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In the nick of time? A reminder of the principles which apply to the adjournment of winding-up petitions

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The recent *ex-tempore* judgment of Kawaley J in *Atom Holdings*[1] in the Grand Court of the Cayman Islands serves as a timely reminder to practitioners and industry participants alike that obtaining an adjournment of a winding-up petition[2] requires cogent evidence demonstrating good reason(s) for delaying what is otherwise the collective right of creditors to seek relief via court intervention. This update explores the key principles applicable to the granting of adjournments in the Cayman Islands and the British Virgin Islands (the **BVI**).

Cayman Islands

Section 95 of the Companies Act (2023 Revision) provides that, upon the hearing of a winding-up petition, the court may (a) dismiss the petition; (b) adjourn the hearing conditionally or unconditionally; (c) make a provisional order; or (d) any other order that it thinks fit.

As her Ladyship Madam Justice Ramsey-Hale (as she then was) put in *Evergreen International Holdings Limited:*[3]

> '*It is well-settled that if a creditor with standing to make an application wants to have the company wound up, and if the court is satisfied that the company is unable to pay its debts, a winding up order will follow, unless there are some special reasons why it should not.*'

It is trite to say that the court has a '*very wide*'[4] and '*broad and flexible discretion*'[5] and what may constitute '*special reasons*', '*exceptional circumstance*'[6] or a '*rational basis*,'[7] for the granting of an adjournment is fact dependant. Those circumstances generally fall into one of three categories.

Category 1 – where there is a prospect of repayment or a solution to cash flow insolvency

An adjournment on this basis requires credible evidence that:

1. there is a reasonable prospect the petitioned debt will be paid within a reasonable time.[8] Such an adjournment was granted in *G3 Exploration*[9] where the court gave significant weight to the views of the joint provisional liquidators that the company's proposed refinancing and sales process '*should*' result

[1] *Atom Holdings* (Unreported, 7 July 2023) (***Atom Holdings***).

[2] The British Virgin Islands equivalent is an originating application for the appointment of liquidators.

[3] *Evergreen International Holdings Limited* (Unreported, 11 January 2022) (***Evergreen***) at paragraph 55.

[4] *In the Matter of Fruit of the Loom Ltd* (Unreported, 30 October 2000) (***Fruit of the Loom***) at page 7.

[5] *In Re Sun Cheong Creative Development Holdings Limited* [2020 (2) CILR 942] at paragraph 35.

[6] *In the Matter of Grand T G Gold Holdings Limited* (Unreported, 30 August 2018) at paragraph 6(b).

[7] *Re ACL Asean Tower Holdco Limited* (Unreported, 8 March 2019) (***ACL Asean***) at paragraphs 32 – 33.

[8] *Sekhon v Edington* [2015] 1 WLR 4435 at page 4436.

[9] *G3 Exploration Limited* (Unreported, 24 July 2020) (***G3 Exploration***) at paragraphs 9 and 17.

in creditors' debts being repaid in full and the company '*ought to be capable of*' continuing as a going concern; alternatively

2. a solution to a company's cash flow issues has been identified and feasible steps are being taken to remedy this. In the English case of *Re Minrealm Limited*[10] the court adjourned a winding-up petition pending quantification and payment of interim sums due to the company from the majority directors in related proceedings, which if paid, would render the company solvent.

Category 2 – *bona fide* dispute as to debt and comity considerations

The court has stressed the importance of comity and cooperation in cross-border insolvency proceedings which has resulted in it granting adjournments of petitions in order to avoid the risk of conflicting decisions being made in related proceedings in a foreign court.

In *Altair Asia Investments Limited*[11] Parker J was satisfied that there was a *bona fide* dispute on substantial grounds as to the existence of the petitioned debt. The court's usual practice in such a scenario would be to dismiss the petition as an abuse of process and require the creditor to establish its claim via ordinary *inter partes* proceedings.[12] However, given that a judgment from the Hong Kong court was expected soon which concerned the same underlying issues relating to the petitioned (and disputed) debt, the court held it was appropriate to grant an adjournment of the Cayman petition to avoid inconsistent findings between the two jurisdictions. The flexible approach adopted by the court in cross-jurisdictional proceedings is a clear demonstration of its commitment to comity and cooperation between courts for the benefit of stakeholders.

Category 3 - to facilitate a restructuring

An adjournment on this basis requires evidence of a genuine intention on the part of the company to present a restructuring plan which will likely be more beneficial for its creditors than if a winding-up order was to be made.[13]

An adjournment was granted by Segal J in *Grand T G Gold Holdings Limited*[14] despite being satisfied that the company was unable to pay its debts because the restructuring proposal put forward in respect of the company was determined by the court to be credible and had a good chance of being successful. On implementation, the proposal would result in substantial benefit to the company's creditors who would be able to choose to take equity in the company or be paid in full.

