BERMUDA

SUPREME COURT

IN THE MATTER OF UP ENERGY DEVELOPMENT GROUP LIMITED AND IN THE MATTER OF THE COMPANIES ACT 1981 – EX TEMPORE RULING ON AN APPLICATION TO ADJOURN THE PETITION

[2017] SC (Bda) 85 Com (13 October 2017)

WINDING UP PETITION – ADJOURNMENT TO PURSUE RESTRUCTURING – PETITIONER SEEKING WINDING UP ORDER – PROVISIONAL LIQUIDATORS RECOMMENDING RESTRUCTURING – GOVERNING PRINCIPLES – IMPORTANCE OF DEMONSTRATING THAT A POTENTIAL SCHEME OF ARRANGEMENT WILL LIKELY ATTRACT THE REQUISITE SUPPORT

The Petitioner in this matter sought a winding-up order. The Joint Provisional Liquidators ("JPLs"), who had been appointed in April 2017, recommended to the Court that the petition be adjourned until the last Friday in January 2018 to allow them to continue restructuring efforts.

The main tension that existed between the competing positions, which were supported on each side by creditors who sought a winding-up and creditors who opposed a winding-up, is a commercial judgment as to whether or not a restructuring was actually viable.

Legal principles

The Petitioner's counsel relied essentially on the classic principle that "*a petitioner who can prove that the debt is unpaid and that the company is insolvent is entitled to a winding-up order* ex debito justitiae" [Re LAEP Investments Limited 2014 Bda LR 35 (Hellman J)].

The principle brought into play by the JPLs' application for an adjournment was that "*the Court is given a broad discretion to adjourn a petition for good reason*" [Re Z-OBee Holdings Limited 2017 Bda LR 19 at para 10]. The question was whether or not good cause had been shown for adjourning this Petition.

Merits of the adjournment application

The Court noted that there was credible evidence that the majority of unsecured creditors supported an adjournment of the Petition, having formed the view that a restructuring – yet to be formulated – may produce a better result for them.

The court-appointed JPLs recommended that a restructuring be pursued. They had predicted, subject to various caveats, that the liquidation return could be between 0.62% and 3.77%. Kawaley, CJ observed that this careful assessment indicated that the JPLs were indeed acting independently of the company.

Will the restructuring attract the requisite support?

Counsel for the Petitioner argued that a restructuring could only take place through a scheme arrangement approved by a majority in number representing three-quarters in value of the unsecured creditors. The Court noted that from the available evidence, the threshold could not clearly be reached.

However, those in favour of restructuring responded that the proposal is that the largest single creditor (which is a related entity, presently secured) would give up its security. This should give the Court comfort that the scheme of arrangement they hope to propose will attract the requisite support.

Kawaley, CJ sounded a warning that it was unlikely to be straightforward to persuade a court that a party related to the company can convert itself into an unsecured creditor and be regarded as properly having the necessary common characteristics with other unsecured creditors who are completely unconnected with the company.

However, he concluded that he was bound to give considerable weight to the judgment of the JPLs and their recommendation. Accordingly, he granted the adjournment. However, he said that by the next hearing of the Petition some progress showing necessary support for the scheme would have to be demonstrated.