UPDATE

JANUARY 2023

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Brave new world: Restructuring Officers in the Cayman Islands

Update prepared by Nicholas Fox and Luke Burgess-Shannon (Cayman Islands)

The Grand Court of the Cayman Islands has issued its first judgment appointing Restructuring Officers under the new section 91B of the Cayman Islands Companies Act, which came into force on 31 August 2022.

Introduction

We have long predicted that the new Cayman Islands Restructuring Officer regime, which came into force on 31 August 2022, would improve and streamline the pathway to restructurings for Cayman Islands companies. We also suggested that the new regime would build upon the certainty and flexibility provided by the wealth of Cayman authority regarding restructurings previously brought under the Provisional Liquidator regime. We also speculated that the first few cases might involve some procedural skirmishing, in particular around the inter-relationships between Restructuring Officer Petitions and Creditors' Winding-Up Petitions.

The judgment in *Oriente Group Limited*, delivered on 8 December 2022 by the Honourable Justice Kawaley, accords with all these predictions. The judgment heralds the start of our improved Cayman Islands restructuring regime, building upon the good work already achieved in this area by the Cayman courts. We analyse the main points you need to know below.

Background

Oriente Group Limited (the **Company**) is the parent company of a group that operates a leading Southeast Asian financial technology platform.

The Company presented a Restructuring Officer Petition (**RO Petition**) on 21 October 2022, pursuant to the new section 91B of the Companies Act (2022 Revision) (as amended), on the bases that:

- it was cash-flow (but not balance-sheet) insolvent; and
- it intended to present a compromise or arrangement to its creditors.

Prior to the presentation of the RO Petition, creditors of the Company had already presented a Creditors' Winding-Up Petition in the Cayman Grand Court, on 27 September 2022. A further Creditors' Winding-Up Petition was subsequently filed in the Hong Kong Court on 10 November 2022, the day before the Cayman RO Petition hearing.

The Judgment

Having heard submissions from the Company and the creditors, the Court granted the first Joint Restructuring Officer appointment under the new regime. There are four main take-aways from the judgment:

Authorities regarding 'light touch' PLs remain relevant and persuasive

Kawaley J accepted the Company's submission that, given the similarity of the statutory provisions regarding the previous restructuring Provisional Liquidator regime and the new Restructuring Officer

regime, case law authorities in respect of the former remain relevant and persuasive under the new regime. He did so, because:

> '*the grounds upon which a restructuring petition may be presented under section 91B(1) are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the former provisions of section 104(3) of the Companies Act…*'

and because:

> '*less technically and more practically, the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere.*'

Having made that determination, Kawaley J referred to *In re Sun Cheong Holdings* [2020 (2) CILR 942] as authoritatively setting out the governing legal principles in this area; and in *Re Midway Resources International* (unreported, 30 March 2021), as providing helpful practical guidance as to how to evaluate the evidence relating to a proposed restructuring.

The legal principles were that the Court has a broad and flexible discretion which it will be prepared to use to appoint Restructuring Officers to help rescue the company, if the Court is satisfied that the appointment would benefit those having a financial interest in the company being rescued (ie its creditors and, subject to the creditors' prior interests, its shareholders). When exercising its discretion, the Court would have regard to matters including:

- the express wishes of creditors (though the Court should be cautious not to 'count up the claims of supporting and opposing creditors';
- whether the proposed rescue is likely to be more beneficial than a winding-up order;
- there is a real prospect of a rescue (eg a refinancing and/or a sale as a going concern) being effected for the benefit of those having a financial interest in the company; and
- the considered views of the company's Board as to the best way forward.

On the evidence, Kawaley J stated that the jurisdiction to appoint Restructuring Officers would normally be exercised where the Grand Court is satisfied that:

1. the company is shown to be or likely to become insolvent, based upon credible evidence from the company or some other independent source;
2. the statutory requirement of an 'intention' to present a restructuring proposal to creditors is met by credible evidence of a '*rational proposal with reasonable prospects of success*'; and
3. the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company.

Stay 'turbo charged'

The second take-away is that the Grand Court accurately described the effect of the new statutory stay provisions as to '*… turbo-charge the degree of protection filing a restructuring petition affords to the petitioning company…*'. Where the old stay only took effect upon the appointment of a Provisional Liquidator, under the new provisions the stay takes effect upon presentation of the RO Petition.

