IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 102 OF 2020 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF GTI HOLDINGS LIMITED

Appearances:	Jonathon Milne and Sean-Anna Thompson of Conyers Dill & Pearman on behalf of GTI Holdings Limited
Before:	The Hon. Justice David Doyle
Heard:	22 February 2022
Orders made:	22 February 2022
Draft Reasons for Judgment circulated:	15 March 2022
Reasons for Judgment approved:	15 March 2022

HEADNOTE

The importance of the place of a company's incorporation when making a winding up order – position where the Hong Kong Court makes a winding up order in respect of a company incorporated under the laws of the Cayman Islands – issues of comity in respect of the Grand Court of the Cayman Islands and the Hong Kong Court – the courts of the Cayman Islands should generally, under well-established principles of private international law, assume the primary role in respect of winding up proceedings involving companies incorporated under the laws of the Cayman Islands

REASONS FOR JUDGMENT

Introduction

1. On 22 February 2022, I made a winding up order and appointed joint official liquidators. I now deliver my reasons.

2. GTI Holdings Limited (the "Company") was incorporated in the Cayman Islands on 9 June 2004.

3. By petition dated 22 May 2020, the Company presented a petition for an order that it be wound up on the ground of its inability to pay its debts and that Osman Mohammed Arab, Lai Wing Lun (both of RSM Hong Kong) and Claire Marie Loebell of R&H Restructuring (Cayman) Ltd be appointed as joint official liquidators of the Company ("JOLs").

4. By summons dated 28 May 2020, the Company applied for an order that the individuals it had identified as potential JOLs be appointed joint provisional liquidators ("JPLs") of the Company to review all issues relating to the feasibility of a debt restructuring plan (the "Restructuring Proposal").

5. By order made on 28 May 2020, Parker J sitting in the Financial Services Division of the Grand Court of the Cayman Islands, the Company's place of incorporation, appointed JPLs of the Company for restructuring purposes.

6. By order made on 13 May 2021, Claire Marie Loebell was released from the performance of her duties as one of the JPLs of the Company and Owen Walker of R&H Restructuring (Cayman) Limited was appointed in her stead.

7. The JPLs applied for and were granted, from time to time, various orders from this court pending the progression of the Restructuring Proposal.

8. The evidence placed before this court indicated that:

   (1) a winding up petition (HCCW 51 of 2020) first came to be heard before Harris J in Hong Kong on 13 July 2020 and was, after several adjournments pursuant to consent summonses filed by the Company and the petitioners, last listed before Harris J as recently as 8 November 2021;

   (2) on 24 September 2020, the JPLs made an application in Hong Kong and Harris J of the Hong Kong Court by order dated 9 November 2020 recognised the appointment of the JPLs for restructuring purposes and allowed the JPLs to exercise certain powers in Hong Kong. Harris J specifically ordered that if the JPLs wished to apply for a stay or other directions in respect of the proceedings before the Hong Kong Court of any sort in consequence of the recognition of their appointment by the Hong Kong Court such application should be listed before Harris J or such other judge as he shall direct. It was ordered that the JPLs should write to the clerk to Harris J seeking case management directions for the determination of any application that they wish to make pursuant to the order of Harris J;

(3) on 17 December 2020, the Company applied to the Hong Kong Court in HCMP 2303 of 2020 for an order that it be at liberty to convene a meeting of the creditors of the Company ("Scheme Meeting") for the purpose and, if thought fit, approving a proposed scheme of arrangement. On 20 December 2020 Harris J heard the Company's application for directions to convene the Scheme Meeting and gave some comments and guidance and invited the Company to submit a revised Scheme Document to him for his consideration. Matters appeared to have been somewhat delayed while queries from regulators were addressed and financial information updated. The Company needed more time to (i) finalise its audited results after which the Company could then continue to address the queries of the Stock Exchange of Hong Kong Limited ("SEHK") and (ii) prepare a draft revised Scheme Document which would incorporate changes made to address queries from regulators and updated developments of the Group (including the audited results). On 8 November 2021, Harris J directed that the fresh application to convene the Scheme Meeting due to be heard on 23 November 2021 be vacated and re-fixed for 29 March 2022;

(4) an adjourned hearing of the only remaining winding up petition in HCCW 51 of 2020 was listed for 22 November 2021 in Hong Kong. The Company reached an agreement with the petitioner to further adjourn the hearing of the petition by way of consent summons. However I am informed that on 15 November 2021 Linda Chan J of the Hong Kong Court considered that the hearing should take place because there were other supporting creditors of the petition and their agreement to the proposed adjournment had not been sought and obtained. It appears from paragraph 17 of Linda Chan J's reasons for judgment delivered on 2 December 2021 that 7 of 23 creditors supported the petition and another 4 by letter dated 19 November indicated that they "endorse" the stance of the petitioner. It appears that only a minority of what were described in the judgment as the "Supporting Creditors" were in favour of a winding up order

being made by the Hong Kong Court. In passing I am reminded of the observations of Segal J in *Grand T G Holdings Limited* (FSD; unreported judgment delivered 22 August 2016 released for publication 30 August 2018) at paragraph 6 that in normal circumstances considerable weight should be given to the fact that the petitioner is an unpaid creditor with a debt which is not bona fide disputed on substantial grounds but as a winding-up order is a class remedy it is well established that the court should consider the views of other creditors and have regard to the interests of creditors generally.