In contrast, an adjournment was refused in *Evergreen* because, among other things:

1. the company had not put forward even an outline of a restructuring proposal, despite a restructuring advisor having been engaged for nearly a year;
2. no explanation was given as to why, having defaulted on its bonds in June 2020, no steps had been taken to sell its real estate assets in China until mid-2021 to generate sufficient cashflow to attempt to remedy the default; and
3. the company's evidence regarding its financial position was contradictory, missing key information and there were concerns raised by the petitioner regarding the conduct of the company's management.[15]

The court considers the views of all creditors but has greater regard to the views of independent creditors as opposed to those connected with the company.[16] While the court is not required to count-up the claims of supporting and opposing creditors and make an order which gives effect to the wishes of the largest body of creditors,[17] evidence in majority support or opposition certainly assists the court in its decision-

[10] *Re Minrealm Limited* [2007] EWHC 3078 (Ch). This case was cited in *Evergreen* at paragraph 59.

[11] *Altair Investments Limited* (Unreported, 16 March 2020). A similar approach was taken in *Guoan International Limited* (Unreported, 29 October 2021).

[12] *Parmalat v Food Holdings* [2008 CILR 202] at pages 208 – 209.

[13] *Fruit of the Loom* at page 10.

[14] *Grand T G Gold Holdings Limited* (Unreported, 30 August 2018) (***Grand T G Gold Holdings***).

[15] *Evergreen* at paragraphs 30 - 39. Another example can be seen in *Silver Base Group Holdings Limited* (Unreported, 5 May 2022).

[16] *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 (***Demaglass***).

[17] *Grand T G Gold Holdings* at paragraph 6(ix).

making.[18] One other relevant consideration when a restructuring proposal is put forward are the views of the company's directors as to the best way forward.[19]

The length of the adjournment sought is an important factor; the longer the time sought, the closer acceding to an adjournment becomes an interference with, or denial of, a petitioner's rights.[20]

It will be interesting to see how this 'category 3' adjournment ground dovetails into, or alternatively sits alongside, the Cayman restructuring officer regime as it has just passed its one-year anniversary. For more information, please see our previous briefings: Cayman Islands' new restructuring officer regime is now in force (August 2022) and Brave new world: Restructuring Officers in the Cayman Islands (January 2023).

Since 31 August 2022, a company has had the option to present a petition to court for the appointment of a restructuring officer if it is or is likely to be unable to pay its debts and intends to commence a restructuring. Coupled with the filing of that application is an automatic global moratorium (subject to recognition as a matter of applicable foreign law) which at least on one occasion has resulted in a creditor's petition being held in abeyance in favour of the appointment of restructuring officers.[21]

Eleventh hour requests?

The short point here is that absent exceptional circumstances, the court will generally be *'leery about last minute adjournment applications'*.[22]

Atom Holdings

Atom Holdings (the **Company**) was incorporated in the Cayman Islands on 28 August 2018 and operated as a holding company for a group of companies known as the Atom Group. The group carried on business as a cryptocurrency exchange offering saving, spot and futures trading via AAX Limited (**AAX Platform**), a Seychellean-incorporated, wholly owned subsidiary of the Company. As of September 2022, AAX Platform allegedly had US$7.1 billion in spot trading volumes and more than three million users in over 160 countries.

Shortly after the collapse of FTX on 11 November 2022, AAX Platform blocked customer access to its platform and suspended withdrawals citing temporary scheduled maintenance to address serious vulnerabilities. On 15 November 2022, the Atom Group issued a statement saying there was acute pressure on its capital position and in the following weeks its website was shut down and management within the group either resigned, were arrested by Hong Kong police, or otherwise became unreachable.

Pursuant to a winding-up petition dated 3 March 2023 presented by two customers of the AAX Platform (the **Petition**), the petitioners sought to wind-up the Company on the grounds that it was unable to pay its debts and that it was just and equitable to do so. On 8 March 2023, Kawaley J appointed joint provisional liquidators (**JPLs**) to prevent the dissipation of assets and misconduct on the part of the directors pending the determination of the Petition.[23]

At the hearing of the Petition on 7 July 2023, the Company sought an adjournment on the basis that its Cayman counsel were only recently instructed and therefore required more time to develop its challenge to the standing of the petitioners as contingent creditors. His Lordship refused the adjournment, holding that the application was *'made not just in the 59th minute of the eleventh hour, but in the last minute of time added on stoppages'*,[24] the challenge to standing had a low prospect of success and lateness in instructing counsel was no basis for an adjournment.[25] Accordingly, the Company was wound up.

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[18] *Demaglass* at pages 638 – 639.

[19] *CW Group Holdings Limited* (Unreported, 3 August 2018) at paragraph 72.

[20] *Re Demaglass* at page 640 and *G3 Exploration* at paragraph 31.

