Alert

Author: Nigel K. Meeson QC, Partner, Head of Asia Disputes & Restructuring

Cayman Islands Restructuring – Recent Cases

Restructuring of insolvent companies in the Cayman Islands is implemented by a flexible regime comprising the appointment of provisional liquidators coupled with an adjournment of the winding-up petition. This enables a restructuring to be pursued, typically through a scheme of arrangement and the dismissal of the winding-up petition. However, recent cases show that the Court will not do so without a sound basis.

The Court has gone so far as to adjourn a winding up petition to enable a restructuring to be pursued even without the protection of provisional liquidators. Segal J was prepared to do so in *Grand TG Gold Holdings Limited* (unreported, 22 August 2016), but this is exceptional. More recent cases have taken a more conventional approach.

In *CW Group Holdings Limited* (unreported, 3 August 2018) Parker J was faced with two competing applications to appoint provisional liquidators: one filed by the company for the purposes of pursuing a restructuring and another filed by a significant bank creditor, supported by other bank creditors, for the purposes of protecting the assets of the company against alleged mismanagement. He resolved the matter by considering whether it was "necessary" to appoint provisional liquidators for the purposes of preventing the dissipation or misuse of assets and mismanagement or misconduct by the directors which was the statutory test which the creditor had to satisfy in order for the Court to make an appointment under Section 104(2)(b) of the Companies Law. He held on the evidence that the creditor had not satisfied this heavy burden which required clear or strong evidence to be presented to the Court.

The judge also rejected the suggestion that the company's proposed provisional liquidators were not independent because they had been appointed by the directors. Affiliates of the proposed provisional liquidators were already in possession of knowledge and information having been working with the company in Hong Kong and Singapore. They were therefore suitable in terms of efficiency and economy. He rejected the suggestion that a nominee from the creditor's proposed provisional liquidators be appointed alongside the company's nominees as being unnecessary. As he pointed out, "*if and when appointed, as officeholders, provisional liquidators are independent persons operating under the direction of the court*" and "*once appointed the joint provisional liquidators would act as officers of the court and in the best interests of all the company's creditors and stakeholders, irrespective of who sought the appointment*."

Most recently in *ACL Asean Tower Holdco Limited* (unreported, 8 March 2019) Kawaley J adjourned a winding-up petition and appointed joint provisional liquidators ("JPLs") even though he had found that a case for winding-up had been made out. The JPLs were directed to prepare a report to the court on whether a restructuring should be further considered or whether it is appropriate to make a winding-up order. This was an unusual order to make and appears to have been based upon the judge having wrong-footed the company by initially indicating that he intended to dismiss the petition and then changing his mind during the course of the hearing.

When the adjourned petition came on for hearing two months later, the JPLs had reported in unequivocal terms that they did not consider a financial restructuring to be viable and recommended the company be placed into official liquidation at the earliest opportunity. Notwithstanding that clear recommendation, notices of appearance were entered by the majority shareholder and certain directors, as creditors, opposing the petition. Unsurprisingly, the judge followed the recommendation of the JPLs and rejected the submissions of those opposing the petition. As he pointed out it is unprecedented for a common law court to adjourn a winding-up petition to permit the company's management to explore the hypothetical possibility of an as yet entirely abstract restructuring in circumstances where the JPLs have reported that the company should be wound up immediately. Although the outcome appeared to be a foregone conclusion, the judge nevertheless took the opportunity to review the authorities and to restate the applicable principles.

Kawaley J identified three distinct principles:

(i) as against an insolvent company, a creditor is entitled as of right to a winding-up order;

(ii) the Court has a broad discretion to adjourn the hearing of a petition;

(iii) where there is a difference of views between various unsecured creditors as to whether the company should be wound up, where appropriate the Court will have regard to the wishes of the majority of such creditors.

The judge observed that where an insolvent company takes the initiative and seeks to implement a court-supervised restructuring, the Court will accord the company's management with a generous margin of appreciation when faced with attempts by creditors to impose a "full-blown" provisional or official liquidation instead. The cases also established that the Cayman Court adopts a more flexible modern approach to adjourning winding-up petitions to explore restructurings, but that there must be tangible grounds for such an adjournment. Such tangible grounds are likely to consist of either (a) support from the majority of creditors and a Listing Committee, (b) proactive restructuring steps taken by the company's management and/or (c) support from the majority of creditors as well as the joint provisional liquidators. Even a short adjournment requires a rational basis to be advanced in order to be justified.

Finally it is of course the case that a winding-up order does not prevent a restructuring taking place within the context of an official liquidation, but if a winding up order is to be avoided the company has to come to the court with a cogent justification for the court to exercise its power of adjournment.

Author:

Nigel K. Meeson QC
Partner, Head of Asia Disputes & Restructuring
nigel.meeson@conyers.com
+852 2842 9553