The making of the winding up order in Hong Kong

9. Much to the surprise and concern of the Company and the JPLs (who as I understand the position were not represented at the hearing) Linda Chan J of the Hong Kong Court, in face of opposition from the Company and against the initial wishes of the petitioning creditor, made what she described as "the usual winding up order" against the Company on 22 November 2021 and gave the reasons for her judgment on 2 December 2021.

10. The JPLs say that despite the fact that the judge was aware (see paragraph 13(10) of her judgment) that the hearing in respect of convening a meeting in respect of the Scheme was due to be held on 29 March 2022 (pursuant to the order made by Harris J on 8 November 2021) the judge (at paragraph 15 of her judgment) could see "no proper basis for the Company to seek a further adjournment of the Petition." At paragraph 18 Linda Chan J stated: "In assessing the feasibility or otherwise of the proposed restructuring, the Court will have to take into account the views of the unsecured creditors as they have the right to decide whether the proposed restructuring is one which they are prepared to accept. It is not for the Company or the PLs to decide whether it is in the interests of the creditors to accept the proposed restructuring." Linda Chan J did "not think that the proposed Scheme is feasible" (paragraph 19 of her judgment). It appears that Linda Chan J relied on 4 main reasons:

(1) only creditors whose aggregate claims against Company account for 48% of the total indebtedness are willing to consider the proposed Scheme;

(2) one of the creditors relied on by the Company is Champion Alliance Industries Limited a secured creditor and it is wrong for the Company to include its claim as part of the 48% creditors who are willing to consider the proposed scheme;

(3) as there is no evidence to show that the proposed Scheme has the support of 75% in value of the claims of the unsecured creditors, there is no basis for the Company to contend that the proposed Scheme is one which can be implemented; and

(4) without any audited financial statements for the 18 months ended 30 June 2021 it is difficult to see how the Company can satisfy SEHK's requirements.

Linda Chan J at paragraph 20 added:

> "More importantly, it is clear from the evidence before the Court that despite the appointment of the PLs for about 18 months, the financial position of the Group has *not* improved and the Company remained unable to comply with the basic obligation of publishing its audited financial statements."

Linda Chan J at paragraph 22 stated:

> "It is highly undesirable for the Company with a substantial net deficit to remain in operation as a going concern. The continued increase in net deficit is prejudicial to the interests of the unsecured creditors. They are entitled to ask the Court to put the Company into liquidation without any further delay."

11. I am informed that there was no appeal against the winding up order in Hong Kong.

12. Mr Milne respectfully submits that "the territorial approach taken by the Hong Kong Court (in this instance) appears to be at odds with the Cayman Court's consistent focus and application of principles of comity and cooperation".

13. Mr Milne highlights the main concerns of the JPLs in respect of the winding up order made by Linda Chan J in the Hong Kong Court on 22 November 2021 and the reasons subsequently delivered on 2 December 2021 as follows (with reference to paragraph numbers being to paragraph numbers in the judgment):

> "a. Chan J made the winding-up order on 22 November 2021 despite being aware of these Cayman Islands proceedings and the fact that Harris J had recognised the JPLs' appointment by the Cayman Islands Court (see para 9);
>
> b. Chan J made the winding-up order on 22 November 2021 despite being aware of the fact that Harris J had given recent case management directions for a convening hearing in relation to the scheme of arrangement on 29 March 2022 (see para.13(10));
>
> c. Chan J made the winding-up order on 22 November 2021 despite 48% by value of creditors of the Company expressing a willingness to consider the restructuring plans at the convening hearing and only 6.4% by value of creditors objecting to moving forward with the restructuring (para. 19(1));
>
> d. Chan J appears to have overlooked the "*present and voting"* component of the 75% by value threshold for schemes of arrangement in both Hong Kong and the Cayman Islands. Accordingly, having disregarded the fact that only 54.4% by value of creditors have expressed a view to date and the fact that the overwhelming majority of that group wish to consider a restructuring, Chan J arrives at the definitive conclusion that "*there is no basis for the Company to contend that the proposed Scheme is one which can be implemented*" (see para. 19(3));
>
> e. The petitioning creditor in Hong Kong had signed a consent summons indicating its agreement to have the Hong Kong petition adjourned.

However, regardless of the agreement between the parties, Chan J declined to vacate the hearing (see para. 16); and

f. Chan J made the winding-up order on 22 November 2021 despite the views expressed by the Company and by the JPLs appointed by the Cayman [Court] that the implementation of the scheme of arrangement would be beneficial to the creditors and shareholders of the Company as the creditors would likely obtain only a minimal recovery in liquidation (see para. 10(13)).”

14. I am informed that the Hong Kong provisional liquidator in a court-ordered winding-up is required to convene separate meetings of the creditors and contributories of the Company for the appointment of a liquidator in place of the provisional liquidator.

