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Cayman Islands Restructuring: Getting Oriented With the New Regime – Part II

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On 11 November 2022, Mr Justice Kawaley ordered the first appointment of restructuring officers in *Re Oriente Group Limited* (FSD 231 of 2022) under the new Cayman Islands restructuring regime, with reserved written reasons to follow. On 15 November 2022, we provided a brief update on some of the key takeaways from the hearing, which can be found here. On 8 December 2022, Mr Justice Kawaley handed down a written judgment and we explore the additional points of interest beyond our previous note below.

A selection of our previous articles on the Cayman Islands restructuring regime, which came into effect on 31 August 2022, are at the following links: here, here and here.

Background

On 27 September 2022, Liu Chak Kwan Kelvin and Tsangs Group Holdings Limited, two unsecured creditors (the "Petitioners"), filed a creditor's winding up petition in the Cayman Islands following the issuance and expiry of statutory demands in respect of debts of approximately US$275,000 and US$1,100,000.

Subsequently, on 21 October 2022, the respondent company, Oriente Group Limited (the "Company"), presented a restructuring petition seeking the appointment of restructuring officers in the Cayman Islands. On 11 November 2022, the Company's restructuring petition came on for a hearing.

The day before the hearing, the Petitioners also filed a winding up petition in Hong Kong in breach of the automatic stay imposed by section 91G of the Companies Act (2022 Revision) ("Companies Act") seeking, amongst other things, the winding up of the Company (on substantially similar grounds advanced in the Cayman Islands winding up petition).

Effect of the Automatic Moratorium

As explained in our previous article, a preliminary threshold matter was the statutory construction of section 91G of the Companies Act which provides for an automatic worldwide moratorium upon filing the petition for the appointment of restructuring officers, unless withdrawn or dismissed. This is to be compared with the remedy of presenting a winding up petition and applying for the appointment of provisional liquidators for restructuring purposes under the previous regime, which provided for a stay from the date a provisional liquidator was appointed and/or a winding up order was made under section 97(1) of the Companies Act.

In the *Re Oriente* judgment, Kawaley J commented that the statutory stay on proceedings under Section 91G of the Companies Act: "*might be said to turbo charge the degree of protection filing a restructuring petition affords to the petitioning company…*"

The relevant text provides:

> ***"91G. Stay of proceedings***
>
> *(1) At any time —*
>
> *(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and*
>
> *(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,*
>
> *no suit, action* ***or other proceedings****, other than criminal proceedings,* ***shall be proceeded with or commenced against the company****, no resolution shall be passed for the company to be wound up and* ***no winding up petition***

> ***may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose***.
>
> …
>
> *(3) In this section —*
>
> *(a) references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country; and*
>
> *(b) references to other proceedings include any court supervised insolvency or restructuring proceedings against the company."*
>
> (emphasis added)

The objecting creditors contended that: (a) it was not permissible to present a petition for the appointment of restructuring officers after a winding up petition had been filed and (b) that the stay did not have any impact on extant winding up proceedings.

The Company submitted that there was nothing in the statutory scheme which prohibited the Company from doing so and that the Company's restructuring plan was not an abuse, given that it had the support of at least 46% of creditors by value. The Company further submitted that the automatic stay under section 91G of the Act takes effect from the date of filing and effectively covers both domestic winding up proceedings, such as the Petitioners' extant winding up petition in the Cayman Islands, and also foreign winding up proceedings, including the creditor's winding up petition filed by the Petitioners in Hong Kong the day before the restructuring petition was heard in the Cayman Islands in breach of the automatic stay of proceedings. The Company submitted that it would be possible for the Petitioners to seek leave of the Cayman Court to lift the stay and pursue the winding up petition(s), if appropriate.

Having heard from the parties as to whether the statutory scheme permits a restructuring officer petition to be presented after a creditor's winding up petition is filed, Kawaley J found that following the presentation of a winding up petition against a company there is no prohibition on a company presenting a petition seeking the appointment of restructuring officers and such filing triggering the automatic stay under Section 91G.

