THE EASTERN CARIBBEAN SUPREME COURT

THE TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2018/0206, 0207,0208,0210,0212

IN THE MATTERS OF CONSTELLATION OVERSEAS LTD.; LONE STAR OFFSHORE LTD.; GOLD STAR EQUITIES LTD.; OLINDA STAR LTD.; SNOVER INTERNATIONAL INC.; AND ALPHA STAR EQUITIES LTD.

AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

[1] CONSTELLATION OVERSEAS LTD.

[2] LONE STAR OFFSHORE LTD.

[3] GOLD STAR EQUITIES LTD.

[4] OLINDA STAR LTD.

[5] SNOVER INTERNATIONAL INC.

[6] ALPHA STAR EQUITIES LTD.

Applicants

Appearances:

Mr David Chivers QC, with him Mr Grant Carrol of Ogier for the applicants
Mr Alex Hall Taylor for the Consenting A/L/B Lenders of Maples and Calder
Ms Rosalind Nicolson for Banco Bradesco S.A of Walkers

2018: December 13, 19
2019: February 5

The Insolvency Act 2003- appointment of provisional liquidators-whether court has jurisdiction to appoint "soft touch" provisional liquidators to support a company's restructuring and reorganization

JUDGMENT

[1] **Adderley, J:** This was an application for the appointment of "soft touch" provisional liquidators over six British Virgin Islands ("**BVI**") registered companies which form a part of a Group of companies. It is believed to be the first application of its kind in the BVI.

[2] On 19 December, 2018, I acceded to the application to appoint "soft touch" joint provisional liquidators ("**JPLs"**) over the companies and to grant a stay of proceedings in respect thereof. I promised to give my reasons later and now do so.

[3] The essence of a "soft touch" provisional liquidation is that a company remains under the day to day control of the directors, but is protected against actions by individual creditors. The purpose is to give the Group the opportunity to restructure its debts, or otherwise achieve a better outcome for creditors than would be achieved by liquidation. It may be appropriate where there is no alleged wrongdoing of the directors.

[4] This application was made in the context of a major cross-border restructuring involving both a Brazilian Judicial Reorganisation and a US Chapter 15 application.

[5] The Applicants to the present Applications were Constellatons Overseas Ltd ("the Company") (a holding company) and the BVI Subsidiaries (certain Drilling Rig-owning entities within the Group). The applicants were seeking orders from this Court to appoint JPLs over each of the applicants in order to allow them to enter into a "soft touch" provisional liquidation in the BVI and thre stay of proceedings against it. The purpose of the appointment of JPLs is to support and facilitate the restructuring of the Group through the RJ, as supported by the Chapter 15 Proceedings in the US. The Company's largest unsecured creditor, Banco Bradesco S.A. (**"Bradesco"**), supports the Company's application for the appointment of JPLs.

[6] In answer to the court's early enquiry counsel made it clear that this was not an application for recognition of an international insolvency or foreign representative under s.457 of the British Virgin Islands' Insolvency Act 2003 ("**IA**"). Therefore the principles of modified universalism discussed in **Rubin v Eurofinance**[1] and in **Cambridge Gas** [2] did not arise with this application. The issue of legislation impliedly excluding the use of common law powers as arose in **Singularis**[3] did not apply either.

[7] The court had raised the issue to assuage its fears that the application might be an attempt to obtain through the back door 'interim relief' under the provision of s 452 of the IA with the remedies afforded under s. 453. Those provisions fall under Part XVIII (Cross Border Insolvency) of the IA which were passed in 2003 by the legislature but for policy or other reasons deliberately not brought into force. Section 452 is predicated on the court recognizing a foreign judgment; this application was not so based.

[8] It was a wholly domestic remedy under the IA based on the common law jurisdiction in the BVI being applied to companies in the BVI in their place of incorporation. That it may assist the ongoing insolvency proceedings in the companies' COMI is a matter which its promoters would have decided before approaching the BVI courts.

[9] The application is a protective measure; the primary reason for making such an application is to ward of predatory creditors who may wish to take satellite ex parte actions against the companies registered in the BVI in an attempt to steal a march on creditors generally. Such attempts have taken place on at least two prior occasions in similar situations in the BVI.

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[1] [2013] 1 AC 236,

[2] Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigation Holdings PLc [2006] UKPC 26

[3] Singularis Holdings Ltd v Pricewaterhouse Coopers [2014] UKPC 36

BACKGROUND

[10] Constellation Oil Services Holding S.A. (Luxembourg) (**"Constellation Holding"**), together with its direct and indirect majority-owned subsidiaries (collectively, **"the Group"**), form an oil and gas drilling business. The Group is experiencing financial distress attributable to the ongoing recession in the oil and gas sector. The effects of this industry-wide downturn have been exacerbated by the recent financial recession in Brazil.