15. I am further informed that a creditor submitted an application to the Hong Kong Court on 6 December 2021 seeking a dispensation of the first meeting of creditors and contributories and the appointment of the JPLs as the joint and several liquidators of the Company in Hong Kong. The application was supported by at least 40 creditors who, in aggregate, hold a total debt of approximately HK$616 million, representing approximately 49% of the estimated total liabilities of the Company at the relevant time. By letter dated 15 December 2021 the clerk to Linda Chan J indicated that:

“Her Ladyship made the following directions on 15 December 2021:

1. The Court is not minded to make the order sought in the application. It does not appear that there is sufficient justification for the Applicant to displace the usual requirements of PLs to convene meetings of creditors to ascertain their view on the appointment of Liquidators and committee of inspection.
2. As the Applicant does not intend to pursue the application tomorrow the hearing is vacated.
3. Costs reserved.
4. Liberty to apply.”

16. It appears as things presently stand that the Hong Kong Official Receiver is the provisional liquidator of the Company in Hong Kong.

17. The JPLs wish to co-ordinate and collaborate with the Official Receiver in Hong Kong to ensure a cost-effective and sensible outcome for the Company's stakeholders.

18. Despite the Hong Kong winding up order, the directors of the Company and Mega Yield Enterprise Development Limited (the "Investor") remain confident that the Restructuring Proposal is still viable. It was stated that the JPLs, if appointed JOLs, would consider all possible options to endeavour to maximise recoveries for stakeholders, including but not limited to, continuing to explore the Restructuring Proposal with creditors.

The summons in the Cayman Islands

19. By summons dated 14 January 2022 the JPLs sought an order that the winding up petition in this jurisdiction be listed for a hearing on or after 28 January 2022. Parker J (the originally assigned judge to this case) was heavily committed in another hearing already set down for a lengthy period so the hearing was set for 10am on 22 February 2022 before me.

20. By letter dated 16 February 2022, Ms Maureen Chan Acting Assistant Principal Solicitor for the Official Receiver in Hong Kong stated:

> "Upon the winding up order being made against the Company on 22 November 2021 in captioned proceedings in Hong Kong, the Official Receiver has become the provisional liquidator of the Company.
>
> The winding up proceedings in the Cayman Islands and the winding up proceedings in Hong Kong are separate court proceedings. The winding up proceedings in Hong Kong do not subject to the winding up proceedings in the Cayman Islands and any order made therein. In the circumstances, any order of appointment of provisional liquidators or liquidators in the Cayman Islands has

no effect on the winding up of the Company in Hong Kong. As the provisional liquidator of the Company, the Official Receiver is endeavoring to arrange for the first meetings of the contributories and creditors to be convened as and when the pandemic safety restrictions in Hong Kong allow.

In any event, nothing contained in this letter should be taken or construed as submission of the winding up proceedings in Hong Kong to those in the Cayman Islands or any admission of the consent, obligation or liability on the part of the Official Receiver and provisional liquidator of the Company under any order proposed to be sought at the hearing of the petition at the Grand Court of the Cayman Islands on 22 February 2022 or any adjourned hearing thereof."

21. It appears that the dates for the first meeting of the creditors and contributories have not yet been set and they appear some way off unless they can take place remotely, in view of the present restrictions on gatherings imposed in Hong Kong because of COVID-19.

22. It was in these circumstances that the JPLs applied for a winding up order and their appointment as JOLs in the jurisdiction of the Cayman Islands, the place of incorporation of the Company.

23. This is against the backdrop of the JPLs being appointed by this court and Harris J of the Hong Kong Court recognising them in Hong Kong. It is also against the backdrop of Harris J in Hong Kong setting the date of 29 March 2022 as the hearing date in Hong Kong to convene a meeting to consider the proposed Scheme. There then appears to the JPLs an inexplicable apparent volte face by the Hong Kong Court and the making of a winding up order on 22 November 2021 by Linda Chan J, against the wishes of the Company and the initial wishes of the petitioning creditor and in a manner seemingly inconsistent with the previous orders of Harris J of the Hong Kong Court.

24. The JPLs say that a winding up order is appropriate and necessary in the Cayman Islands for the following principal reasons:

(1) Although the Company has some subsidiaries in Hong Kong, it also has many subsidiaries in other places such as Cambodia, BVI, Cayman Islands and the People's Republic of China. The appointment of JOLs in the place of the Company's incorporation will be more effective than the appointment of the Hong Kong Official Receiver as provisional liquidator. A winding up order made in Hong Kong over a foreign company, as recognised by the Hong Kong judiciary, may have limited effect outside Hong Kong in respect of subsidiaries. A winding-up order made by the Grand Court of the Cayman Islands against a company incorporated under the laws of the Cayman Islands will be more effective internationally in respect of subsidiaries outside Hong Kong than a winding-up order made by a Hong Kong Court. Mr Milne refers to *China Huiyan Juice Group Limited* [2020] HKCFI 2940 and *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622 and submits that if there are subsidiaries

in Mainland China (or indeed elsewhere), as in this case, and the holding company is incorporated in an offshore jurisdiction, it would normally be appropriate for the place of incorporation to be the primary insolvency jurisdiction to give liquidators the prospect of obtaining control of such subsidiaries for the benefit of the company's stakeholders;