However, Kawaley J noted that there was a judicial temptation to "*allow the tail of the past to wag the dog of the present*" by following the pre-existing line of case law, which did not have such a turbo-charged version of the statutory moratorium. Whilst Kawaley J found "*it was easy to accept*" that, if a restructuring petition could be validly presented whilst a winding up petition was extant, this might interfere with existing winding up proceedings, it was difficult to find any literal or contextual support for the proposition for the position adopted by the objecting creditors. The decisive point, in His Lordship's view, was that section 91G of the Act covers not only the commencement of fresh proceedings but that extant proceedings shall not "*be proceeded with*", which would include the Petitioners' winding up petition.

Mr Justice Kawaley was also critical of the fact that the objecting creditors had breached the automatic stay (which included foreign proceedings) by filing a creditors' winding up petition in Hong Kong the day before the Cayman Islands hearing, such that it "*would have been difficult for the Court to hear them or place much reliance on their objections as to the merits of the Petition*".

Continuing Relevance of Pre-existing Case Law

Mr Justice Kawaley indicated that the previous body of case law on light touch or restructuring provisional liquidations under the former rescue regime, would continue to be relevant and persuasive in the context of petitions to appoint restructuring officers.

Kawaley J accepted that both regimes were broadly analogous for two primary reasons.

1. Firstly, the statutory requirements for the appointment of restructuring officers under section 91B(1) of the Companies Act are expressed in broadly similar terms as the grounds for appointing provisional liquidators for restructuring purposes under the provisions section 104(3) of the Companies Act. In other words, both regimes require that an applicant satisfy the court that the relevant company: (i) is or is likely to become unable to pay its debts; and (ii) intends to present a compromise or arrangement to its creditors.
2. Secondly, Mr Justice Kawaley accepted that, in the interests of pragmatism, the cases under the former provisional liquidation regime *"… record valuable judicial and legal experience in essentially the same commercial sphere…"*[1]

Mr Justice Kawaley held that, in particular, *Re Sun Cheong Holdings*[2] was authority as regards the governing legal principles which *"lucidly paints an instructive portrait of the old statutory scheme which applies with equal force to the restructuring officer regime…*" and *Re Midway Resources International*[3] which provides practical guidance as to how to evaluate the evidence relating to a proposed restructuring.

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[1] In reference to a recent speech of Lady Arden in the Cayman Islands: *"Taking stock of recent case law of the Judicial Committee of the Privy Council – its breadth and depth on 25 March 2022".* A copy of our recent article on the role of the Privy Council can be found here.
[2] [2020 (2) CILR 942]
[3] (unreported, 30 March 2020, Segal J)

It is helpful to have early clarification on the breadth of the automatic stay and the relevance of the existing case law. It is clear that the Court is eager to promote consistency and certainty, albeit under a turbo-charged framework. This clarification will be especially important for foreign courts considering whether to recognise and assist Cayman Islands restructuring officers in future.

Key Considerations

Mr Justice Kawaley held that in light of previous cases dealing with the provisional liquidation for restructuring regime (now repealed), *"it may confidently be stated that the jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction…"* to be exercised where the Grand Court is satisfied that:

1. that the statutory precondition of insolvency or likely insolvency of the company is met by credible evidence from the company or some other independent source;

2. the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof 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".*

Advertising

Mr Justice Kawaley allowed dispensation with the formal advertising requirements under the Companies Winding Up Rules 2018 on the basis that the Company had directly notified all unsecured creditors of the petition and its contents together with the hearing date at least 7 calendar days before the hearing. Mr Justice Kawaley accepted that the commercial reality that the actual notice given to each creditor through an emailed circular was in real world terms more effective notice than would have been achieved through strict compliance with the advertising requirements (which required publication in a newspaper).

Comments

This decision represents a useful and interesting development in Cayman Islands jurisprudence under a new statutory regime. However, it will be important to monitor further developments, based on different fact patterns, as more cases are brought before the Cayman Court (and recognition is sought elsewhere) in the ensuing months and years.

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