International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2017 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

Grand TG Gold Holdings Limited: Pragmatic Adjournment of a Winding Up Saves a Going Concern Business

Nigel Meeson QC, Partner, head of Asia Litigation and Restructuring, Conyers Dill & Pearman, Hong Kong, and **Fraser Hughes**, Partner, Conyers Dill & Pearman, Cayman Islands

Introduction

It is well settled that the Cayman Court's power to order the winding up of a Company is discretionary, section 92 of the Companies Law (2013 Revision) providing that 'A company *may* be wound up by the Court if …'. In practice however it is not often that the discretion is not in fact exercised where the Company is in fact insolvent and the debt is not disputed. As Jones J observed in *HSH Cayman I GP Limited & Ors v GP Limited & Anor*:[1]

> 'A winding-up order is a discretionary remedy, but it is well established as a matter of Cayman law that an unpaid petitioning creditor in respect of an unpaid debt is entitled to expect the court to exercise its discretion in his favour by making a winding-up order in the absence of some exceptional circumstances or special reasons.'

Grand TG Gold Holdings Limited (unreported 21 August 2016) is such a rare case where Segal J adjourned a winding up petition upon an opposed application by a Hong Kong listed Company to be allowed more time to progress a restructuring proposal which was ultimately successful and allowed the shares of the Company to resume trading on the Stock Exchange of Hong Kong.

Background

Grand TG Gold Holdings Limited was a public listed company on the Growth Enterprise Market ('GEM') of the Stock Exchange of Hong Kong. The principal activity of the Company through its operating subsidiary in China, Tongguan Taizhou Mining Company Ltd ('Taizhou Mining') is gold exploration, mining and mineral processing with gold concentrate as their product. Its shares had been suspended since November 2010 as the result of a failure to file interim results which had arisen out of a dispute between the then Chairman of the Company and the general manager of Taizhou Mining. This situation was ongoing until the former Chairman resigned in March 2016 and a new board was appointed.

The Company had put forward a resumption proposal to the GEM listing committee during the course of 2015 which had been rejected, but the new board, having regained control of Taizhou Mining and having engaged financial advisers, put forward a new resumption proposal which it believed had a realistic prospect of being acceptable to the GEM listing committee.

There were three parts to the resumption proposal. First, a debt capitalisation to include creditors agreeing to a debt for equity swap. Second, an underwritten open offer at a ratio of 1:2 new to existing shares, at a very significant discount to the last closing price of the shares prior to suspension. Third, the cash settlement of any non-capitalised debt out of the proceeds of the open offer, with any surplus being retained as working capital.

The effect of the resumption proposal would be to provide creditors with a choice as to whether to swap their debt for equity or be paid in cash out of the proceeds of the open offer, but in either case they would be paid in full in cash or in kind with no haircut and no compulsion.

The deadline for submission of the resumption proposal to the GEM listing committee was September 2016.

It was against this background that a winding up petition had been presented by a creditor in June 2016 and which came on for hearing in July 2016.

The competing arguments

The Petitioner submitted that the debt could not be disputed and the Company was by its own admission insolvent on a cash flow basis. There were serious concerns regarding the resumption proposal and many aspects were open to doubt as to whether they would be viable. Many of the supporting creditors were connected to the Company or had other vested interests

Notes

1 2010 (1) CILR 157 para. 3.

and so their views should be discounted. Even if there was majority support for the adjournment the Court was not bound to (and ought not) follow the majority view. The Petitioner argued that it was appropriate that professional and independent insolvency practitioners be appointed to oversee the proposal.

The Company submitted that the resumption proposal was for the benefit of all the creditors and could (if successful) lead to 100% recovery. The prospects for success were fairly high, with a very low non-completion risk because none of the elements of the resumption proposal required shareholder approval. On the other hand any form of liquidation order would seriously jeopardise the chances of approval of the resumption proposal by the Stock exchange. The timescale for the proposal was only a few months and the proposal had the support of the majority in both value and number of the Company's creditors (c.60% in each case). An adjournment of the petition would not cause real prejudice to the petitioner because if the resumption proposal was not successful the petition could be proceeded with. There was no suggestion of any mismanagement or other reason why the appointment of liquidators was required to protect the interests of the Company's creditors.

The judgment

Segal J acknowledged that the normal practice of the Court was to make a winding up order upon the application of a petitioner who was a creditor with a debt that was not bona fide disputed on substantial grounds. However, the Judge observed that a winding up order is a class remedy and it is well established that the Court should consider the views of other creditors and have regard to the interests of creditors generally. Where there are exceptional circumstances or special reasons the Court may decline to make the order.

Whilst acknowledging and taking into account the proper and serious concerns raised by the Petitioner regarding the evidence surrounding the resumption proposal, the Judge considered that on balance the most appropriate course, having regard to the interests of all the Company's creditors as a class and all the circumstances was to adjourn the petition for a period long enough to allow the Company to make and demonstrate substantial progress in advancing the resumption proposal, but short enough to permit a further review by the Court to ensure that the position of creditors is being protected. The Judge determined that a suitable period having regard to those considerations would be five weeks.

The reasoning

The Judge based his decision on the following factors:

- He considered that the resumption proposal was both credible and clearly had a chance of being successful. If successful, then it would result in substantial benefits to the Company's creditors who will be able to choose whether to take up equity in the Company or be paid in full. The risk for creditors from a winding up would be that they may not be paid in full.
- There was a serious concern and risk that if a winding up order was made it would seriously damage the chances of obtaining the Listing Committee's approval and may even cause it to refuse the resumption in trading in the Company's shares.
- The timetable for progressing and completing the resumption proposal was relatively short so that its prospects of success and detailed terms and conditions applicable to it would become much clearer in the short term.
- The resumption proposal had the support of a significant group of creditors. The judge noted that their views were only one of a number of factors and he also gave less weight to the views of those creditors who appeared to be connected to the Company. He also observed that he was not required to count up the claims of supporting and opposing creditors and make an order giving effect to the wishes of the majority
- In concluding that five weeks was an appropriate period for an adjournment he concluded that it would be enough to enable the Company to finalise all or at least the main terms of the proposal and to obtain all necessary consents including underwriters so as to be able to demonstrate to the Court that the proposal would be deliverable and completed.

One matter which was raised at the hearing was the application of section 99 of the Companies Law. Section 99 provides:

> 'When a winding up order has been made, any disposition of the company's property … made after the commencement of the winding up is, unless the court otherwise orders, void.'

The judge reminded the Company's directors that they needed to be mindful of and need to take advice on their duties in the circumstances and have regard to the impact of the winding up petition remaining on file and section 99. However, this was not a factor which was relevant to the question whether to make the winding up order or whether to adjourn.

Commentary

Almost half the companies listed on the Stock Exchange of Hong Kong are Cayman Islands companies.

It is therefore to be welcomed that Segal J demonstrated that the Cayman Court is willing and able to take a constructive and pragmatic approach when dealing with listed companies.

Many winding up petitions are opposed by Companies, most often with the board of directors adopting the approach of Wilkins Micawber. This typically results in an immediate winding up order being made. However, as this case demonstrates, where the Company is able to present a cogent proposal with the support of a significant number of creditors which is likely to result in a better outcome for unsecured creditors than a winding up, and the court considers that it has some realistic prospect of being carried out, then the Court is open to reaching a pragmatic solution to allow a restructuring proposal to be matured.

It is open to the Court to appoint provisional liquidators and in many cases this may be appropriate where there is some need for supervision of the Company or professional assistance with progressing the proposal. However, as this case demonstrates that need not always be the case. The appointment of liquidators, provisional or otherwise, may be undesirable for reasons other than adding a significant burden of costs. In this case there was a serious risk that it would make the proposal impossible to achieve.

A five-week adjournment may seem a small issue, but in this case it was all that was necessary for the resumption proposal to be finalised, approved by the Listing Committee and ultimately prove successful.

The winding up petition was eventually withdrawn on 26 April 2017 and the shares in the Company resumed trading on 9 May 2017.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com