(2) The JOLs with their knowledge of the Group would be much better placed to bring forward the restructuring plan in the best interests of all creditors, secured and unsecured;

(3) Mr Milne referred to paragraph 74 of Mr Lai's fifth affirmation affirmed on 14 January 2022. Mr Lai makes the following points:

> "The Hong Kong court, in making the winding-up order, referred to responses received from creditors representing 48% of the value of the total debt. Such creditors have indicated they would be willing to consider a scheme of arrangement and support advancing the restructuring plans. Of the remaining 52% in value only 6.4% in value have expressly objected to moving forward with the restructuring

proposal. Accordingly, 45.6% of the total creditor group by value have not expressed a view at this stage";

(4) Mr Milne reinforces those points with the submission that for the Scheme to be passed the relevant number will be in respect of those present and voting within the relevant class and not a percentage of all creditors;

(5) Mr Milne stressed that the best way forward would be to make a winding up order in this jurisdiction and appoint the JPLs as JOLs. Mr Milne asked the court to consider the unattractive alternatives:

(i) The JPLs are discharged from office but there is still a foreign winding up on foot where a Cayman company is unable to pay its debts; or

(ii) The JPLs are still in place despite the Hong Kong Court winding up order and there is confusion over the status of the directors in the context of audited accounts requiring urgent sign off;

(6) Mr Milne submitted that the best way forward would be for a winding up order to be made in this jurisdiction and the JPLs appointed JOLs in the place of incorporation of the Company. Moreover, the JOLs would be far better placed than the Hong Kong Official Receiver to progress the scheme in the best interests of all creditors some of whom are in Hong Kong but many creditors are also outside Hong Kong;

(7) Mr Milne submitted that there was a reasonable chance for the Scheme to progress. Linda Chan J focused on the negative deficit in the Company's financial position but Mr Milne submitted that there had recently been some good news. Mr Milne referred to the evidence of Mr Lai. In his fifth affirmation Mr Lai at paragraph 63 states:

> "The Group's performance in its three major segments (i.e. (i) production, sale and trading of textile products; (ii) RMB banknotes clearing up services [relating to cleaning, ironing and packaging folding banknotes] and others; and (iii) trading of petroleum and chemical products) has seen considerable improvement, especially for the three months ended 30 September 2021...";

(8) Mr Milne submitted in effect that there seems to be some light at the end of the dark financial tunnel. Mr Lai at paragraph 67 refers to the considerable improvement in the Group's major segments and concludes that:

> "… the results for the Group's major segments have shown improvement for the three months ended 30 September 2021, compared to the previous results. In particular, the Group's revenue and gross profit for the three months ended 30 September 2021 has significantly increased."

At paragraph 68 Mr Lai adds:

> "Such improvement and results also demonstrated one big step of the restructuring work carried out by the Company since the JPLs' appointment on 28 May 2020 pursuant to the Appointment Order. Recent financial performance demonstrates a significant improvement in revenue and profitability of the Group's business. As described above, a key focus of the restructuring efforts has been to turn around or close loss-making businesses while reviving and/or expanding profitable business lines within the Group."

At paragraph 69(b) Mr Lai refers to the Groups operations and customers in Cambodia, PRC, France, Japan and Africa and the expectation that "the operation in both mask and the textile products will grow continuously throughout the year ending 30 June 2022."

At paragraphs 71 – 73 Mr Lai adds:

> "71. The Management is of the view that, if the Restructuring Plan is approved and implemented, the Company would have additional
>
> financial resources to continue to further expand its existing business, which is beneficial to the creditors of the Company. In particular, the Management is optimistic about the performance of the Group's major segments, the performance of which has already improved for the three months ended on 30 September 2021, and expects the growth in revenue will continue in the future, especially when the general market condition recovered from the impact of COVID-19.
>
> 72. In addition, most of the debts of the Company will be settled upon implementation of the Restructuring Plan. In such case, the Company will no longer have to incur substantial finance costs and the Company's net income would be closer to its gross profit.
>
> 73. The Creditors of the Company would likely obtain a minimal recovery under liquidation scenario and needless to mention, the potential recovery of the shareholders would likely be nil. In light of recent improvements and the expected development of the business of the Company, the JPLs agree with the Company that the implementation of the Restructuring Plan would remain beneficial to the creditors of the Company as well as the shareholders of the Company and so far, based on the regular communication between the Company and the creditors, majority of them do support the restructuring."; and

(9) Mr Milne rightly emphasised with some considerable persuasive force the importance of the place of the Company's incorporation. I will deal with this

recurring issue and some of the relevant authorities in the law section of this judgment.

34. In short summary, Mr Milne submitted that this case is a paradigm example of an international group which would benefit from a single insolvency proceeding of its holding company taking place in the jurisdiction of incorporation.

Law

35. I now turn to some of the relevant law which was engaged in respect of the relief I granted on 22 February 2022.

The Companies Act

36. Under section 92(d) of the Companies Act a company may be wound up by the court if the company is unable to pay its debts.