[11] In view of its financial position, and after taking legal advice in the relevant jurisdictions the Group decided to seek the protection of a court-supervised restructuring under the First Business Court of Rio de Janeiro (**"the Brazilian Court"**), facilitated by supporting ancillary proceedings in other jurisdictions. On 6 December 2018 (**"the RJ Petition Date"**) the applicants, along with a group of their affiliates, (together, **"the RJ Debtors"**), filed a petition for a jointly administered *recuperação judicial* (a **"Judicial Reorganisation"**, or **"RJ"**) in the Brazilian Court. The aim of the RJ is to facilitate the agreement and implementation of a plan for restructuring the Group's debt. On the same day, the Brazilian Court entered an order formally accepting the RJ Debtors into the Brazilian RJ Proceedings. The RJ Debtors are presently operating their businesses under the judicial supervision of the Brazilian Court

[12] As the Group has both a complex, integrated, and multinational corporate structure and debt structure, ancillary support from courts in several other jurisdictions (including the BVI) is needed in order for the restructuring under the RJ to be successful. For this reason, shortly after the RJ proceeding was commenced in Brazil, certain companies within the Group, including the applicants, (together, **"the Chapter 15 Debtors")** commenced ancillary proceedings in the US for protection under Chapter 15 of the US Bankruptcy Code (**"the Chapter 15 Proceedings"**), in order to seek the recognition of the RJ as the "*foreign main proceeding*" of each of the Chapter 15 Debtors.

[13] Counsel for the applicants represented that the reorganization is supported by creditors holding over US$ 1 billion of the companies' debt of US$ 1.5 billion. The court acceded to the request of

the applicants to have Mr Alex Hall Taylor and David Welford of Maples and Calder appear at the hearing in support representing a group referred to as the Consenting A/L/B Lenders , a consortium of lenders led by HSBC(USA) NA and Citibank NA who have acted as lenders of the order of US$600 million to various entities within the Group. While reserving all their rights they expressed the view that the Consenting A/L/B Lenders have a significant interest in the solvency, financial position, and restructuring plans of the Group and its underlying entities to which they have lent very substantial funds and to which they intend to lend further funds. Therefore they are very interested in the determination of the applications.

[14] Similarly, Ms Rosalind Nicholson representing Banco Bradesco the single largest creditor of the Group in the sum of about US$152.6 million was in attendance to support the application.

[15] A look at the consolidated balance sheet to September 2018 shows that the company is balance sheet solvent but with approximately only US$100 million cash on hand the Group is not likely to be able to pay its upcoming debts absent a restructuring and so is cash flow insolvent. This is exacerbated by the insolvency event in the loan documents automatically triggered by the commencement of the RJ Proceedings and the Chapter 15 Proceedings.

BACKGROUND

[16] The applicants made a declaration that to the best of the applicants' knowledge, there was no existing arrangement nor proposal for a creditors' arrangement under Part II of the Act, nor any administrator or administrative receiver acting, in relation to any of the applicants in any jurisdiction. They were also not aware of any pending foreign insolvency proceedings against them, other than the Brazilian and US proceedings which they themselves have just initiated along with other entities in the Group, as described below.[4]

[4] As confirmed in relation to: (i) the Company (ii) Snover International Inc. (iii) Lone Star Offshore Ltd. and (iv) the remaining Applicants

Brazilian RJ Proceedings

[17] On 6 December 2018 the RJ Debtors [5] filed the RJ Petition in the Brazilian Court commencing their procedurally joint Judicial Reorganisation. The Brazilian Court's acceptance of the RJ Petition is currently pending.

[18] An RJ is a collective mechanism under Brazilian bankruptcy and restructuring law for adjusting debts under the control and supervision of a competent Brazilian court, and is commenced by debtors filing a petition in the court in the jurisdiction in which the debtors maintain their "*principal estabelecimento*"[6] according to Brazilian law.

[19] The Brazilian Court has jurisdiction to process an RJ of foreign entities, such as the applicants, if Brazil is the "*principal estabelecimento*" of the debtors for the purposes of Brazilian restructuring law. The RJ Debtors have been accepted to undergo a jointly administered RJ

[20] Proceedings and collections of claims against the RJ Debtors are stayed for 180 days from the date of the Brazilian Court formally accepting the debtors into an RJ.

[21] The officers of debtor companies subject to an RJ continue to administer the companies' affairs, acting under the supervision of the court**.**

[22] Creditors are given additional protection throughout the process by provisions in the law which allow for the formation of creditors' committees and the appointment of a Judicial Administrator to oversee the process**.** The procedure requires equal treatment of creditor claims of the same class, absent an economic justification for treating a certain subgroup differently (e.g. payments to critical suppliers, payments to creditors providing additional financing during the RJ).

[5] A full list of the RJ Debtors was provided to the court. All of the Applicants are RJ Debtors.

[6] As noted in the Galdino Affidavits, Brazilian bankruptcy laws employs the concept of "*principal estabelecimento*" (typically translated as "principal place of business", in order to explain this Brazilian concept to a non-Brazilian audience) for the purpose of venue and jurisdiction in an RJ proceeding.

[23] Debtors have a set time period in which to present a plan to their creditors. Following plan submission, a general meeting is held for a creditor vote. The plan is then either approved, "crammed-down" on dissenting classes, or rejected. Approval of a plan requires significant consensus among creditors of each secured and unsecured class.

[24] The Group elected to commence its centralised restructuring in Brazil because Brazil has to date been the operational centre of the Group's business. Brazil is the "*principal estabelecimento*" of the Group for the purposes of Brazilian restructuring law. It is also the "centre of main interests" or "COMI" of each Chapter 15 Debtor for the purposes of US restructuring law (which is relevant because of the Group's New York law-governed debt, and the commencement of the Chapter 15 Proceedings seeking recognition of the RJ for each of the Chapter 15 Debtors, including the applicants). Approximately R$ 5,753,783,237.77 (US$ 1,482,934,061.44) in third-party debt owed by the RJ Debtors collectively will be subject to restructuring in the course of the RJ.