Interplay between rival petitions

After commenting on the new statutory stay, the Grand Court then considered the interplay between the Creditors' Winding-Up Petition already filed in relation to the Company, and the Company's own RO Petition.

The creditors argued that the correct construction of the new section 91G meant that either a RO Petition could not be validly presented if a Creditor's Winding-Up Petition was already pending before the Court, or that if an RO Petition could still be presented, the statutory stay it brings simply does not 'bite' on the Winding-Up Petition already filed.

The creditors' argument rested on the fact that section 91G says:

> '*At any time*
>
> *(a) after the presentation of a petition for the appointment of the restructuring officer…*
>
> *no suit, action or other proceedings… shall be proceeded with or commenced against the company….* ***and no winding up petition shall be presented against the company.***'

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The creditors argued that whereas the statutory stay prohibited the commencement or proceeding with any proceedings against the Company, by its later words it only prohibited the presentation of (and not the proceeding with) a Winding-Up Petition. This was even though '*other proceedings*' is later defined in section 91G(3) as including '*any court supervised insolvency or restructuring proceedings against the company*'.

The Grand Court acknowledged that the highlighted words '*may be viewed as superfluous*' and acknowledged that this created a '*potential ambiguity*'. However, the Court concluded that this was insufficient to override the clear terms in which the words '*other proceedings*' are explicitly defined.

On that basis, the Grand Court firmly dismissed both the creditor's arguments, holding instead that a RO Petition *could* be presented even if a Creditor's Winding-Up Petition was already on foot, and that the resulting statutory stay *does* bite on that Winding-Up Petition, preventing it from being proceeded with.

Non-advertising

The final, relatively minor, take-away, involves the Grand Court's treatment of a failure to advertise the RO Petition with the required statutory notice.

In this case, the Court had '*little difficulty*' in exercising its discretion under the Companies Winding-Up Rules to dispense with the strict requirements, having been satisfied that no material prejudice had been caused by the failure to comply with them – in circumstances where the Company had directly notified all its unsecured creditors of the RO Petition and its contents together with the RO Petition hearing date more than seven calendar days before the hearing.

Conclusion

This judgment signals a new milestone for restructurings involving Cayman Islands companies.

The Court has sensibly construed the new '*turbo-charged*' statutory stay, whilst retaining the many years of carefully reasoned jurisprudence on the gateway into the appointment of restructuring professionals. In doing so, it has once again displayed a sensible and pragmatic focus on the best interests of creditors and the preservation of value. We expect to see more judgments following in a similar vein over the next few months and years.

One footnote is that this is not necessarily the end of the story for this company.

Firstly, the Grand Court has a discretion to lift the statutory stay and allow a proceeding, such as a Creditor's Winding-Up Petition to continue. Accordingly, if at a later stage it appears that notwithstanding the appointment of Restructuring Officers a restructuring is unlikely to be achieved, steps still could be taken to wind-up the company.

Secondly, we shall have to wait and see whether the creditors, notwithstanding the statutory stay, seek to pursue their Winding-Up Petition filed before the Hong Kong Court and, if they do, how the Hong Kong Court reacts.

Accordingly, we shall wait to see if further developments eventuate.

Contacts

Christopher Harlowe
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9232
christopher.harlowe@mourant.com

Jonathan Moffatt
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9216
jonathan.moffatt@mourant.com

Justine Lau
Partner
Mourant Ozannes (Hong Kong) LLP
+852 3995 5749
justine.lau@mourant.com

Michael Popkin
Partner
Mourant Ozannes (Hong Kong) LLP
+852 3995 5769
michael.popkin@mourant.com

Nicholas Fox
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9268
nicholas.fox@mourant.com

Peter Hayden
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9108
peter.hayden@mourant.com

Simon Dickson
Partner
Mourant Ozannes (Cayman) LLP
+1 345 814 9110
simon.dickson@mourant.com

Luke Burgess-Shannon
Senior Associate
Mourant Ozannes (Cayman) LLP
+1 345 814 9160
luke.burgess-shannon@mourant.com

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