The Insolvency Practitioners' Regulations 2018

37. Mr Milne also refers to my judgment in *Global Fidelity Bank, Ltd (In voluntary liquidation)* (FSD; unreported judgment reason delivered 20 August 2021) in respect of the independence, qualification, residency and insurance requirements of official liquidators. I had full regard to that judgment and the evidence before the court on these issues.

The primacy of the place of incorporation of a company in the context of winding up proceedings

38. It is a very serious step for a foreign court to make a winding-up order against a company incorporated under the laws of another jurisdiction. The Hong Kong Court took that step on 22 November 2021 for the reasons stated in the judgment delivered on 2 December 2021. Usually the best and most appropriate way forward is to leave it

to the courts of the place of incorporation of the company to deal with applications for winding up orders and to be treated as the courts with primary jurisdiction. As Chief Justice Smellie stated at paragraph 6 of his oft-cited judgment in *Sun Cheong Creative Development Holdings Limited* (FSD; unreported 20 October 2020) in considering which jurisdiction is the more appropriate to assume the role of primary insolvency proceeding all things being equal "this will generally be assumed to be the place of incorporation of the company." I accept that such comments were made in the context where "an appointment has yet to be made" but the Chief Justice in respect of a company incorporated under the laws of the Cayman Islands "accepted that the starting point would be for the Company to be wound up by, or reorganised under the supervision of this Court, unless there were compelling reasons justifying the displacement of the Cayman Islands as the primary jurisdiction." At paragraph 8 the Chief Justice stressed that:

> "It is not the practice of this Court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time."

At paragraph 53 the Chief Justice added:

> "…any insolvency proceedings, including any restructuring or scheme of arrangement, should be supervised by the Grant Court of the Cayman Islands as the court of the place of incorporation of the Company."

39. Harris J in *Joint Official Liquidators of A Company v B & C* [2014] 5 HKC 152 dealt with a number of applications made by liquidators including an application that the liquidators and their appointment in the Cayman Islands be recognised. The headnote to the judgment indicates that it was held that generally matters concerning the constitution and management of the affairs of a foreign company were determined by the law of the place of its incorporation and if under the law of the place of incorporation

a liquidator is appointed his authority should be recognised in Hong Kong. Harris J referred to my decision (in my then capacity as a Deemster in the Isle of Man) in *Impex Services Worldwide Ltd* 2003-05 MLR 115 and Kawaley J's decision (in his capacity as a Judge in Bermuda) in *Re Founding Partners Global Fund Ltd* [2011] Bda LR 22 and stated at paragraph [17] that the significance of such decisions was that "they serve to demonstrate the extent to which the courts in different common law jurisdictions are adopting a consistent and expansive view of the extent to which established common law principles require the court to recognise foreign liquidators and allow the court to provide assistance to them". Harris J (at paragraph [18]), recognising and accepting well established principles of the common law and private international law, took the view that the Hong Kong Companies Court should adopt a similar approach.

40. In international insolvency cases, the common law and the principles of private international law all emphasise the importance and primacy of the place of a company's incorporation.

41. Deputy High Court Judge William Wong SC in *Moody Technology Holdings Limited (in provisional liquidation for restructuring purposes)* [2020] HKCFI 416 referred, in an illuminating and informative judgment, at paragraph 46 to the importance of the law of a company's incorporation (citing *Re Z-Obee Holdings Ltd* [2018] HKLRD 165 at 13 per Harris J) and rightly described this as "orthodox and well established."

42. Lawrence Collins J in *Drax Holdings Limited* [2003] EWHC 2743 (Ch) at paragraph 24 in the language of the day stated:

> "…The English court will not wind up a foreign company where it has no legitimate interest to do, for that would be to exercise an exhorbitant jurisdiction contrary to international comity …"

At paragraph 29, Lawrence Collins J recognised that a scheme of arrangement between a company and its members "would essentially be a matter for the courts of the place of incorporation." Lawrence Collins J at paragraph 30 recognised that in the case of a

creditors' scheme which involved the alteration of contractual rights "international effectiveness" required that regard be had to the courts in the country of incorporation but also to the courts of the country whose law governs the contractual obligations:

> "Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

43. In international insolvency cases, I agree that it is especially important to adopt a broad internationalist global outlook rather than a narrow, insular territorial approach. As a well-established and fundamental principle of private international law it is also important to have proper regard to the primacy of the law of the place of the relevant company's incorporation. Lord Sumption confirmed such an approach in *Singularis Holdings Limited v PriceWaterhouseCoopers* [2014] UKPC 36 at paragraph 23 of his judgment when he stated:

> "…The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally…".

44. In the somewhat urgent circumstances of *Silver Base Group Holdings Ltd* (FSD; unreported judgment 8 December 2021), I touched upon the importance the law attaches to the place of incorporation. I stated:

> "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."

45. Mr Milne emphasised another relevant quote from Fletcher, a leading work on the international law of insolvency, at paragraph 28:009:

> "… it is fully in accord with both principle and authority, so far as English law is concerned, to regard all questions concerning the creation, continuing existence, and ultimate dissolution of a company as being primarily governed by the law of the place in which that company has undergone formation. Hence the courts of that country are considered to constitute the proper *forum* for proceedings to bring about the insolvent liquidation of the company, and English law will recognise the effectiveness of any resultant decree whereby the company is declared to be dissolved, and its legal personality terminated."