[25] The Group hopes that as a result of the RJ and ancillary proceedings in other jurisdictions (including provisional liquidations in the BVI), it will be able to maintain its operations during the course of its restructuring negotiations, and thereby preserve its value as a going concern for the benefit of creditors and employees as a whole.

[26] In order to ensure that the Group can undergo a globally co-ordinated and centralised restructuring, certain of the RJ Debtors have initiated complementary restructuring proceedings in other relevant jurisdictions: specifically the US and this jurisdiction. These proceedings are necessary because the Group is presently vulnerable to adverse creditor actions. Such adverse creditor action would be to the detriment of the Group's creditors as a whole, and would jeopardise the prospects of success in the RJ.

US Chapter 15 Proceedings

[27] **The Chapter 15 Debtors**[7] have commenced ancillary proceedings in the US to seek recognition of the RJ as the "foreign main proceeding", in order to obtain certain protections from the US

[7] A full list of the Chapter 15 Debtors is provided in the table at Appendix 1 to the appellants' skeleton argument. All of the Applicants are Chapter 15 Debtors.

Bankruptcy Court, Southern District of New York (**"the US Court"**) in support of the RJ. On 6 December 2018 the Chapter 15 Debtors filed a Chapter 15 petition (**"the Chapter 15 Petition"**) under the US Bankruptcy Code in order to commence their Chapter 15 Proceedings

[28] The Chapter 15 Debtors initiated these proceedings in order to seek the protection of the US Court over their assets, property and interests within the US (and also because the vast majority of the Group's debt is governed by New York law). The US Court's determination of the Chapter 15 Petition is currently pending. Temporary injunctive relief (namely, a stay barring the commencement or continuation of actions against the Chapter 15 Debtors or their US property) has been sought pending a hearing of the Chapter 15 Petition.

THE BVI INSOLVENCY LAW ("IA")

[29] A brief summary of the relevant provisions under the IA will place the application in context, and will allow the provisions to be readily compared with the legislation of other jurisdictions to which I shall refer.

[30] By s 159 of the IA the court has the power to appoint a liquidator of a company under s 162. The grounds set forth in s.162 include s 162(1) (a) the company is insolvent, s.162(1)(b) that it is just and equitable that a liquidator should be appointed , and s 162(1)(c) it is in the public interest to do so.

[31] Insolvency is defined in s 8 of the Act. Under s 8(c)(ii) a company is defined as being insolvent if it is unable to pay its debts when they fall due. It is also deemed to be insolvent if it fails to comply with a statutory demand and does not pay or apply under s156 to set it aside within 14 days.

[32] Under s. 162(2) amoung the persons who have standing to apply to appoint a liquidator are the company itself, a creditor or a member, the supervisor of a creditors arrangement, the Financial Services Commission and the Attorney General. There are special provisions governing an application by the latter two and or by a member.

[33] Rule 157 mandates that a sealed copy of the application and supporting affidavit for the appointment of a liquidator "shall" be served on the company 14 days or less after filing, and an affidavit verifying such service be filed.

[34] Under s.165 (1)(b) of the IA the application must be advertised between 7 days or more after service and 7 days or more before the date on which the petition is to be heard. Under Rule 31 advertisement must be in the BVI Gazette (r.31(1) (a)), and in such newspaper or newspapers that the applicant considers most appropriate for ensuring that the application comes to the attention of the creditors or individuals subject to the insolvency proceeding (R 31(1)(b)).

[35] Under s 162(2) if not duly advertised, the court may dismiss the application.

[36] Under Rule 15 the proposed liquidator must give his/her written consent to act, and as the consent is only valid for 6 weeks the written consent cannot be more than six weeks old at the time the court grants the Order. Under section 483 non-resident insolvency practitioners must provide prior written notice the Financial Services Commission.

[37] Under s 168 an application for the appointment of a liquidator must be determined within 6 months from filing failing which it is deemed to be dismissed. The court has a discretion to extend the period for up to three months provided that the application is made before the period expires and the Court is satisfied that special circumstances justify the extension. There is no limitation on the number of times that such an extension can be granted if at the time of the application the court is satisfied that special circumstances exist to grant an extension.

[38] After hearing the application the court has power to "make any interim order or other order that it deems fit". Section 167 lists the orders that can be made:

> "On the hearing of an application for the appointment of a liquidator, the Court may-
>
> (a) appoint a liquidator under section 159(1);
>
> (b) dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved;
>
> (c) adjourn the hearing conditionally or unconditionally; or

(d) make any interim or other order that it considers fit"

Appointment Provisional liquidators

[39] Section 170 under which a provisional liquidator is appointed and s174 under which certain consequential remedies may be applied for by the applicant are not freestanding. In each case application for the appointment of a liquidator must first have been made and not yet determined or withdrawn.

[40] Section 170 of the IA provides for the appointment of provisional liquidators as follows:

> "(1) Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, the court may, on application of a person specified in subsection (2) appoint …and eligible insolvency practitioner as provisional liquidator of the company on the grounds specified in subsection (4)."(underline added)

[41] Subsection (2) lists, the company among those having standing to apply. Two of the grounds specified in subsection (4) of section 170 on which the court would appoint a provisional liquidator include: if the company consents, and the Court is satisfied that the appointment is necessary for the purpose of maintaining the value of the assets owned or managed by the company. There is also a public interest ground on which a provisional liquidator may be appointed that is not germane to this case.

[42] Under s170(2) a creditor can apply to terminate the appointment of the provisional liquidation.

[43] Pursuant to section 170(4) of the Act, the Court has the power to appoint JPLs on "*such terms as it considers fit*". Section 171(1) further provides that JPLs have *"the rights and powers of a liquidator to the extent necessary to maintain the value of the assets owned or managed by the company or to carry out the functions for which [they were] appointed*". The Court has the power under section

170(2) of the Act to further limit the powers of JPLs in such manner and at such times as it considers fit.

[44] The jurisdiction of the court exercised under statutory provisions has been considered in a number of jurisdictions and certain principles have emerged.

ENGLAND

[45] The legislative provisions setting out the ability of the English courts to appoint JPLs are contained in section 135 of the Insolvency Act 1986. This section provides that:

> (1) Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.
>
> (2) In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order, and either the official receiver or any other fit person may be appointed.
>
> (3) The provisional liquidator shall carry out such functions as the court may confer on him.
>
> (4) When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him."

[46] **Palmer's Company Law**[8] describes section 135 of the Insolvency Act 1986 as conferring "*a general power which the court will exercise on the basis of the view it takes of the requirements in the case before it*".

[47] Further, section 130(2) of the Insolvency Act 1986 provides that: "*When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose*"

[8] Morse, Geoffrey snf Worthington, Sarah, eds. (2018) Palmer's Company Law. Sweet & Maxwell, London, UK, Sections 15.290 and 15.295

[48] There are a number of English authorities which lend support to a court order appointing JPLs over the Applicants in order to enable a court-supervised restructuring process to take place. The development of this practice is described in **Palmer's Company Law** in the following manner:

> "*The latent potential of provisional liquidation to serve as a vehicle for resolving the financial affairs of insolvent companies has been increasingly explored in recent years. The relative speed with which the procedure can be initiated, combined with the benefits of an automatic moratorium in relation to the company's affairs and property, can in certain cases be utilised to facilitate the rescue of a financially troubled company where such alternatives as administration or administrative receivership may not be available. Provisional liquidators can be appointed with wide powers and duties which transcend the function of merely maintaining the assets for the benefit of creditors pending a winding up. If they are successful in restoring the company to viability, the order of appointment can be discharged and no winding up need take place. The courts have been supportive of such creative use of the procedure, and have been prepared to adapt other principles of insolvency law to meet the needs of emerging practice*."

[49] The flexibility of the ability of the English courts to appoint JPLs is consistently emphasised in the English authorities.

[50] In **MHMH Ltd and others v Carwood Barker Holdings Ltd** [2004] EWHC 3174 (Ch**)**, Evans-Lombe J observed that "*one thing*" that emerges from the English and Commonwealth authorities "*is the flexibility of the remedy for the appointment of provisional liquidators of companies*".

[51] Sir Robert Megarry V-C in **Re Highfield Commodities Ltd (1984)** 1 B.C.C. 99277; [1985] 1 W.L.R. 149 said that:

> "… *section 238* [the predecessor to section 135 of the Insolvency Act 1986] *is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences*."

[52] The practice seems to have had particular attraction for insurance companies to whom administration under Part II of the Insolvency Act 1986 did not apply (see **Re English and American Insurance Co Ltd** [1994] 1 BCLC 649 and **Re Hawk Insurance** [2001] 2 BCLC 480**.** In **Smith & Ors v UIC Insurance Co Ltd** [2001] B.C.C. 11; [2000] All ER (D) 33. His Honour Judge Dean QC acknowledged the wide range of purposes for which JPLs can be appointed:

> "i. *Historically, the appointment of a provisional liquidator was by way of a temporary and very often urgent appointment for the purpose of preserving the assets, for the purposes of preserving priorities of creditors pending the completion of the winding-up proceedings. The effect of the appointment is immediately to prevent parties commencing or continuing proceedings against the company or its property with the leave of the court …*
>
> *ii. It appears, however … that the appointment of a provisional liquidator can be used for far wider purposes … in the case particularly of insurance companies the procedure of appointing a provisional liquidator is frequently, if not inevitably, made not for the purpose of safeguarding rival priorities or protecting assets in a pending full blown liquidation, but in order to enable a form of administration of the company with a view to resolving the financial difficulties, not necessarily by a winding up but by a scheme of arrangement under s. 425 of the Companies Act 1985.*"

[53] However, the practice was not confined to insurance companies, and extended to others that were not eligible for administration.

[54] Harman J discussed and acknowledged the "*developing practice of the court of using a petition by the company for its own winding up as a basis for the appointment of provisional liquidators*", and said that this was "*a practice which several Chancery judges have dealt with and approved of*" (**Re English & American Insurance Co Ltd** [1994] 1 BCLC 649**.** He summarised the breadth of the grounds on which the English Court is able to appoint JPLs. In **Re Andrew Weir Insurance Company Limited** (1992, High Court, unreported judgment**).** He said this:

> "[p.2] Traditionally, provisional liquidators have usually been appointed in cases where it was thought by the petitioning creditor, frequently the Crown, that there was a real risk of the assets of the company being dissipated or for there to be some form of jeopardy to assets or risk of improper dealing with assets. Nothing of that sort whatever arises in this case. However, the power in the Court to appoint liquidators provisionally, as the Act puts it under Section 135, is in entirely general terms: "The court may" (plainly creating a judicial discretion) "at any time after the presentation of a winding up petition appoint a liquidator provisionally."
>
> There is no sort of suggestion in the Statute that it is only in cases where there is jeopardy to assets or impropriety of some sort that the court should make such an appointment (p. 2)…
>
> [p.3] I believe that there is a tendency to appoint provisional liquidators nowadays in cases where there are no suggestions of misfeasance or wrong-doing by the directors. I have myself made such appointments in other cases."

[55] Although analogies are sometimes inappropriate in law, the learned Judge's comments can be applied by analogy to the legislative provisions which govern the appointment of JPLs in the BVI, as they are phrased in similarly broad terms:

Burden of Proof

[56] The Court does not have to be satisfied that a restructuring will occur. That could only be known after the vote. The cases seem to require only that there was at least "*some prospect"* of promoting a restructuring (see **Re Esal (Commodities) Ltd** [1985] BCLC 450 and **Re ARM Asset Backed Securities** [2013] BCC 252 per Richards J.

[57] A company's own application for the appointment of JPLs has always been treated more favourably than that of a creditor (see **Re London, Hamburg and Continental Exchange** [1866] 2 LR Eq 231 and **Re Club Mediterranean Pty Ltd** [1975] 1 ACL 36]). A distinction has always been drawn historically between applications to appoint JPLs which are made by a company itself and those which are made by a company's creditors. If the company itself makes, consents to, or is

shown not to oppose the application, "*the appointment is almost a matter of course …* " (see **Palmer's Company Law** referred to in **Re Union Accident Insurance Co Ltd** [1972] All ER 1105).

Foreign Restructuring

[58] Further, **Palmer's Company Law** contains an express discussion of "*the potential for deployment of* [the provisional liquidation procedure] *in support of foreign proceedings directed at procuring the rescue of a company*" The commentary refers to the case of **Re Daewoo Motor Co Ltd** (2001, High Court, unreported judgment, Lightman J) which is summarised as follows:

> "*In that case, a Korean company had been placed under the control of a court-appointed receiver in its country of incorporation. The receiver anticipated that there was a risk creditors might seek to seize the company's English assets* […] *By presenting a winding up petition in the name of the company, coupled with an application for appointment of provisional liquidators, the receiver was able to establish the necessary conditions for concluding an orderly disposal of the assets under the protective mantle of the automatic stay. Subsequently, the provisional liquidators obtained an order from the English court authorizing them to remit the proceedings of realization to the receiver in Korea, to be administered for the benefit of all creditors including those from England itself*."[9]

[59] **Lightman & Moss*, The Law of Administrators and Receivers of Companies (6th ed.)*[10]** summarises the position under English law as follows:

> "*The traditional aim and purpose of the appointment [of JPLs] was usually to secure the assets of the company so that they may be available for equal distribution to creditors. Accordingly, obvious insolvency and jeopardy to assets are reasons for an appointment, but not the only reasons … The avoidance of a scramble by*

[9] While this case itself was unreported, in the subsequent related case of ***Daewoo Motor Co. Ltd. v Stormglaze UK Ltd*. [2005] EWHC 2799 (Ch)** Lewison J confirmed that "*The provisional liquidators were appointed by an order of Mr. Justice Lightman essentially to assist the Korean receiver*".

[10] Fletcher, I. F., Lightman, G., & Moss, G.S. (2012). London:Sweet & Maxwell. Sections 2-053

creditors for assets and the protection of the assets pending the putting forward of a Companies Act scheme of arrangement have also been accepted as good reasons for the appointment of provisional liquidators."

[60] Accordingly, there is persuasive authority in England for using the Court's statutory powers flexibly in support of restructuring in general, including a foreign restructuring process. The practice in the English courts of using provisional liquidations in aid of corporate rescues has also been used, adapted and built upon by the courts of the Cayman Islands and Bermuda, who each now have a well-established practice of appointing JPLs in aid of cross-border corporate rescues.

[61] A few examples will suffice.

THE CAYMAN ISLANDS

[62] At all material times until 1 March 2009, when the Companies (Amendment) Law, 2007 (Commencement Order , 2009) was brought into force section 99 of The Companies Law in Cayman did not contain an express provision that JPLs could be appointed for the purposes of aiding a restructuring. It simply provided that:

"*the Court may, at any time after the presentation of a petition for winding up a Company under this law, and before making an order for winding up the Company, upon the application of the Company, or of any creditor or contributor of the Company, restrain further proceedings in any action, suit or proceeding against the Company upon such terms as the Court thinks fit; and the court may also, at any time after the presentation of such petition and before the first appointment of liquidators appoint provisionally an official liquidator of the estate and effects of the company*".

[63] While this provision was phrased in general terms, and did not expressly state that JPLs could be appointed for the purposes of aiding a restructuring, the provision was used to appoint JPLs for these purposes in **Re Fruit of the Loom Ltd.** ([2000] CILR, Note 7b; unreported **)**

[64] The practice of appointing JPLs upon the application of a company in aid of a company presenting a compromise or arrangement to its creditors was then codified in 2007.[11] Section 104 of the Companies Law (as amended) which provides…

> "i. *the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally".*
>
> Section 104(3) provides:
>
> a. *"*An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that- (a) the company is likely to become unable to pay its debts within the meaning of section 93; and (b) the company intends to present a compromise or arrangement to its creditors".

[65] Further, section 96 of the Companies Law (as amended) provides that:

> *"At any time after the presentation of a winding up petition and before a winding up order has been made, the company and any creditor or contributory may –*
>
> *where any action or proceeding against the company … is pending in a summary court, the Court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and*
>
> 1. *where an action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein,*
>
> ii. *and the court to which the application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit".*

[11] Pursuant to The Companies (Amendment) Law 2007 (Law 15 of 2007). This Act repealed, *inter alia*, section 99 of the previous Companies Law, and replaced it with *inter alia* section 104 of the current Act.

[66] This provision to stay proceedings is in similar terms to s 170(4) of the IA.

[67] The decision to appoint JPLs in aid of a refinancing in **Re Fruit of the Loom Ltd** was made before the provision to appoint JPLs for such purposes had been codified, and is therefore analogous to the current legal position in the BVI. In that case the holding company for an international group sought the appointment of JPLs in order to assist a refinancing of its assets. The court approved the refinancing package, appointed JPLs to oversee the company's business and the refinancing procedure under the control of the board and supervision of the Court; and granted an injunction restraining proceedings against the company.[12] In considering whether the appointment of the JPLs should continue, Smellie CJ held applying the dicta of Harman J in **Re English & American Insurance Co Ltd** that since there were no specific statutory powers enabling the Cayman courts to make administration orders over companies, the court could use its wide discretion under section 99 of the Companies Law to allow a company to restructure and refinance itself for the benefit of creditors and shareholders.

[68] He also opined on the principles that should govern whether the appointment of the JPLs should be continued as follows:

1. The JPLs should be satisfied that the refinancing and/or sale of the business as a going concern was likely to be more beneficial to creditors than a liquidation of the company's assets and a rateable distribution to creditors;

2. there must be a real prospect of a refinancing and/or sale as a going concern being effected for the benefit of the general body of creditors;

3. Achieving such a refinancing and/or sale as a going concern should be in the best interests of creditors and shareholders in the circumstances; and

4. The Court will be astute to ensure that its orders are not abused by a company which is hopelessly insolvent being allowed to continue to trade.

[12] The decision to appoint JPLs was made during a previous unreported hearing, but the nature of the application and the decision were discussed in Smellie CJ's later judgment concerning whether or not the appointment of JPLs should continue.

[69] There have been other appointments of “soft touch” provisional liquidators since then in the Cayman Islands including, amoung others, **Re Trident Microsystems (Far East) Limited** [2012] (1) CLR 424, **Re Mongolian Mining Corporation (**2016, Grand Court of the Cayman Islands, court order, McMillan J**)**[13]**,** and **Re China Agrotech Holdings Limited (2017, Grand Court of the Cayman Islands,** unreported **,** per Segal J**).**

BERMUDA

[70] There are several judgments from the Bermudan courts considering and endorsing the use of "soft touch" provisional liquidations in order to assist with global restructurings.

[71] The statutory powers of the Bermudan courts to appoint JPLs are contained in section 170 of the Companies Act 1981 as follows:

> "(1) For the purpose of conducting proceedings in winding up a company and performing such duties in reference thereto as the Court may impose, the Court may appoint a liquidator or liquidators.
>
> (2) The Court may on the presentation of a winding up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person.
>
> (3) When the Court appoints a provisional liquidator, the Court may limit his powers by the order appointing him."

[72] Further, section 167(4) of the Companies Act 1981 provides:

> "When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose".

[13] There was no reported judgment of the decision to appoint the JPLs, but the Applicants had obtained a copy of the court's order appointing the JPLs.

[73] The case law foundation for the Bermudan courts' provisional liquidation restructuring jurisdiction was laid in the case of **Re ICO Global Communications (Holdings) Limited** 1999] Bda L.R. 69.[14] A Bermudan company applied for JPLs to be appointed over itself on the same day as it filed for Chapter 11 protection in the US in order to allow it to consider a refinancing or reorganisation. The court granted the company's application. Ward CJ (as he then was) was required to consider whether the initial appointment of JPLs should be continued. In his judgment the Judge considered the initial appointment, and endorsed the practice of appointing JPLs in aid of restructurings and stated (p.2, ¶6):

> "An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) Rules 1982 to make such an Order. Under it the directors of the company remained in office with continuing management powers subject to the supervision of the joint provisional liquidators and of the Bermuda Court…"

[74] **Discover Reinsurance Company v PEG Reinsurance Company Limited [2006]** Bda L.R. 88 concerned an initial appointment of JPLs by the court upon the application of a creditor of a Bermudan company,[15] which the company subsequently sought to have discharged. In the judgment Kawaley J considered in detail the principles governing the appointment of JPLs in Bermuda. In my judgment the following passages (at p.5, ¶19) are of particular germane:

> "i. The use of provisional liquidation to facilitate a restructuring has not always occurred in clear cases of insolvency. It has often been utilized when companies are in what has been referred to as the "zone of insolvency". Be that as it may, the Bermuda model of restructuring provisional liquidation has often kept the pre-existing management in place, and merely given the provisional liquidators "soft" monitoring powers. In theory, these

[14] The original judgment in which JPLs were appointed over the company was not reported, but one of the issues before Ward CJ in **Re ICO Global Communications (Holdings) Limited [1999] Bda L.R. 69** was whether the appointment of the JPLs that had already been appointed should be continued. It was in this context that the Judge discussed the original appointment of the JPLs, and endorsed the practice of appointing JPLs in aid of restructurings.

[15] The initial application for the appointment of JPLs was not reported.

monitoring powers are designed to reassure both creditors and the Court that assets are not dissipated, on the implicit assumption that the management that has run the company into difficulties can hardly be trusted to have the creditors' best interests at heart…."

[75] In **Up Energy Development Group Limited** [2016] SC (Bda) 83 (2016, Supreme Court of Bermuda, unreported**)** a creditor of a Bermudan company that held underlying assets in China and Canada sought the appointment of "soft touch" JPLs over a Bermudan debtor company in order to oversee a debt restructuring that was being negotiated by the company. The application was opposed by the Bermudan debtor company. Kawaley J expressed the view:

"*The established practice of this Court in appointing JPLs to supervise a de facto debtor-in-possession restructuring has typically arisen in the context of winding-up petitions presented by the company*" (at ¶11). This supports the ability of the Applicants to seek the appointment of JPLs over themselves.

"*Further, given the evidence concerning the likely favourable return to creditors if a restructuring can be achieved, and the role the JPLs would play in protecting creditor interests during negotiations, it is also difficult to see how the Applications could reasonably be opposed by creditor interests*."

"*In summary, the Court has a broad discretionary jurisdiction to appoint JPLs before a winding-up order is made."* (at ¶14).

[76] The powers of this Court are similarly broad.

[77] In **Re Seadrill Limited & others [2018] SC (Bda) 30 Com (5 April 2018)** three Bermudan companies within an offshore drilling group commenced Chapter 11 proceedings in the US in order to facilitate a group restructuring. The restructuring was required in order to address liquidity challenges resulting from the downturn in the oil and gas industry. The original decision to appoint JPLs over the companies was not reported, but in a later decision granting recognition of the Chapter 11 plan and permanently staying all claims against the companies Kawaley CJ Commented that:

"*When a Bermudian company is placed into provisional liquidation for the purposes of pursuing an insolvent restructuring, this Court makes three central interlocutory findings:*

1. *a prima facie case for winding-up has been made out on the grounds of insolvency;*
2. *the creditors have displaced the shareholders as the key stakeholders in the company; and*
3. *an arguable case that a restructuring is where the best interests of the creditors lie have been made out*" (¶19).

[78] He also confirmed that these findings had underpinned the original order appointing the JPLs (¶20).

HONG KONG

[79] The powers and jurisdiction of the courts of Hong Kong to appoint JPLs are contained in section 192 and following sections of the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). Section 192 provides that: "*For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with sections 193 and 194*". Section 193 prescribes the jurisdictional conditions for the exercise of this power.

[80] The decision of the Hong Kong Court of Appeal in **Re Legend International Resorts Limited** [2006] 2 HKLRD 192 cast doubt upon the Hong Kong courts' ability to appoint JPLs in aid of a restructuring. In his judgment, Rogers VP speaking for the panel (Rogers, LePichon JJA) said that based upon the wording of section 192 and the following sections, the appointment of JPLs must be for the primary purpose of a winding up "*not for the purposes of avoiding the winding-up*" (¶35 – 36).

[80] The extent of the principle established by the decision has been ameliorated to some extent by the recent decision of **Re China Solar Energy Holdings Limited [2018]** HKCFI 555. The court held

that JPLs may pursue a corporate restructuring, provided they have originally been appointed on conventional grounds such as a need to preserve company assets against creditor actions.

THE BAHAMAS

[81] In The Bahamas, the common law position has been codified into statute. Under **The companies (Winding Up Amendment) Act, 2011** section 199(3) a company may, as in the Cayman Islands under their 2009 Act, seek the appointment of JPLs on the grounds that the company is, or is likely to become, unable to pay its debts, and intends to present a compromise or arrangement to its creditors. It reads as follows:

> "(3) an application for the appointment of a provisional liquidator may be made under subsection(1) at any time after the presentation of a winding up petition but before the making of a winding up order by the company ex parte on the grounds that-
> the company is or is likely to become unable to pay its debts within the meaning of section 188; and
> (b) the company intends to present a compromise or arrangement to its creditors"

THE CURRENT APPLICATION

[82] The applications to appoint liquidators were filed after the boards of directors of each of the applicants resolved to appoint Mr Paul Pretlove and Ms Eleanor Fisher as JPLs and/or liquidators. A separate Fixed Form R14 was filed electronically on 7 December 2017 by each company stating its intention to apply for an order under s 162(1)(a) of the IA for Joint Liquidators to be appointed over each of the applicants, and of their intention to appoint Eleanor Fisher of Kalo (Cayman Limited) and Paul Pretlove of Kalo (BVI) Limited as such liquidators. As explained earlier the ground relied on under Section 162(1)(a) was that the company is insolvent. The meaning of 'insolvent' is set out in s 8. For present purposes section 8(1)(c) applies, namely, either the value of the company's liabilities exceeds it assets, or the company is unable to pay its debts as they fall due. Ms Eleanor Fischer is a non-resident insolvency practitioner and so prior written notification was given to the FSC as required by section 483 of the IA. Each of the proposed JPLs has given consent to act.

[83] As mentioned in paragraph 15 above, the Report of Alvarez and Marshall which was in evidence shows that as of 30 September 2018 the companies were balance sheet solvent but that absent a restructuring, they are prima facie cash flow insolvent and would not have sufficient cash to meet upcoming financial debt obligations. If the companies were to default on certain debt obligations this would trigger additional defaults due to the default provisions in certain finance documents. Therefore there is a prima facie case for appointing a liquidator.

[84] Self-evidently because the companies themselves are the applicants they have consented as required by s 170(4)(a), and likewise there is no requirement to serve notice on the companies pursuant to Rule 157. After consideration of extensive business and financial evidence the court was satisfied that the appointments were necessary for the purpose of maintaining the value of the assets owned or managed by the companies, and aiding their possible reorganization.

[85] Since the hearing date has not yet been set prima facie there is no requirement to advertise pursuant to s165(1)(b) either. However, in the interest of all the creditors as well as to put potential investors on notice I order that notice of the appointments be provided by placing an advertisement in the BVI Gazette as soon as reasonably practicable.

[86] There is evidence of a real prospect of restructuring. The restructuring involves releases of some security to facilitate cash flow and injection of further cash by bondholders. With the requirement for a 50% majority of creditors' approval, the **RJ** has a realistic chance of success. The US court on 10 December granted a moratorium and the effective hearing will be on 15 February 2019.

[87] The Houlihan Report in evidence before the court showed that realization of assets for the company as a going concern is significantly better than a company in liquidation. There is a US$700 million difference between the breakup value and the company as a going concern, and therefore the appointment of a provisional liquidator is very germane to allowing the going concern value to be maintained for the benefit of the creditors as a whole.

[88] The court noted that both Mr Pretlove and Ms Fisher are a highly experienced restructuring experts. This is a relevant consideration to the appointment of "soft touch" provisional liquidators, and the court took it into account consideration.

[89] I adopt the opinions of general principle relating to the flexibility of the court and the principles to be applied in appointing provisional liquidators expressed by Smellie, CJ in **Re Fruit of the Loom**, Kawaley, J in **Discovery Reinsurance** and **Re Seadrill** and Ward CJ in **ICO Global** all of which themselves were anchored in the persuasive English authorities cited. In summary, on principle the court has a very wide common law jurisdiction to appoint provisional liquidators to preserve and protect the assets owned or managed by the Company, and that the jurisdiction includes making such appointments to aid the company's reorganization including cooperating with cross border reorganizational efforts aimed at achieving that overriding objective. While it is not always good to rely on analogies, having regard to the authorities mentioned the court was of the view that jurisdiction with a similar wide discretion exists under s 170 of the IA. It would allow this Court to co-operate with the Brazilian and US Courts; would not destroy the rights of the applicants' creditors; and would have the benefit of allowing the Court oversight of the Group's restructuring process for the benefit of the creditors as a whole. Schemes of Arrangement are not alien to the laws of the BVI being allowed under s178 of the Business Companies Act 2005 albeit in the context of voluntary liquidations.

[90] The Hong Kong Case of **Re Legend International Resorts Limited** [2006] 2 HKLRD 192 where in his judgment, Rogers VP opined that the appointment of JPLs must be for the purposes of a winding up "*not for the purposes of avoiding the winding-up*" can be distinguished. Under s 167(1)(b) of the IA on hearing a liquidation application the court can dismiss the application even if a ground on which the Court could appoint a liquidator has been proved. From this it appears that the legislature did not intend that the application for the appointment of a liquidatior was necessarily for the purpose of winding up the company.

[91] For all the above reasons I was satisfied that the court had jurisdiction to appoint the JLPs for the intended purpose and that this was a proper case in which to do so. I therefore acceded to the application and approved the appointment of Paul Pretlove and Eleanor Fisher as joint Provisional Liquidators of the applicants with the powers set out in the draft order. The JLPs shall deliver regularly but at least every 60 days to the court a confidential Report on the progress of the RJ Brazilian proceedings and the Chapter 15 Proceedings with the purpose of informing the court of the prospects and likely timing of successfully concluding the pending reorganization and restructuring. The court will be alive to the need that as officers of the court the JLPs will preserve

and not facilitate any dissipation or misuse of the assets of the companies to the detriment of creditors or facilitate mismanagement on the part of directors.

[92] In order to promote the orderly administration of the estate the JLPs may enter into protocols with the directors. In addition as there are parallel cross-border insolvency proceedings taking place, the JLPs should consider whether it is in the interest of the estate to enter into protocols for cross boarder cooperation within the framework of the Judicial Insolvency Network's (JIN) Guidelines for Communication and Cooperation between Courts in Cross Border Insolvency Matters which is a template to help parties customize communication and cooperation agreement for individual cross-border restructuring and insolvency cases. These Guidelines were adopted by the BVI under the Insolvency Rules on 15 May, 2017 by the Chief Justice's Practice Direction 8, No 2 of 2017 under the Insolvency Rules.

[93] Under the IA there is no automatic moratorium upon filing of an application for the appointment of a liquidator; an application must be made. Section 174(1) of the Act, which governs the Court's power to stay or restrain proceedings when an application for the appointment of a liquidator has been made, provides that:

> "Where an application for the appointment of a liquidator of a company has been filed but not yet determined or withdrawn, a person specified in section 170(2) [the applicant for the appointment of a liquidator, the company, a creditor, a member, the commission or any person entitled to apply for the appointment of a liquidator] may,
>
> iii. where any action or proceeding is pending against the company in the Court, the Court of Appeal or the Privy Council, apply to the Court, the Court of Appeal or the Privy Council, as the case may be, for a stay of the action or proceeding; and
>
> iv. where any action or proceeding is pending against the company in any other Virgin Islands court or tribunal in the Virgin Islands, apply to the Court for a stay of the action or proceeding".

[94] As part of this application the applicants sought a stay under s.174(1). I granted that stay in the form of the draft Order.

[95] I wish to thank counsel who acted for the applicants for the industry and research in preparing their skeleton arguments from which I lifted certain pertinent parts verbatim. The fact that I did not refer to all of authorities mentioned does not mean that I did not review them.

The Hon K. Neville Adderley
Commercial Court Judge (Ag)

By The Court

Registrar