[21] See *In the Matter of Oriente Group Limited* (Unreported, 8 December 2022) at paragraphs 24 and 38 and section 91G(3) of the Companies Act (2023 Revision).

[22] *ACL Asean* at paragraph 39.

[23] *Atom Holdings* (Unreported, 18 May 2023) (released for publication on 15 June 2023).

[24] *Atom Holdings* at paragraph 1.

[25] *Atom Holdings* at paragraphs 10, 37 – 44 and 45 – 46.

BVI

On hearing an application for the appointment of a liquidator (an **Application**), the BVI court may (a) appoint a liquidator; (b) dismiss the Application; (c) adjourn the hearing conditionally or unconditionally; or (d) make any interim or other order it considers appropriate.[26] Typically, an Application will be listed for 30 minutes for hearing unless it is apparent that the Application is likely to be contested. Otherwise, where an Application is subsequently contested, 30 minutes may be insufficient time for the court to hear full argument from the parties. In such circumstances, there may be a short adjournment of the hearing to a date where more time is available.

However, unlike the Cayman Islands, the BVI Insolvency Act 2003 provides that absent an extension, an Application shall be determined within six months after it is filed, and if not so determined, it is deemed to have been dismissed.[27] As such, whilst the date for determination can be extended by a period of three months at a time, it is in the interests of the applicant to ensure that an Application is heard swiftly. This reflects the language of the BVI Insolvency Act which makes clear that an Application is to be prosecuted timeously and it is in this context that we discuss the BVI Commercial Court's approach to adjournment requests.

As is the position in the Cayman Islands, the BVI court has a wide discretion to adjourn an Application. However, as held In *Daselina Investments Ltd v Kirkland Intertrade Corp*,[28] it is a discretion that must be exercised for some proper purpose, or in other words, for a good reason. There are no set rules on what a 'good reason' may include, albeit in *Daselina*, the Commercial Court suggested that where a decision was outstanding which could reduce or eliminate the debt upon which an Application is predicated, that could be sufficient justification for an adjournment. In *Daselina*, there was no such existing challenge to the underlying debt, merely the suggestion of one, which was an insufficient reason for the Court to adjourn the Application.

Another ground upon which debtor companies may seek an adjournment is to permit them time to undertake a restructuring.[29] Such requests were made in *Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd*[30] and *Happy Lion Ventures Limited and Chinex Limited v RZ3262019 Limited*.[31] In *Cithara*, the court found that there was no hope of the debtor company (Haimen) obtaining the necessary 75 per cent creditor approval (by value)[32] to put its restructuring proposals into effect.[33] In *Happy Lion Ventures*, an intervening party claiming to have a financial interest in the debtor company sought an adjournment of the Application to permit time for restructuring. The debtor company itself had not indicated its support or desire for restructuring and it had defended the Application on other grounds. The court expressed a view that there are cases where it should seriously consider an adjournment to allow a debtor company to pursue restructuring, but this invariably requires the support and buy-in of the debtor company. Without that, as was the case in *Happy Lion Ventures*, the court will not permit an adjournment.

In summary, there must be some good reason for the court to exercise its discretion to grant an adjournment. Where the reason for seeking an adjournment is to permit a company to pursue restructuring, the proposal must be credible[34] and supported by the debtor company. Further, the debtor company ought to demonstrate to the court that real progress has been made towards restructuring and that it could achieve the necessary majority of 75 per cent of its creditors to approve any proposed scheme of arrangement to be promulgated to affect such a restructuring.

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[26] Section 167 of the Insolvency Act, 2003.

[27] Section 168 of the Insolvency Act, 2003.

[28] *Daselina Investments Ltd v Kirkland Intertrade Corp* (BVIHCM2019/0149, 17 December 2019).

[29] A 'Category 3' scenario in the Cayman Islands.

[30] *Cithara Global Multi-Strategy SPC v Haimen Zhongnan Investment Development (International) Co Ltd* (BVIHC(COM)2022/0183, 19 July 2023) (***Cithara***).

[31] *Happy Lion Ventures Limited and Chinex Limited v RZ3262019 Limited* (BVIHCM(COM)2022/0126, 18 May 2023) (***Happy Lion Ventures***).

[32] See section 179A of the BVI Business Companies Act 2004.

[33] See paragraph 5 of *Cithara*.

[34] See paragraph 137 of *Happy Lion Ventures*.

Comment

Requests for adjournment require thought and cogent rationale supported by evidence setting out clearly that such a request will be of benefit to a company's creditors and other stakeholders. Whether an adjournment is granted remains of course ultimately a discretionary case management decision of the court. *Atom Holdings*, *Cithara*, *Happy Lion Ventures* and the discussion above serve as a timely reminder that in putting its best foot forward, an adjournment applicant must substantively turn its mind to what, in its relevant factual matrix, can be explained to the court as exceptional grounds for denying a petitioning creditor the order it seeks.

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