46. England and Wales and the Cayman Islands are not alone in respecting the primacy of the law of the place of a company's incorporation. Other sophisticated common law jurisdictions (including Bermuda and Hong Kong) have also delivered judgments that generally respect the primacy of the place of the company's place of incorporation.

47. Chief Justice Hargun sitting in the Supreme Court of Bermuda in *Stephen John Hunt v Transworld Payment Solutions U.K. Limited* [2020] SC (Bda) 14, Com, 6 March 2020 at paragraph [32] stated:

> "The general rule is that the court will recognise at common law only the authority of the liquidator appointed under the law of the place of incorporation of the company."

48. It has also been recognised at the highest level in Hong Kong. In *Kam Leung Siu Kwan v Kan Kwan Lai* (2015) 18 HKCFAR 501 in a strong joint judgment by former Chief Justice Geoffrey Ma and Lord Millett NPJ (with whom Ribeiro PJ, Tang PJ and Fok PJ agreed) at paragraph [19] it was stated: "…the most appropriate jurisdiction in which to wind up a company is the jurisdiction where it is incorporated …." and referred for the necessity for there to be "good reason" to exercise the "abnormal jurisdiction" (sometimes previously described as "exhorbitant" or as "usurping" the functions of the

courts of the country of incorporation although the Hong Kong Court of Final Appeal described such labels as unhelpful and potentially misleading) of winding up a foreign company.

49. The appeal before the Hong Kong Court of Final Appeal involved a company incorporated in the British Virgin Islands. At paragraph [25] this well respected court of final appeal referred to:

> "…the starting point that the country of incorporation normally provides the most appropriate jurisdiction in which to seek a winding up order …"

50. The court recognised, as the Court of Appeal had observed, that "creditors are not personally attached to the state of incorporation whereas the shareholders of a foreign company or their predecessors will usually have voluntarily adopted and approved the

law of the state of incorporation as the law governing the company's legal status." I would merely add that, although shareholders in effect agree to be bound by the laws of the place of incorporation of the company, sophisticated commercial creditors must also be taken to have knowledge that the company they are contracting with is generally governed by the laws of its place of incorporation which as a matter of private international law usually has primacy.

51. Harris J in *Re China Huiyuan Juice Group Limited* [2020] HKCFI 2940 at paragraph 19 also referred to the acknowledgement by the Hong Kong Court of Final Appeal in *Han Leung Sui Kwan v Kan Kwan Lai* (2015) HKCFAR 501 that:

> "…the normal and most appropriate course for a person seeking to wind-up a company is to issue the necessary application in its place of incorporation."

52. Harris J at paragraph 21 refers to the assumption of Ma CJ and Lord Millett NPJ in the Hong Kong Court of Final Appeal that, in the context of a solvent foreign incorporated company with immediate subsidiaries also incorporated in an offshore jurisdiction, "it

would probably not be possible for a liquidator appointed in Hong Kong to be able to change the board of the subsidiaries or alter the register of shareholders."

53. Harris J at paragraph 21 referred to the difficulties with subsidiaries outside Hong Kong and prefaced his remarks by referring to:

> "the need for the petitioner to demonstrate sufficient benefit that the petitioner will derive from a winding-up order to justify making an order in Hong Kong rather than requiring the Petitioner to take what will normally be the more appropriate step and seek to wind-up the Company in its place of incorporation."

54. It should also be emphasised that, while a winding up in the place of incorporation will normally be given priority, recognition and extra territorial effect of a foreign winding up elsewhere only has operation in that foreign jurisdiction. See for example *Re International Tin Council* [1987] 1 Ch. 419 which involved an international organization established by treaty in 1956 with its headquarters in London. The issue in that case was whether such an organisation could be compulsorily wound up by the English court. In dealing in general terms with jurisdiction, Millett J at page 445 stated:

> "The status of a foreign corporation is a matter of private international law and is governed by the law of the country of incorporation."

55. At page 447 Millett J adds:

> "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation."

56. Millett J in the *Tin Council* judgment, with his eye rightly on the global position and comity in respect of an English court exceptionally making a winding up against a foreign company, adds at pages 446 – 447:

> "Where the company is simultaneously being wound up in the country of its incorporation, the English court will naturally seek to avoid unnecessary conflict, and so far as possible to ensure that the English winding up is conducted as ancillary to the principal liquidation."

57. In the present case, it is to be hoped that the Hong Kong Court would also strive to avoid unnecessary conflict and ensure that the Hong Kong winding up is conducted as ancillary to the principal liquidation of the Company which is incorporated in the Cayman Islands.

