

UPDATE

Much Ado About Nothing: In the matter of China Agrotech Holdings Limited

Update prepared by Simon Dickson (Partner, Cayman Islands)

The Grand Court of the Cayman Islands again demonstrates its pragmatic approach by granting common law recognition and assistance to foreign liquidators of a Cayman Islands company for the purpose of promoting a scheme of arrangement.

In a recent decision, the Grand Court of the Cayman Islands granted recognition to liquidators appointed by the Hong Kong court over a Cayman Islands Company. Whilst some have heralded this decision as signalling a resurgence of the concept of modified universalism after *Rubin* and *Singularis*, on closer inspection, there is considerable doubt as to whether it has this effect. Instead and in accordance with *Rubin* and *Singularis*, what this judgment shows is that the Court will only use its common law power to assist a foreign liquidator when it is satisfied that there is a pre existing right to do so.

Background

China Agrotech Ltd (the **Company**) was incorporated in Cayman but conducted most of its business in Hong Kong such that it was considered that its centre of main interest was probably Hong Kong. Unsurprisingly given its connections with Hong Kong, when the Company suffered from financial difficulty, its creditors petitioned for its winding up on the basis of its insolvency in Hong Kong. On 17 August 2015, the Hong Kong Court placed the Company into liquidation and appointed liquidators (the **JOLs**) over it.

The JOLs considered that the best way to maximise returns to creditors was by the effecting a resumption proposal and reorganisation of the Company. An integral part of that process was the approval and sanction of a scheme of arrangement between the Company and its creditors by the Hong Kong Court. The JOLs were also advised that it was necessary for an inter-conditional scheme to be sanctioned by the Cayman Court, being the court of the place of the Company's incorporation.

In furtherance of this plan, the JOLs successfully applied to the Hong Kong Court which issued a letter of request to the Cayman Court seeking, *inter alia*, an order that the Cayman Court treat the JOLs as if they have been appointed as joint provisional liquidators of the Company by the Cayman Court with the specific power to promote a scheme of arrangement pursuant to section 86(1) of the Companies Law. In addition to the letter of request, the JOLs also issued a summons in the Cayman Court seeking substantially the same relief as that requested in the letter of request.

The JOLs however did not take the more conventional step of having the Company apply for the appointment as joint provisional liquidators by the Cayman Court pursuant to section 140(1) of the Companies Law. This is because, on advice, they considered that there were *various uncertainties that made it undesirable to seek to present a winding up petition in Cayman*, including whether the directors of the Company, consequent upon the appointment of the JOLs in Hong Kong, had the authority to present such an application.

Ability of the Cayman Court to assist foreign liquidators

The immediate question which the Mr Justice Segal (**Segal J**) had to answer is whether, given the scope of the Cayman Court's non-statutory jurisdiction¹ to recognise and assist foreign court-appointed liquidators as defined in the recent decisions of *Rubin v Eurofinance* and *Singularis v PriceWaterhouseCoopers*, it was open to the Cayman Court to provide the assistance sought by the JOLs.

Segal J considered that, although the Cayman Court had the jurisdiction to grant a foreign liquidator relief based upon powers given to it by Cayman Islands substantive or procedural law, it could not otherwise do so unless the circumstances enabling the exercise of such a power existed. In following the Privy Council's decision in *Singularis*, Segal J noted that the common law jurisdiction to assist foreign liquidators could not be used to:

- (a) make an order, which could only be made in reliance on a Cayman statutory power; or
- (b) make an order granting relief to a foreign liquidator where no Cayman law right exists.

On that basis, Segal J held that he could not make an order which treated the JOLs in all respects in the same manner as if they had been appointed as provisional liquidators by the Cayman Court. The statutory requirements of Cayman law for the appointment of provisional liquidators had not been met and the Cayman Court could not use its common law powers of assistance to manufacture such a fiction.

However, in demonstration of the Cayman Court's practical approach to issues of cross-border restructurings, Segal J did find that the Cayman Court's powers did provide him with the ability to grant the JOLs the ability to promote a scheme of arrangement.

Section 86(1) of the Companies Law (the **Law**) provides that certain classes of stakeholder may apply for the promulgation of a scheme of arrangement, including the company itself. Accordingly, Segal J considered the real issue to be, not whether the JOLs can be treated as if they were liquidators appointed by the Cayman Court, but whether, as foreign appointees, they had the ability to act for and on behalf of the Company in making an application under section 86(1).

Segal J found that under the principles of private international law, the Liquidators could not be recognised as they had not been appointed by the Cayman Court being the place of the Company's incorporation. However, with reference to case law and the leading texts, he found that the Cayman Court had a common law power to recognise and assist the JOLs by permitting them to act on behalf of the company. However, Segal J went on to find that this power could be exercised where:

- (a) the Company's board of directors was either unable or unwilling to act and, in any event, had not shown any willingness to do so;
- (b) it was undesirable and prejudicial to the interest of all stakeholders to delay matters by seeking shareholder consent to the filing of the application for a scheme of arrangement;
- (c) there was no prospect that any creditor or other stakeholder would seek a winding up order in Cayman;
- (d) there were no issues which involved competing claims of creditors which would result in any prejudice (such as different levels of recovery between creditors) and there were no local reputational, regulatory or policy reasons which required the substantial involvement of the Cayman Court; and
- (e) whilst not determinative, the Company had substantial connections with a foreign country such that its likely centre of main interests was there.

Segal J held that *none of the limitations in Singularis applied in the present case to prevent the exercise of the power to recognise and assist the foreign liquidators*. The relief granted by the Court merely permitted the JOLs the ability to act for and on behalf of the Company in relation to its application under section 86(1)

¹ It was accepted by the JOLs that they were unable to rely upon the statutory powers for recognition and assistance set out in Part XVII of the Companies Law.

and did not involve "the heresy or impermissible exercise of the common law power...in which the Court applies legislation which otherwise does not apply "as if" it applied."²

Accordingly, Segal J held that the JOLs were able to apply to Court on behalf of the Company for permission to promote and implement a scheme of arrangement.

Stay of Proceedings

Pursuant to section 97 of the Law, upon the appointment of joint provisional liquidators, the Company has the benefit of an immediate stay of proceedings in Cayman such that no action can be brought or continued against the Company in the Cayman Courts. The JOLs recognised that, absent their appointment as provisional liquidators by the Cayman Court, no stay would be effected and, although unlikely, creditors or other stakeholders could issue proceedings against the Company which may have effect of derailing the intended scheme of arrangement.

Accordingly, the JOLs (in both the Letter of Request and their separate application) sought an order that section 97 shall apply to the Company such that no action or other proceedings shall continue or be commenced against the Company before the Cayman Court except with leave of the Court.

Segal J felt unable to grant such an order. He noted that relief under section 97 was only available to the Court where provisional liquidator had been appointed by it. If the Cayman Court were to grant such relief by acting as if it had done so, it would involve the same "heresy" which Lord Collins in both *Rubin* and *Singularis* had said was impermissible.

Notwithstanding this limitation, Segal J adopted a pragmatic solution and directed that any proceedings commenced (or in existence) against the Company in the Cayman Court be assigned to him so that he can ensure that those proceedings are stayed or adjourned pending the completion of the scheme.

Conclusion

China Agrotech confirms the entirely conventional position that the Cayman court has the ability to exercise its common law jurisdiction to offer judicial assistance to foreign liquidators. However, contrary to the views of some commentators, it is not a landmark decision which has changed the law. Instead, it has affirmed the view that the concept of modified universalism is not an independent principle of law which grants courts with special powers. Instead, it is *convenient shorthand* for the approach the court takes when exercising its existing common law powers of assistance.

While the Cayman Court will pay heed to the clear limitations placed upon the exercise of those powers described by the House of Lords and Privy Council respectively in the decisions of *Rubin* and *Singularis*, this decision should be welcomed as yet a further example of the pragmatic, solution oriented approach which the Cayman Court will adopt in seeking to provide assistance to foreign appointees and stakeholders alike in implementing complex, cross-border restructurings.

² Segal J also considered the question of whether a company's submission to the foreign court's jurisdiction would also enliven its power to grant assistance. Whilst he considered that it may in certain circumstances, it was not the subject to extensive argument and no concluded view was formed.

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