



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 329 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF SILVER BASE GROUP HOLDINGS LIMITED

Appearances: Mr Jonathon Milne and Ms Róisín Liddy-Murphy of Conyers Dill &
Pearman LLP for the Company

Before: The Hon. Justice David Doyle

Heard: 8 December 2021

Judgment Delivered: 8 December 2021

HEADNOTE

Appointment of light-touch provisional liquidators for restructuring purposes – importance of the laws of the place of incorporation of a company – the need to take into account the position of creditors – sections 95(1)(b) and 104 of the Companies Act (2021 Revision) – adjournment of winding up petition – winding up proceedings also filed in Hong Kong – comity concerns dealt with



JUDGMENT

Introduction

1. This judgment should be read in the light of the judgment I delivered on 22 November 2021.
2. I have considered the pleadings, the evidence, the skeleton arguments and the oral submissions of Mr Jonathon Milne who with Ms Róisín Liddy-Murphy appears today on behalf of Silver Base Group Holdings Limited (the “Company”). I am grateful to them for their helpful assistance to the Court. In allaying the concerns of the creditors and the Court they have displayed first class written and oral advocacy skills. No one has appeared today to oppose the relief requested by the Company.
3. I have however considered the views of the creditors which have been put before the court including the letters dated 29 November 2021 and 6 December 2021 from Katherine Chan Law Office for Mr WANG Jianfei a dissatisfied significant creditor of the Company, communications from Shao Bin, Mayfair & Ayers Financial Group Limited, Patrick Chu, Conti Wang Lawyers LLP, Fan Wu on behalf of his father, and numerous others.

The Law

4. I have considered the relevant statutory provisions including sections 95(1)(b) and 104 of the Companies Act (2021 Revision) (the “Companies Act”).
5. I have considered the relevant local case law, emanating from the formidable judicial quartet of Justices Smellie, Kawaley, Segal and Parker including the following judgments:

- (1) Parker J in *CW Group Holdings Limited* (FSD; unreported judgment 3 August 2018);
- (2) Kawaley J in *ACL Asean Towers Holdco Limited* (FSD; unreported judgment 8 March 2019);



- (3) Smellie CJ in *Sun Cheong Creative Development Holdings Limited* (FSD; unreported judgment 20 October 2020); and
- (4) Segal J in *Midway Resources International* (FSD; unreported 30 March 2021).

The importance of the laws of the place of the Company's incorporation

6. The Company is incorporated under the laws of the Cayman Islands. I have full regard to the importance of the laws of the place of a company's incorporation and the international recognition of light-touch provisional liquidators appointed for restructuring purposes. See *The Law of Insolvency* 5th Edition (2020) Ian Fletcher at paragraph 30-054; *Dicey, Morris & Collins on The Conflict of Laws* (Fifteenth Edition) rules 175 and 179; Chief Justice Smellie in *Sun Cheong*; Harris J in *Re China Huiyan Juice Group Limited* [2020] HKCFI 2940 (19 November 2020) and Harris J in *Li Yiging v Lamtex Holdings Ltd* [2021] HKCFI 622.
7. Ian Fletcher puts it well at paragraph 30-054 when he refers to the long accepted fundamental principle that the law of the place of a company's incorporation is primarily, "possibly immutably", competent to control all questions concerning a company's initial formation and subsequent existence. Dicey Rule 179 sets out the common law and private international law position that the authority of a liquidator (and I would add a provisional liquidator) appointed under the law of the place of incorporation should be recognised in other jurisdictions.
8. Dicey Rule 175(2) under the heading "Corporations and Insolvency" citing at footnote 78 caselaw from as long ago as 1843 states:

"All matters concerning the constitution of a corporation are governed by the law of the place of incorporation."

This fundamental principle has been etched on my mind ever since *Buckmaster and Moore*



v Fado Investments 1984 – 86 MLR 252 (in respect of foreign partnerships) – challenging experiences in court are always memorable.

9. Lord Sumption (who also sits in the Hong Kong Court of Final Appeal) at paragraph 23 of his much read judgment in *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36 also emphasised the importance, in international insolvency cases, of respecting and having full regard to the laws of the relevant company’s place of incorporation.
10. I note Mr Milne’s observation that the Cayman Islands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency and that this court should place emphasis on the laws of the place of the Company’s incorporation and in effect not be too influenced by the observations of Harris J in Hong Kong in respect of the laws of a company’s centre of main interests.
11. Mr Milne is right to stress that the Cayman Islands is a jurisdiction of substance:

“...the Cayman Islands is a highly sophisticated jurisdiction with a predictable and highly-regarded legal system. There are many reasons that Hong Kong-listed companies, in particular, choose to be incorporated in the Cayman Islands, such as:

- a. the essential basic company law framework is based on English law concepts covering the whole life cycle of the company from incorporation to dissolution. The statutory regime and corporate governance framework is modern and flexible, which enables companies to meet and adapt to the listing rule requirements of a major stock exchange;
- b. there is an appropriate balance under the Companies Act in relation to restructuring and insolvency issues, with officeholders and the Court ensuring careful regard to the interests of management and all stakeholders; and



- c. incorporation and maintenance costs of a Cayman Islands company are relatively low. There are experienced practitioners in the areas of legal, corporate and accounting services for Cayman Islands companies located in Hong Kong.”
12. The Cayman Islands is plainly a jurisdiction of substance which legitimately facilitates world trade and develops the common law to the great economic benefit of many jurisdictions worldwide. If higher authority is required to support that proposition one need only turn to Lady Arden’s important lecture at The Peace Palace in The Hague (3 February 2020) on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* which generously acknowledged the significant contribution of the Cayman Islands to such jurisprudence and its “importance in today’s world in commercial terms”, emphasising how the jurisdiction legitimately attracts “massive funds for investment” and how the determination of those weighty financial cases “inspires respect for the rule of law.”

Hong Kong case law

13. In view of the Company’s substantial connections with Hong Kong and other areas of the People’s Republic of China I have considered some of the Hong Kong case law including:
- (1) Deputy High Court Judge William Wong SC in *Moody Technology Holdings Limited (in provisional liquidation for restructuring purposes)* (12 March 2020);
 - (2) Harris J in *Re China Huiyan Juice Group Ltd* [2020] HKCF 1 2940;
 - (3) Harris J in *Li Yiqing v Lamtex Holdings Ltd* [2021] HKCFI 622 ;
 - (4) Harris J in *Re China Bozza Development Holdings Ltd* [2021] HKCFI 1235;
 - (5) Harris J in *Ping An Securities (Holdings) Ltd* [2021] HKCFI 651;
 - (6) Harris J in *Victory City International Holdings Ltd* [2021] HKCFI 1370; and
 - (7) Harris J in *China Oil Gangran Energy Group Holdings Limited* [2021] HKCFI 1592.



The initial lack of notice to creditors and comity concerns

14. I was initially concerned over lack of notice to the creditors and comity in respect of the Hong Kong proceedings. These two concerns have now been dealt with.
15. Firstly, I adjourned on 22 November 2021 to enable creditors to be given further notice. The initial adjournment was to 1 December 2021 and then a further adjournment to today 8 December 2021 to give the creditors more time to express their views.
16. Secondly, in relation to the comity concern Mr Milne has skillfully and pragmatically dealt with that concern in amended paragraph 4 of the latest draft Order. In effect the Hong Kong proceedings are carved out of the statutory moratorium if the Hong Kong Court sees fit to do so. Moreover it is open to any creditor to apply to this court seeking leave to proceed against the Company notwithstanding the appointment of the joint provisional liquidators (“JPLs”).

Various other concerns and issues

17. In light of the opposition of numerous creditors I had concerns as to the viability of any restructuring proposals but again Mr Milne has skillfully and pragmatically allayed those concerns by including an amended paragraph 3(v) of the latest draft Order in effect requiring the JPLs to report to the court on the feasibility of a restructuring for the benefit of the Company’s creditors.
18. I was also concerned that the original draft Order did not require the JPLs to consult with the Company’s creditors. I see from paragraph 3(i) of the amended draft that there is now a provision giving the JPLs power to consult with the Company’s creditors. I would expect the JPLs to exercise that power. Moreover paragraph 3(ii) now expressly includes a power for the JPLs to do all things necessary to implement the Restructuring Proposal not only in consultation with the board of directors of the Company but also “the Company’s creditors”.



19. A significant creditor has expressed concerns in respect of the Chairman of the Company. The JPLs under paragraph 3(ii) of the Order are given express power to monitor, oversee and supervise the board of directors of the Company (the “Board”) and the continuation of the business of the Company under the control of the Board pending the implementation of the restructuring proposals. Again I would expect the JPLs to exercise that power and keep a close eye on the Chairman in light of the concerns expressed by the creditor. The JPLs have power under paragraph 3(v) to conduct investigations into the affairs of the Company and in particular in respect of three areas of specific concern. Moreover under paragraph 6 of the proposed Order there can be no payment or disposition of the Company’s assets (including real and personal property) without the express written approval of the JPLs.

20. I should record that I am satisfied as to the identity of the proposed JPLs. Another creditor preferred others within Ernst & Young and R&H Restructuring (Cayman) Ltd who were stated to have more experience and resources but their consents to act were not filed and there was no good reason not to appoint the individuals proposed by the Company. I have no doubt as to their significant experience and resources. I considered the case law in this area including my judgment in *Global Fidelity Bank, Ltd (in voluntary liquidation)* (FSD; unreported judgment 20 August 2021) and was satisfied that there were no issues of lack of independence in respect of the JPLs.

