

BERMUDA SUPREME COURT

In the Matter of Energy XXI [2016] SC (Bda) 79 Com

PARALLEL RESTRUCTURING PROCEEDINGS FOR BERMUDA COMPANY - BERMUDA PROVISIONAL LIQUIDATION AND CHAPTER 11 PROCEEDINGS IN THE US - APPLICATION BY PROVISIONAL LIQUIDATOR FOR PROSPECTIVE RECOGNITION OF US PLAN CONFIRMATION ORDER - JURISDICTION TO RECOGNISE RESTRUCTURING ORDERS MADE BY FOREIGN COURTS

Energy XXI Ltd (the “Company”) is the holding company of a US-based group and one of the debtors in a Chapter 11 filing in the United States Bankruptcy Court (“USBC”). The Company petitioned for its own winding up in the Bermuda Court and applied for and was granted an Order appointing a Provisional Liquidator, creating a stay preventing actions being commenced against the Company in Bermuda. The Provisional Liquidator applied for an order giving recognition in Bermuda to the proposed reorganisation plan of the USBC by granting a permanent stay of proceedings against the Company upon the USBC confirming the plan of reorganisation in the Chapter 11 proceedings (the “Recognition Order”). The USBC had appointed an official committee of equity holders of the Company (the “Equity Committee”), who would receive nothing under the proposed plan.

The Equity Committee objected to the Provisional Liquidator’s application for the Recognition Order on a number of grounds, including: (i) the Company’s lack of standing to file the petition, (ii) the Court had no statutory or common law power to grant a Recognition Order such as the one sought in the present proceedings (relying on *Cambridge Gas Transport Corp -v- Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508), and (iii) that even if the Court did have such a power, it should not grant such an order prospectively due to the large number of issues in dispute before the USBC. In addition, the Equity Committee argued that it may have, as yet

undetermined and unidentified, claims against the Bermuda Company and need more time to consider such claims.

The Chief Justice held that:

a) the use of parallel proceedings in a cross-border restructuring was now too well-established for a first instance court to question its propriety. In addition, such proceedings were implicitly authorised by Section 170 of the *Companies Act, 1981* (based on the provisions of the *1948 English Companies Act*), the Court had free rein to shape provisional liquidation to commercial needs on a case by case basis.

b) the Court did have power to grant the Recognition Order. Distinguishing, *Cambridge Gas* he held that in the present case there were no parallel proceedings in the “home” Court, so the Court was not invited to consider the question of the primacy of Chapter 11 proceedings. Secondly, and more significantly, the main basis of the shareholders’ objections in *Cambridge Gas* was that they had never submitted to the jurisdiction of the US Bankruptcy Court and were therefore not bound to its orders. In the present case the Equity Committee comprised of shareholders who had submitted to the jurisdiction of the USBC, the Company was party to the US restructuring proceedings and the USBC had, unarguably, personal jurisdiction over both the Company and its shareholders. In these circumstances, the

Chief Justice found it 'impossible' to see how the Court had no jurisdiction to make the Recognition Order.

In addition, Kawaley CJ found that the stay provisions set out in the proposed order were intended to be supplementary to recognition, to ensure that the confirmation order made in the USBC should not be subject to re-litigation in Bermuda. The requested stay could therefore be justified by reference to the doctrine of modified universalism in cross-border insolvency law. However, he found it could also be justified under the Court's general jurisdiction to restrain abuses of process and manage the processes of the Court, and its implied statutory power to stay proceedings brought against companies in liquidation. On these grounds, he rejected the submission that the Court had no jurisdiction to grant the stay.

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