date of Reasons: February 21, 2017

Ms Lilla Zuill, Zuill & Co., for the Petitioner

Background

1. The Petitioner is a Bermuda company which was listed on the Hong Kong Stock Exchange ("HKSX"). The Company has been in provisional liquidation since June 27, 2014 in the High Court of the Hong Kong Special Administrative Region ("the Hong Kong Court"). Although there are wrinkles to be straightened out concerning its HKSX listing status, the Hong Kong joint provisional liquidators ("JPLs") have found a potential 'white knight' investor and seek to have the Company restructured rather than wound up.

2. On February 7, 2017, the Company presented its own insolvency-based winding-up petition which has yet to be heard. By an Ex Parte Summons issued on February 9, 2017, the Company applied to appoint the Hong Kong JPLs as Bermuda JPLs for the explicit purpose of restructuring the Company. It was explained to the Court in the

supporting evidence that an important reason for the application was the inability of the Hong Kong Court to use provisional liquidation proceedings for restructuring purposes. It was submitted that the Bermuda Court had an established practice of appointing JPLs to manage a restructuring. If the application was granted, it was anticipated that the present Hong Kong winding-up proceedings would be discontinued and that the Bermuda JPLs would apply to this Court in the primary liquidation proceedings for the issue of a Letter of Request to the Hong Kong Court for assistance in the form of promoting a parallel scheme of arrangement in Hong Kong, serving as the ancillary liquidation forum, to the scheme the JPLs would seek to implement in Bermuda.

3. The evidence disclosed that substantial creditor support existed for the proposed restructuring. It was also deposed that at a hearing on February 13, 2017 in Hong Kong, Jonathan Harris J of the High Court adjourned the Hong Kong Petition to enable the Hong Kong JPLs to make the present application.

4. On February 17, 2017 I granted the relief sought by the Company on its Ex Parte Summons and appointed Messrs Man Chun So, Donald Edward Osborn and Yat Kit Jong as JPLs. I now give brief reasons for this decision.

Statutory provisions

5. Section 170 of the Companies Act 1981 provides as follows:

> "***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.*" [Emphasis added]

6. This provision has for almost 20 years been construed as empowering this Court to appoint a provisional liquidator with powers limited to implementing a restructuring rather than displacing the management altogether pending a winding-up of the respondent company. Section 170 (3) is read in this way by taking into account the wider statutory context. One other key provision is pertinent. Section 164 of the Act provides:

> "*(1) On hearing a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.*"

Case law

7. Ms Zuill placed various authorities before the Court. The following passages from my recent judgment in *Re Up Energy Development Group Limited* [2016] SC (Bda) 83 Com (20 September 2016) perhaps best explains the legal basis for appointing JPLs for restructuring purposes:

> "*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:*
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> > *'18. There are circumstances in which, in England and Bermuda, provisional liquidators may be appointed when a winding-up order is not necessarily expected to be made, in early course at least. Since the last decade of the last century, many insolvent English insurers have been routinely placed into provisional liquidation and run-off under schemes of arrangement, essentially for regulatory reasons. Over the last ten years in this jurisdiction, a considerable number of companies, typically non-insurance companies, have been placed into provisional liquidation to facilitate a restructuring involving parallel proceedings in the United States commenced under Chapter 11 of the US Bankruptcy Code. These Bermudian winding-up proceedings have been almost invariably commenced by the company itself, and usually on the basis that the company will ultimately be wound–up in any event, when the restructuring process is completed.*
> >
> > *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.""

8. That case entailed a restructuring plan which contemplated an eventual winding-up order. This factor was not pivotal to the analysis. The Company also relied upon my judgment in *Re Titan Petrochemicals Limited* [2013] Bda LR 76 where that anticipated outcome was clearly not a relevant consideration. The company there had been a HKSX-listed company and it appeared that the majority of creditors (but not at that stage the petitioning creditor) favoured a restructuring over a winding-up. In that case I held:

> "*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…"*

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."

9. While this practice of using provisional liquidation proceedings in aid of restructurings (both in cases where it is anticipated that the petition may ultimately be dismissed and where an eventual winding-up order is contemplated) is only expressly supported by local first instance decisions, it is too well established today for this Court to depart from in the absence of full and compelling arguments for so doing. I respectfully declined to follow the contrary approach taken by the Hong Kong Court of Appeal in *Re Legend International Resorts Ltd* [2006] HKLRD 192, which I did not find persuasive for present purposes.

Legal findings: Statutory jurisdiction to appoint provisional liquidators to seek to implement a restructuring while the winding-up proceedings are proposed to be adjourned and may ultimately be dismissed

10. The terms of section 164(1) and 170(3) as interpreted by many previous decisions of this Court supported the following jurisdictional findings. Although a winding-up petition may only be presented in circumstances where there are grounds to wind-up a company the Court is given a broad discretion to adjourn a petition for good reason. And that power was in my judgment clearly flexible enough to encompass an adjournment to enable alternatives to a winding-up to be explored. After all, the question of whether or not a winding-up order should be made when a *prima facie* case for winding-up is made out is always a matter to be determined by reference to the best interests of the creditors. The creditors can choose to have the company wound up or for the petition to be adjourned or dismissed.

11. Can the adjournment power only be exercised with a view to determining whether a petitioning creditor has standing or ascertaining whether the majority of creditors wish the petition to be granted or dismissed? In my judgment it made (and makes) no sense for the statutory scheme to be construed as excluding the option of the creditors electing to pursue a middle path, a restructuring, preferably with (rather than without) the assistance of a provisional liquidator.

12. When a winding-up petition presented by the company or a creditor on grounds of insolvency is heard, the Court will generally decide whether or not the petition should be granted, dismissed or adjourned having regard to the best interests of the creditors. The adjournment power conferred on this Court may be exercised either conditionally or unconditionally with no express statutory fetters. The power to appoint provisional liquidators is expressed in correspondingly broad terms. It was (and is) difficult to identify any principled reason why this unfettered adjournment power may only be exercised to enable a decision to be made on whether the petition should be granted or dismissed without attempts being made in the interim to implement a restructuring.

13. After all, some restructurings might result in a winding-up order being made in any event (e.g. after a sale of the business), others might not. Adjourning the petition for a restructuring to be attempted as an alternative to a 'full-blown' liquidation merely

postpones an ultimate decision as to whether the winding-up relief should be granted or not. Even if a petition is presented by the company with the specific purpose of pursuing a restructuring which if successful will result in the petition being dismissed, it will rarely if ever be the case that there is no possibility at all that the plan will fail and that a winding-up order will still result. In such circumstances the winding-up jurisdiction is still being used to fulfil the primary purpose of the winding-up jurisdiction: protecting the best interests of the general body of unsecured creditors.

Merits of application

14. The Company clearly had standing to both petition for its own winding-up (on grounds of insolvency) and, with the apparent support of a clear majority of creditors, seek the appointment in this jurisdiction the same JPLs here who have been in office in Hong Kong for almost three years to implement a restructuring. The application necessarily implied that the Company would seek an adjournment of the Petition when it is heard. It was impossible to identify any or any cogent reason for not acceding to the application. The evidence disclosed a realistic prospect of a scheme of arrangement being successfully implemented if the HKSX relisting hurdle can be overcome in circumstances where it was believed that the proposed restructuring would yield a better return to creditors than would be achieved through a traditional liquidation.

15. For continuity purposes the Company sought to appoint the JPLs on terms that preserved the broader powers conferred on them by the Hong Kong Court. I saw no problem with that. It has not infrequently happened that provisional liquidators have been appointed with 'full-blown' powers to investigate and if thought fit implement a scheme of arrangement rather than to pursue a winding-up order.

Conclusion

16. For the above reasons on February 17, 2017 I granted the Company's application to appoint JPLs for restructuring purposes.

Dated this 21st day of February 2017 _____
IAN RC KAWALEY CJ