21. I cannot see any prejudice to the creditors in appointing JPLs at this stage to monitor the Board, conduct investigations and to consult with creditors in respect of the feasibility of a debt restructuring plan and then to report to the court in that respect. The appointment will not stop the winding up proceedings in Hong Kong if the Hong Kong Court decides not to recognise the statutory moratorium in respect of any proceedings in Hong Kong. It will, of course, be entirely a matter for the Hong Kong Court as to what orders it makes in respect of any active proceedings before it involving the Company. Looking at the matter through Cayman Islands’ eyes, in the judgment of this court, it would be sensible and appropriate for the Hong Kong Court to recognise and give assistance to the JPLs which

this court has appointed over a company incorporated under the laws of the Cayman Islands. I leave these matters however to the Hong Kong Courts having endeavoured to deal with the concerns previously expressed by Harris J.

22. It may be that in the future a detailed protocol can be arrived at for appropriate communications between this court and the Hong Kong Court when dealing with similar cases involving companies with connections to both jurisdictions but for the moment I endeavour to communicate my messages to the Hong Kong Court through this judgment.
23. I think it also sensible to adjourn the winding up petition in this jurisdiction to 10am on Friday 11 February 2022 with the JPLs to report, after consultation with the creditors, on the feasibility of a debt restructuring before 2pm on 27 January 2022. If such is not feasible then the court can make a winding up Order on the 11 February 2022.

Summary

24. In summary:

- (1) I am satisfied that the Company has been duly authorised to present the winding up petition and the application to appoint JPLs. I considered Article 162(1) of the Company's Articles of Association and the resolutions passed by the Board. The Company was incorporated on 12 September 2007 prior to the 1 March 2009 date referred to in section 94(2) of the Companies Act so I also considered the rule in *Emmadart* [1979] 1 Ch 540 and the judgment of Smellie J (as he then was) in *Banco Economico S.A. v Allied Leasing and Finance Corporation* 1998 CILR 102.

- (2) I have concluded that the Company is or is likely to become unable to pay its debts and that it intends to present a compromise or arrangement to its creditors. The section 104(3) conditions are met. My initial reservations have been dealt with by Mr Milne and I am now content to appoint JPLs for restructuring purposes. Moreover there is good reason to adjourn the winding up petition to give some breathing space in the best

interests of the creditors and to enable the JPLs to report back as to whether a restructuring is feasible;

- (3) I have noted the concerns of Harris J expressed in the judgments I have referred to above. I have considered those concerns prior to deciding to appoint JPLs in this case. I have given the creditors an opportunity to be heard. I have ordered that the documents filed in these proceedings should be filed with the Hong Kong Court. In this case the Board has taken professional advice and sought the assistance of experts. There is a plan and information has been provided about the past and potential future of the Company. The Board are well aware that as the Company has entered the zone of insolvency focus moves to the best interests of the creditors. The JPLs will be able to consult with the creditors and endeavour to take matters forward in their best interests.

The Order

25. I make an Order substantially in terms of the amended draft filed yesterday such draft to include the further amendments I specified during my exchanges with counsel.
26. The following Order was made:
- (1) Ms. CHAN Pui Sze and Ms. MAK Hau Yin, both of Briscoe Wong Advisory Limited and Mr. Martin Nicholas John Trott of R&H Restructuring (Cayman) Ltd, are hereby appointed joint provisional liquidators (“JPLs”) of the Company.
 - (2) The JPLs shall not be required to give security for their appointment.
 - (3) The powers of the JPLs appointed pursuant to paragraph 1 above shall be limited to the following:
 - (i) to consult with the Company and the Company’s creditors in respect of, and review, on an ongoing basis, all issues relating to the feasibility of a debt restructuring plan (the “Restructuring Proposal”) as to be recommended by

the directors of the Company and the JPLs, including with respect to the necessary steps which need to be taken in order for the Restructuring Proposal to be successfully implemented to allow the Company to continue as a going concern;

- (ii) to do all things necessary to implement the Restructuring Proposal in consultation with the board of directors of the Company (the “Board”) and the Company’s creditors;
- (iii) to monitor, oversee and supervise the Board and the continuation of the business of the Company under the control of the Board pending the implementation of the Restructuring Proposal;
- (iv) with the consent of the Board to do all acts and to execute in the name of and on behalf of the Company, all deeds, receipts and other documents and for that purpose to use, when necessary, the seal (if any) of the Company;
- (v) for the purpose of reporting to the Court on the feasibility of a restructuring and for the benefit of the Company’s creditors, to ascertain and conduct investigations into the affairs of the Company and its subsidiaries. Such investigations shall include, *inter alia*, an investigation into: (i) prepayments of approximately RMB534,191,000 (equivalent to approximately HK\$652,034,000) to three purchase agents for the purchase of liquor products, of which approximately RMB164,691,000 (equivalent to approximately HK\$201,022,000) was paid to a company controlled by the Chairman’s brother; (ii) restrictions (if any) placed on the use of the Company’s RMB cash reserves in the context of paying current debts owed to the Company’s creditors located in Hong Kong, and the People’s Republic of China and elsewhere; and (iii) the status of the Company’s redemption of its investment in the collective investment scheme managed by Guotai Junan.

- (vi) to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency.
- (vii) to locate, protect, secure and take into their possession and control all assets and property within the jurisdiction of the courts of the Cayman Islands to which the Company is or appears to be entitled.
- (viii) to locate, protect, secure and take into their possession and control the books, papers, and records of the Company including the accountancy and statutory records within the jurisdiction of the courts of the Cayman Islands and to investigate the assets and affairs of the Company and the circumstances which gave rise to its insolvency.
- (ix) to retain and employ barristers, solicitors or attorneys and/or such other agents or professional persons as the JPLs consider appropriate for the purpose of advising or assisting in the execution of their powers and duties.
- (x) seek recognition of the provisional liquidation and/or the appointment of the JPLs in any jurisdiction the JPLs consider necessary together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction, including but not limited to potential applications for recognition in Hong Kong and the People's Republic of China; and
- (xi) to bring or defend legal proceedings and make all such applications to this Court whether in their own names or in the name of the Company on behalf of and for the benefit of the Company including any applications for:
 - (a) orders for disclosure, the production of documents and/or examination of third parties which it is anticipated may be made by the JPLs to facilitate their investigations into the assets and affairs

of the Company and the circumstances which gave rise to its insolvency; and/or

- (b) ancillary relief such as freezing orders, search and seizure orders in any legal proceedings commenced.
- (4) For the avoidance of doubt, for so long as provisional liquidators are appointed to the Company, pursuant to section 97(1) of the Companies Act and subject to the proviso below, no suit, action or other proceeding, including criminal proceedings, shall be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose. Provided however, this Order is made without prejudice to the jurisdiction of The High Court of the Hong Kong Special Administrative Region (the “Hong Kong Court”) to determine whether to recognise the statutory moratorium under section 97(1) of the Companies Act, including in relation to extant winding-up proceedings presented in action HCCW 385 of 2021 which are pending before the Hong Kong Court.
- (5) This Order, along with all other Orders, judgments and court filings in the Cayman Islands in this matter, shall be filed forthwith in electronic and hard copy form with the Hong Kong Court under cover of a letter which makes reference to all extant proceedings concerning the Company and/or subsidiaries of the Company currently before the Hong Kong Court.
- (6) For the avoidance of any doubt, no payment or disposition of the Company’s assets (including real and personal property) or any transfer of shares or any alteration in the status of the Company’s members shall be made or effected without the express written approval of the JPLs but no such payment or other disposition or transfer of shares or alteration in the status of the Company’s members made or effected by or with the authority or approval of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 99 of the Companies Act.

- (7) In the event that a winding-up order is made against the Company by this Court, any fees and expenses of the JPLs, including all costs, charges and expenses of any attorneys and all other agents, managers, accountants and other persons that they may employ, which are payable in accordance with the terms of the orders which may be made by this Court, and which are outstanding at the date of the winding-up order, shall be treated as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company for the purposes of Order 20 of the Companies Winding Up Rules, 2018.
- (8) Save as are specifically set out herein:
- (a) the JPLs will have no general or additional powers or duties with respect to the property or records of the Company; and
 - (b) the Board shall continue to manage the Company's affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association, provided always that, should the JPLs consider at any time that the Board is not acting in the best interests of the creditors of the Company, the JPLs shall have the power to report same to this Court and seek such directions from this Court as the JPLs consider are appropriate.
- (9) The Company shall provide the JPLs with such information as the JPLs may reasonably require in order that the JPLs should be able properly to discharge their functions under this Order and as officers of this Court.
- (10) The powers exercisable by the JPLs pursuant to this order may be exercised jointly and severally.
- (11) The remuneration and expenses of the JPLs, including the expenses associated with the exercise of their powers, shall be paid out of the assets of the Company subject to approval of the Court.

- (12) The JPLs, the Company and any creditors of the Company do have liberty to apply.
- (13) The winding up petition presented by the Company on 11 November 2021 be adjourned until 10 am on Friday 11 February 2022.
- (14) The JPLs provide their report on the status of their investigations and the feasibility of a debt restructuring process to this Honourable Court, with a copy served upon the Company's creditors and filed with the Hong Kong Court before 2 pm on 27 January 2022.
- (15) No order as to costs.

THE HON. JUSTICE DOYLE
JUDGE OF THE GRAND COURT