58. Sir Richard Scott V-C sitting in the High Court of England and Wales in *Bank of Credit and Commerce International S.A.* [1997] Ch 213 held that where a foreign company was in liquidation in its place of incorporation, any winding up in England would be ancillary thereto. Sir Richard Scott at pages 238 - 248 dealt with the issue of ancillary liquidations and recognised that Sir Nicholas Browne-Wilkinson V-C and Sir Donald Nicholls V-C, his two distinguished predecessors, had also intended that "the winding up of B.C.C.I in this country would be an "ancillary" liquidation with the Luxembourg liquidation constituting the principal liquidation" (B.C.C.I being incorporated under the laws of Luxembourg). Sir Richard Scott added at page 238 what he regarded as "common ground" that:

> "It is equally clear from the terms of the Luxembourg winding up order of 3 January 1992 and the several judgments of the Luxembourg courts that the Luxembourg courts regard the Luxembourg winding up as the principal winding up."

It is plain that these distinguished and commercially experienced English judges respected the position and decisions of the courts in the company's place of incorporation.

59. I end the law section of this judgment by referring to Harris J's relatively recent judgment in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622 where at paragraph 7 the learned judge stated:

"A winding up in a company's country of incorporation will as a matter of Hong Kong rules of private international law be given extra-territorial effect in Hong Kong."

60. Harris J at paragraph 22 adds:

"The current position in Hong Kong is that the court recognises only insolvency practitioners appointed in the place of incorporation."

61. Harris J at paragraph 31 referred to the common structure of a Cayman incorporated holding company, which owns intermediate subsidiaries incorporated in the British Virgin Islands, which own Mainland subsidiaries and stated:

"… in cases in which a listed company's business is in the Mainland it may be necessary because of the common structure of such groups for the holding company, if it is incorporated in an offshore jurisdiction, to be wound up in its place of incorporation in order for liquidators to have any prospect of obtaining control of Mainland subsidiaries. If this is a material consideration it would normally be appropriate for the place of incorporation to be the primary insolvency jurisdiction."

62. Harris J at paragraph 32, with years of valuable experience presiding over international insolvency cases, was acutely conscious of and sensitive to comity concerns and added:

"Another consideration is the principles of comity. Generally, the courts of Hong Kong are slow to ignore the express requests of other courts particularly in the present context of a request from the court of the jurisdiction of the company's incorporation. It is but one factor to which regard is to be had. It is, however, a weighty one, which requires careful scrutiny of the reasons advanced by a party asking the Hong Kong court not to comply with a request."

Main reasons for making the winding up order in the Cayman Islands and appointing JOLs

63. Having referred to some of the relevant law, I turn now to my main reasons for making the winding up order in the Cayman Islands and appointing the JOLs.

64. I made a winding up order because the Company was unable to pay its debts.

65. I appointed the JPLs as JOLs as I felt that they were best placed to take matters forward in the best interests of the Company, its creditors and other relevant stakeholders.

66. I took into account the views of the Company's stakeholders and in the interests of comity the views expressed by the Hong Kong Court and the Hong Kong Official Receiver. The directors of the Company, a substantial group of creditors in number and by value and the Investor were all supportive of a winding-up order being made in the Cayman Islands and supportive of the JPLs being appointed as JOLs. I noted carefully the orders made and judgments issued by the Hong Kong Court and I noted that the Hong Kong Official Receiver did not express a view other than to say that the proceedings in Hong Kong and the Cayman Islands were "separate and distinct." There was substantial support for and no opposition to the orders sought by the JPLs on behalf of the Company on 22 February 2022.

67. I also took into account the fact that a winding up order made by the Hong Kong Court would have limited effect on subsidiaries outside Hong Kong and that an order made by a court in the place of incorporation of the Company should be more effective internationally in accordance with well-established principles of private international law. This was another good reason why the Cayman Islands in this case should be the primary jurisdiction in respect of the winding up of the Company.

Comity concerns

68. I subjected Mr Milne to a barrage of questions and requests for further assistance at the hearing as, although I was persuaded that the Company was unable to pay its debts and there was no opposition to the winding up order being made (and due notice had been given of the hearing), I was hesitant to make an order which may appear, at least to some, to be stepping on the toes of Linda Chan J in Hong Kong. The judges in the Cayman Islands take great care to avoid potential conflict with courts in friendly foreign jurisdictions, especially Hong Kong in view of the very strong connections between the two countries and the importance of the legitimate financial business conducted in and from them. It is plainly in the best interests of the Cayman Islands and Hong Kong that such business continues to flourish and that both jurisdictions have a mutual respect for each other.

69. Chief Justice Smellie in *Sun Cheong* referred to comity concerns at page 23 under the heading "URGENCY AND COMITY" and at paragraph 3 indicated that he was providing reasons for orders which he made on 31 July 2020 "not only for the sake of those interested in the Company but also in deference to the Hong Kong Court whose jurisdiction is also engaged."

70. In *Silver Base,* I also referred to and dealt with comity concerns in respect of the Hong Kong Court.

71. Parker J in *Altair Asia Investments Limited* (FSD; unreported judgement 16 March 2020) at paragraph 67 stated:

> "…Comity and cooperation is particularly important in the field of cross-border insolvency and it would not be appropriate for this court to proceed to a judgment on the disputed debt by determining the Petition before Mr Justice Harris has handed down judgment."

72. Segal J in *China Agrotech Holdings Limited (in liquidation)* 2019 (2) CILR 302 at paragraph 68(d) stated:

> "It also seems to me to be right, for the reasons given by Mr Lowe, that there are strong grounds for believing that the risk of inconsistent judgments is low. I am anxious, however, to avoid any discourtesy to or conflict with the Hong Kong court and would, had the Hong Kong court expressed the wish to do so, have been prepared to defer giving judgment pending further discussions between the parties and the courts regarding the need for steps to be taken to coordinate the Cayman and Hong Kong proceedings (I have for some time suggested to the liquidators that consideration be given to court to court communication for this purpose if the need arose)."

73. Kawaley J in *Guoan International Limited* (FSD; unreported judgment reasons delivered 29 October 2021) at paragraph 8 stated, in the particular circumstances of the case before him,:

> "…Having regard to considerations of comity, and the importance of judicial cooperation in commercial matters in the winding-up sphere in particular, I considered this court should not make an immediate winding-up order in circumstances where the Hong Kong Courts might, possibly in relatively short order, suspend and ultimately set aside the judgment upon which the Petitioners relied."

Kawaley J at paragraph 37 added:

> "It is moreover important in the interests of comity, as I observed in the course of argument, that the Cayman Islands courts are astute to avoid accidentally undermining the integrity of parallel or related proceedings before the Hong Kong courts…"

Kawaley J at paragraph 38 referred to the views he expressed in "the course of the hearing about the importance of showing due deference to the Hong Kong Courts in the context of overlapping proceedings."

74. Cayman judges have sensibly had comity concerns at the forefront of their minds when determining issues in proceedings before the Grand Court of the Cayman Islands when there are connected proceedings in foreign friendly jurisdictions such as Hong Kong. I did not want to place the Grand Court of the Cayman Islands in potential conflict with the Hong Kong Court. Having considered the position in detail I concluded, taking into account all relevant factors including the primacy of the place of incorporation, comity concerns, the views of stakeholders, and the lack of opposition, that it was just and appropriate to make the orders which I made on 22 February 2022.

75. It is, of course, entirely a matter for the Hong Kong Court but I express the wish that it gives the JOLs recognition and assistance. On 1 March 2022, I made an order that a letter of request be issued and directed to the Hong Kong Court seeking its assistance in aid of the Grand Court in these proceedings. It was respectfully requested that the Hong Kong Court recognise the order of 22 February 2022 ordering that the Company be wound up and appointing the JOLs.

76. It appears, at least in the first instance, to be a matter for the creditors and contributors as to who shall be appointed liquidators to replace the Hong Kong Official Receiver as provisional liquidator. I would respectfully suggest that it appears, at least to this court, that it may be more effective and efficient and would plainly save time and avoid duplication if the JOLs this court has appointed were also appointed as liquidators in Hong Kong. This, to my mind at least, would appear to be in the best interests of all creditors but at the end of the day it will be a matter for them to vote upon the position as they see fit and subject to any intervention of the Hong Kong Court.

77. Harris J, for good reason, adjourned the convening meeting hearing to 29 March 2022 in Hong Kong and again it will be for the Hong Kong Court to make whatever order it

sees fit on that day but it seems to me that the creditors of the Company, incorporated under the laws of the Cayman Islands, should at least be given an opportunity to vote on the proposed Scheme. Creditors should not be lightly deprived of their vote on the Scheme. Hopefully the court hearing in Hong Kong will go ahead on 29 March 2022 whether in person or remotely and the Scheme Meeting will be convened to ascertain the views of the creditors on the Scheme and in an endeavour to achieve the requisite majority for the approval of the Scheme in the best interests of the creditors.

Three specific areas in respect of the draft order

78. There were three specific areas in respect of the draft order as filed by the attorneys that needed attention:

Firstly, the draft originally at paragraph 4 provided:

> "The Joint Official Liquidators be authorised to exercise powers in accordance with Part I and Part II of Schedule e to the Act."

The Part II powers are exercisable without sanction of the Court. The Part I powers are only exercisable with sanction. Yet again I had to remind local attorneys of the judgment of Jones J in *UCF Fund Limited* 2011 (1) CILR 3015. Normally a court should not give "blanket authority" to exercise powers contained in Part I. An application for sanction needs to be based on specific circumstances or transactions in which the exercise of the relevant power(s) was appropriate and needs to be supported by relevant evidence. It would normally be inappropriate and wrong in principle for the court to authorise a liquidator to exercise all Part I powers as the liquidator saw fit without further reference to the court, simply on the basis that it might become appropriate to exercise such powers.

Secondly, in the specific circumstances of this case I was willing to authorise the JOLs to take such action as may be necessary or desirable to obtain recognition in Hong Kong

and thought it best to include a specific paragraph to this effect as it did not prima facie appear to be covered in the Part II powers.

Thirdly, in the specific circumstances of this case I also concluded that it was appropriate to provide the JOLs with power to authorise the directors of the Company to approve the audited financial results of the Company. The JOLs do not feel able to sign off on the accounts. The directors have the necessary knowledge and information to do that. The sooner they do that the better as it appears necessary to satisfy the SEHK and for the Scheme to progress in the best interests of the creditors.

Conclusion

79. It was for these main reasons that I made the orders which I did on 22 February 2022.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT