IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 240 of 2023 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF AUBIT INTERNATIONAL

Before:	Justice David Doyle
Appearances:	Sarah Dobbyn and Cameron Thomson of Sinclairs attorneys for Aubit International Erik Bodden and Alecia Johns of Conyers Dill & Pearman LLP attorneys for LedgerScore Pte Ltd, LS Litigation Holdings LLC and Earn Guild Pte Ltd
Heard:	6 September 2023
Date of Decision:	6 September 2023
Draft Reasons Circulated:	2 October 2023
Reasons delivered:	4 October 2023

HEADNOTE

Dismissal of petition for the appointment of restructuring officers pursuant to section 91B of the Companies Act (2023 Revision) – need to produce a rational and credible restructuring plan, even if only provided in outline – there must be a real prospect that the restructuring plan, with reasonable prospects of success, will be effected for the benefit of the general body of creditors – a two-phase approach of firstly gathering in assets, documentation and information, commencing legal proceedings for recovery of the same if necessary and undertaking forensic investigations and then presenting a restructuring plan many months or some years later will not usually be appropriate – observations as to the jurisdiction and discretion of the Court under section 91B

INDEX

JUDGMENT

Introduction

1. On 6 September 2023 after considering all relevant documentation and hearing oral submissions I dismissed a petition for the appointment of restructuring officers ("ROs") and provided brief reasons. I indicated I would provide detailed reasons in due course which I now do.

2. In this matter Aubit International (the "Company") presented a petition dated 23 August 2023 (the "Petition") pursuant to section 91B of the Companies Act (2023 Revision) (the "Act") seeking the appointment of two individuals of Grant Thornton Specialist Services (Cayman) Limited as ROs of the Company. Sarah Dobbyn and Cameron Thomson of Sinclairs are the attorneys for the Company. At paragraph 17 of their concise written submissions dated 30 August 2023 they said that "the Company's only creditor in the Cayman Islands is the law firm Sinclairs (which is intimately familiar with the Petition)". At paragraph 4 of the written submissions they rightly confessed that:

> "The Company's restructuring is unusual, if not unique, since it needs to take place in two phases: first, an asset and information gathering phase in order to be able to formulate the terms of recovery or restructuring plan, followed by a more typical restructuring phase once the exact financial position of the Company and its potential asset recoveries have been ascertained."

3. On 4 September 2023, two days before the hearing, Conyers Dill & Pearman LLP provided notice (the "Notice of Appearance") that LedgerScore Pte. Ltd., LS Litigation Holdings LLC and Earn Guild Pte Ltd described as creditors to whom the Company owes US$6,324.901.77 "intend to appear on the hearing of the petition to support the appointment of a restructuring officer to [the Company] and to oppose the appointment of Margot MacInnis and John Royle of Grant Thornton Specialist Services (Cayman) Limited … as restructuring officers." At that stage no alternative nominees were proposed. Such notice did not comply with Order 1A rule 3 (3) of the Companies Winding Up Rules (2023 Consolidation).

4. Sadie Hutton says that she is a director, Chief Executive Officer and founding shareholder of the Company and is authorised by the Board of Directors of the Company to make her affidavits on its behalf. In her second affidavit sworn on 30 August 2023 for the first time she refers to the "Atypical Nature of the Proposed Restructuring". This was not highlighted in her first affidavit sworn on 24 August 2023. She puts no meat on the bones of the proposed restructuring plan in either of her two affidavits. At paragraph 8 of her second affidavit she states her belief that "the typical nature of a restructuring or scheme of arrangements involves a Company which has a known, quantified amount of assets which are insufficient to pay all its liabilities, and seeks either (a) a breathing space to trade through its difficulties to arrive at a better financial outcome for all creditors through a recovery plan being agreed with creditors; or alternatively, (b) to come to some negotiated consensual arrangement or formal scheme of arrangement with creditors/stakeholders to restructure the Company's financial indebtedness".

At paragraph 9 of her second affidavit she adds:

> "The Company's restructuring is atypical in that it will need to be conducted in two distinct phases: first, an asset and information gathering phase in order to be able to formulate the terms (sic) a recovery or restructuring plan, followed by a more typical restructuring phase once the exact financial position of the Company and its potential asset recoveries are known."

Grounds of the Petition

5. At paragraph 52 of the Petition it is stated that the Company seeks the appointment of ROs on the grounds that the Company:

> "a. is presently unable to pay its debts due to the unexplained delay or alternatively, refusal by Ardu Prime to release any of the approximately US$60.4 million in fiat currencies and cryptocurrencies (as at 31 May 2023) held in the Company's brokerage accounts in Greece, and for this reason is insolvent within the meaning of section 93 of the Act; and

b. intends to present a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act, or alternatively to present a consensual restructuring plan once all available assets have been recovered by the Restructuring Officers from the Company's accounts at Ardu Prime, to allow time for the Company's new business opportunities to generate sufficient income for all creditors to be paid in full; and

c. intends to present a related compromise or arrangement under the laws of the Republic of Seychelles to the creditors and other interested parties of Freeway (as the Company's majority creditor), or alternatively, to present a consensual restructuring plan once all available assets have been recovered by the Restructuring Officers from the Company's accounts at Ardu Prime, to allow the Company's new business opportunities to generate sufficient income to repay Freeway as its major creditor, so in turn Freeway's creditors may be paid in full as well as to fund Freeway's capital requirements to recommence the buyback of Freeway's Supercharger digital simulation products and related accrued rewards on such products."

The Petition and the affidavit evidence in support

6. The following further information is taken from the Petition. I am conscious that I have not heard from any of the entities against which the Company makes serious allegations in the Petition. I did however briefly hear from the entities specified in the Notice of Appearance.

7. The Company was incorporated under the laws of the Cayman Islands as an exempted company on 21 March 2019 and its registered office is located at Sinclair Corporate Services Ltd in George Town, Grand Cayman.

8. The Company says that AIP Management ("AIP") is "affiliated with the Company". Freeway Operations Inc ("Freeway") is a wholly owned subsidiary of AIP and was incorporated in the Republic of Seychelles on 27 January 2021.

9. Freeway is stated at paragraph 5 of the Petition to be "the Company's majority creditor with a debt or alternatively a potential claim, of up to US$122 million in relation to funds transferred to the

Company acting as investment manager for investment between March 2021 and October 2022. The Freeway indebtedness or potential claims includes significant personal investments made by the founders, management and staff of the Company as well as their respective friends and families and other affiliated entities in Freeway's "*Supercharger*" digital networked products …"

10. Freeway operated as "an online business, operating a retail, gamified trading platform of virtual simulations demonstrated in various currencies called "Superchargers"" (paragraph 10 of the Petition).

11. Between March 2021 and 13 October 2022 Freeway's income from Supercharger purchases and Freeway Token ("FWT") staking amounted to US$252,481.265. Freeway also "redeemed and bought back a total of US$102,237,140 in Superchargers … The cash amount of "rewards" taken out by the platform by its users … prior to 12 October 2022 amounted to US$11,953,393." (paragraph 14 of the Petition).

12. The proceeds of sales of Freeway's Superchargers and FWT were transferred to the Company's regulated brokerage accounts at Ardu Prime Investments SA incorporated and registered under the laws of Greece ("Ardu Prime").

13. On 17 October 2022 Freeway suspended all buy-backs of Superchargers (paragraph 16 of the Petition).

14. It is stated that "as interested parties in Freeway … Supercharger and FWT holders' views are to be ascertained and taken into account whether by means of a formal Scheme of Arrangement in the Republic of Seychelles or other consensual restructuring in parallel with the Company's own restructuring plan" (paragraph 17 of the Petition). No details are given as to the proposed restructuring in the Seychelles and counsel for the Company stated that no legal proceedings had been commenced in the Seychelles in respect of any proposed restructuring.

15. On 4 January 2021 the Company agreed to Ardu Prime's terms and conditions for regulated brokerage services and opened brokerage accounts. Clause 28 refers to Greece as the relevant law and jurisdiction.

16. On 19 March 2021 the Company and Ardu Prime signed an Acknowledgement of Understanding which contemplated a form of joint venture cooperation. On 11 August 2021 the parties entered

into a Strategic Cooperation Agreement. There is reference in clause 10 to the governing law being English and at clause 11 the parties submit to the exclusive jurisdiction of the English courts.

17. On 13 June 2022 the Company agreed a US$40 million credit line a term of which was that the Company was not permitted to "remove or withdraw the equivalent value in assets (i.e. US$40 million) from its Ardu Prime accounts." (paragraph 31 of the Petition). The credit line and restrictions were subsequently increased to US$50 million on 22 July 2022 (paragraph 33 of the Petition) and US$60 million on 14 August 2022 (paragraph 34 of the Petition).

18. On 13 October 2022 the Company's management was informed that the Company had suffered "an unrealised loss of US$70 million" (paragraph 35 of the Petition). On the same day the Company agreed a new credit line of US$130 million and the prohibition on "the withdrawal or removal of all assets from the Company's brokerage accounts at Ardu Prime, since all assets were held as collateral." (paragraph 36 of the Petition).

19. On 22 or 23 December 2022 the Company agreed to reduce the credit line from US$130 million to US$70 million on the condition that "the $70 million of credit would be tradeable" (paragraph 37 of the Petition).

20. In order to, amongst other things, ascertain the causes and quantum of the significant losses incurred in the Ardu Prime accounts on 13 October 2022 the Company engaged an FX Expert (unnamed in the Petition but in the evidence referred to as Paul Allmark) in late October 2022. The FX Expert produced an interim findings report in November 2022, a draft interim report in January 2023 and further draft reports in April and August 2023. It is stated that the FX Expert has been hindered in completing his investigations and forensic analysis by lack of access to relevant documentation. The preliminary conclusions of the FX Expert include references to a "reconcilable loss of US$22,106,000 in the timeframe to 13 October 2022" and "More than US$60 million in losses reported by Ardu Prime cannot be verified or accounted for in the available trading reports and data", "the Company had no need for *any* credit line of US$40 million in June 2022 …". The "necessity of further credit lines … is also doubtful, and appears to have been a tactic by which Ardu Prime sought (and still seeks) to prevent the Company from removing its assets from the brokerage accounts." (paragraph 44 of the Petition).

21. Paragraph 45 of the Petition perhaps reveals the main thinking behind the somewhat unusual relief requested at paragraph 57-59 of the Petition. Paragraph 45 states:

"The preliminary findings and draft reports of the FX Expert show a compelling need for Restructuring Officers, as independent insolvency practitioners and officers of the court, to undertake their own forensic investigations into all activities relating to the Company's brokerage accounts at Ardu Prime, and to report to the Court their findings as to the causes and quantum of the losses on the said brokerage accounts."

22. The Company is concerned that an individual (who it describes as Anthony Constantinou a.k.a. Anthony Kent) who it says was convicted on 9 June 2023 of "defrauding investors in a London FX investment firm, Capital World Markets of GBP 50 million by operating a ponzi scheme" (paragraph 48 of the Petition) was a key individual "with a significant influence over operations at Ardu up to the recent past" (an email dated 13 June 2023 from Sadie Hutton, wrongly described in paragraph 49 of the Petition as a letter dated 14 June 2023 from "the Company's management").

23. Paragraph 51 of the Petition also perhaps reveals the main motivation behind the relief sought in that it refers to the need for further "forensic investigations":

"Anthony Constantinou's involvement with Ardu Prime and ClearTech gives rise to a compelling need for Restructuring Officers, as independent insolvency practitioners and officers of the court, to undertake their own forensic investigations into all activities relating to the Company's brokerage accounts at Ardu Prime, and to report to the Court their findings as to any involvement, activities or dealings of the convicted fraudster, Anthony Constantinou (a.k.a Anthony Kent) in relation to the said brokerage accounts."

24. In fairness, I should record that at paragraph 50 of the Petition there is reference to an email dated 15 June 2023 from Sotiris Botsios, stated elsewhere to be "shareholder/owner of ClearTech Industries DMCC" ("ClearTech") where it is stated that:

"No one other than myself and our employees have access to any part of the technology and software we own. Also every aspect of the business is managed internally. No other person has any influence or control."

25. Sadie Hutton in her second affidavit at paragraph 6 (v) refers to information which she says "provide[s] the overall context for the concerns the Board now have about the close involvement of Anthony with both Ardu Prime and ClearTech" and adds:

> "This is one of the main reasons for the Company's request that if the Court appoints Restructuring Officers as sought, they should have the power to undertake a full investigation into the Company's activities and all dealings with Ardu Prime and ClearTech and all transactions on the Company's brokerage accounts at Ardu Prime."

26. At paragraph 6 (viii) Sadie Hutton adds:

> "The appointment of Restructuring Officers will allow the actual truth of the Company's business dealings and the causes of the losses in its Ardu Prime brokerage accounts to be thoroughly investigated and reported to the Court …"

27. At paragraph 40 she says that: "One key role for the Restructuring Officers if appointed, will be to terminate the unwanted credit line (which in any event will expire on 20 October 2023 … investigate whether such credit lines were ever needed or indeed traded for the benefit of the Company."

28. At paragraph 42 she says that the close involvement of Anthony Constantinou "needs thorough investigation by independent Restructuring Officers as experienced insolvency professionals and officers of the Court."

29. At paragraph 43 she refers to adverse comments from online commentators alleging that the Company/Freeway must have been operating "a scam" adding:

> "The Board would welcome a thorough independent investigation by Restructuring Officers, so such rumours and speculative gossip (directed in particular to the Board and management of the Company and Freeway) may be quashed, and the truth about any losses suffered by the Company in its brokerage accounts may be reported to the Court …"

30. Sadie Hutton at paragraph 44 asks the Court to confer on the ROs "the power to investigate the causes of any or all losses on the Company's brokerage accounts at Ardu Prime and to investigate generally the business, dealings, finances and affairs of the Company."

31. It appears that the main thrust of the Petition was to obtain the appointment of ROs for them to undertake an investigation on behalf of the Company.

32. At paragraph 55 of the Petition the Company says that it is working with "independent professional advisors to formulate the potential terms of a restructuring with the intention of presenting a compromise or arrangement to its creditors (or classes thereof) pursuant to section 86 and/or section 91I of the Act or the Law of a foreign country, by way of a consensual restructuring."

33. At paragraph 56 of the Petition the Company says that it also is also working with its independent advisors including Appleby as its legal counsel in the Republic of Seychelles "in order to formulate the potential terms of a restructuring of Freeway, as an affiliate and major creditor of the Company, with the intention of presenting a compromise or arrangement to Freeway's creditors (or classes thereof) and interested parties such as Supercharger holders FWT holders, pursuant to section 211 of the International Business Companies Act of the Republic of Seychelles or by way of a consensual restructuring."

34. Paragraphs 57-59 seek unusual relief in the context of a petition for the appointment of ROs.

35. At paragraph 57 of the Petition the Company requests that a power to recover all assets of the Company is conferred on the proposed ROs and for that purpose they be authorised to take all such proceedings as they consider necessary.

36. At paragraph 58 of the Petition the Company requests that a power be conferred on the proposed ROs to take all necessary steps to take possession of, collect and get in documents, reports, brokerage statements, daily trading reports and any other accounting records, data and information and for that purpose to take all such proceedings as they consider necessary.

37. At paragraph 59 of the Petition the Company requests that a power be conferred on the proposed ROs to take all steps necessary to investigate the causes of any and all losses on the Company's brokerage accounts at Ardu Prime Investment Services SA and to investigate generally the business

dealings, finances and affairs of the Company and to analyse all documentation and data recovered as part of such investigation and for that purpose to engage the services of an FX algorithmic expert or other advisors and to take all such proceedings as the ROs consider necessary.

38. Sadie Hutton at paragraph 16 of her first affidavit states:

> "... of course the Board recognises that it made a poor choice in service provider when choosing to pursue a form of joint venture cooperation with Ardu Prime, and its affiliate ClearTech..."

39. I noted the recent evidence provided in respect of creditor support.

40. I record that I considered all the affidavit evidence presented to the Court in respect of the Petition.

Submissions

41. I record that in addition to the oral submissions I also considered:

(1) the written submissions of the Company dated 30 August 2023;
(2) the written submissions dated 5 September 2023 of those specified in the Notice of Appearance referred to below; and
(3) the additional written submissions of the Company dated 6 September 2023 and filed by email on the day of the hearing at 9.41a.m.

The position of the Company

42. In its initial written submissions dated 30 August 2023 the Company submitted that it was insolvent in that it was unable to pay its debts. It was further submitted that an outline of a restructuring plan had been provided.

43. The Company's position was that it had been significantly hindered in its efforts to develop the terms of a restructuring with its creditors as there was missing information and documentation and this is why the matter had to proceed in two phases and "this is why the second phase of the proposed restructuring will focus on the development of such plan" (paragraph 13 of the Company's written submissions).

44. In its additional written submissions filed at 9.41a.m. on the morning of the hearing the Company only devoted 4 lines in 12 pages in answer to its question "Should an order be made appointing restructuring officers." It simply stated that it was common ground between the Company and the entities specified in the Notice of Appearance that ROs should be appointed, and it was submitted that "the Court should make an order appointing restructuring officers." (paragraph 28)

45. In Sarah Dobbyn's oral submissions on behalf of the Company the following points, amongst others, were made (some in response to questions from the bench):

(1) the Company is unable to pay its debts and therefore the first ground is satisfied;

(2) it is accepted that the Company has not started legal proceedings against Ardu Prime but it intends to do so;

(3) the largest creditor is Freeway;

(4) the best estimate of the management of the Company is that in a liquidation scenario no creditor could expect better than something in the region of 40 to 45% of any claims in a liquidation. Ms Dobbyn referred to no evidence in support of this submission;

(5) in respect of the second hurdle all that the Company has to satisfy the Court upon is that it simply has an intention to present a restructuring plan or arrangement;

(6) most companies when presenting restructuring plans know the launching point, in this case the Company "does not know where it is at";

(7) Ardu Prime are uncooperative at the moment and the appointment of ROs will facilitate obtaining information from them;

(8) the petition is not premature as the only other alternative would be to present a winding-up petition. The binary options are a winding up or a restructuring. Kawaley J in his "very helpful decision in setting out the legal landscape" in *Re Oriente* teaches us that we must look at the best interests of the creditors as a whole including Freeway which is the largest creditor in this case. In a liquidation scenario the branding, the goodwill, the intellectual

property "everything becomes tarnished." Everything that is valuable is destroyed. Maximum 40% recovery and minimum 60% complete loss. There are 126 letters of support from creditors (including management connected creditors) and those who are beneficially interested in recoveries because they are Freeway Supercharger holders;

(9) Looking at the case law it starts with *ICU Communications* in respect of the provisional liquidation statutory framework and then *Fruit of the Loom*. There was a dual nature of provisional liquidations including the need for investigations in for example misfeasance cases and also the need to restructure to live to trade another day. The Court should take into account the common history of this new statutory restructuring regime and the history of provisional liquidations in the Cayman Islands. The Court should "take the current framework of legislation into an additional dimension.";

(10) Under section 91B(4) of the Act the Court may confer on the ROs broad functions and powers necessary to accomplish the Company's intention of presenting a restructuring plan. Order 1A rule 6(3)(j) provides that the Court may also make orders and directions for "such other matters as the Court thinks fit". The Court could exercise its discretion and give the ROs a broad range of powers where the finalisation of a restructuring plan is being hindered by an absence of information. It is realistically accepted that in this case the Order sought would be in "the widest scope of powers that any Court has ordered to date". No Order has previously been made that includes the wide relief claimed in this case. The Order in *Oriente* at paragraph 3.14 however gave the ROs power to take such steps as they may consider necessary or appropriate in respect of any and all proceedings to which the Company is a party including but not limited to the proceedings for winding up in the Cayman Islands and Hong Kong and the arbitration in Hong Kong. If there is power to continue existing proceedings there should, in principle, be no lesser scope for a power to commence litigation. There is no judgment on the website in respect of *Carbon Holdings* but in that case it is apparent from the petition that an Order was sought that the ROs have power to request and receive from third parties documents and information concerning the company and its promotion;

(11) the key part of phase one could be concluded "by the end of the year";

(12) no legal proceedings have been commenced in the Seychelles to progress a restructuring;

(13) in respect of the 127 letters from creditors in support, the first ten or so are from creditors of the Company and all the remaining 116 letters are from clients or "interested parties" who are Supercharger holders;

(14) there is no evidence that the creditors of the Company have been presented with the very outline restructuring plan and the reason is "those same creditors are … I don't say the word "insider", sounds pejorative, but they are team members. They are the ones who are working with the management to create this. The other largest creditors apart from Freeway are also the management, it is Graham Doggart and Sadie Hutton, and Peter Neilson ... They are otherwise the largest creditors of this Company and it would be somewhat self-serving for the management …". Sinclairs are an independent creditor. The main creditors are internal creditors;

(15) in respect of management creditors' views the Court should attach weight to them as they have bothered to write letters and invited the Court to appoint ROs. There are no letters from a single creditor or contingent creditor saying "We do not want a restructuring";

(16) it is difficult to begin the process of fully engaging with creditors when you have only got half the pieces of the jigsaw puzzle. The problem is it is a Catch 22 situation. The appointment of ROs will massively expedite and facilitate the gathering in of the missing jigsaw puzzle pieces. The jigsaw will be completed in three months. The additional authority of ROs will make a big difference;

(17) if further consultation with creditors is necessary the Court could grant an adjournment;

(18) the Court has a broad and flexible discretion to facilitate the rescue of a company if such would be for the benefit of those having a financial interest in the company to be restructured;

(19) in respect of the moratorium it only applies unless the Court orders otherwise;

(20) the key factor is that one has to be mindful of the nature of the Company's business. "This is a new world.", "It's very unique and a new paradigm. It's the new world."; and

(21) there is no dispute that the Company is insolvent and has been unable to pay its debts since June 2023 when Ardu Prime stopped releasing any funds from the accounts and the Company does intend to present a restructuring. The very outlined plan is "more outline than normal." There are two phases but they can run "to some extent in parallel." The Company may not have the complete jigsaw puzzle by the end of the year but it will have the key features of the jigsaw. The key data and key information about its assets will be provided "pretty quickly" if ROs with wide powers are appointed. The creditors support the appointment of ROs and a restructuring will be more beneficial than a winding up. The statutory limb in respect of a restructuring being effected for the general body of creditors "is not at the moment capable of being fully satisfied". The wide powers sought are "just at the furthest reaches of the scope of powers" that may be granted but the Court should grant them in this case.

The position of those specified in the Notice of Appearance

46. In Nathan Christian's affidavit reference was made to the claim filed by LedgerScore Pte Ltd ("LedgerScore") stated to be a creditor in the sum of US$3,205,276.96, and LS Litigation Holdings LLC stated to be a creditor in the sum of US$50,000 by way of assignment of part of Ledger Score's claim in the District Court of Wyoming on 3 August. The claim alleges that the Company and others orchestrated an investment scam by which investors were wrongly fleeced of over US$160 million under false pretences.

47. It is stated that Earn Guild Pte Ltd's current balance at "Aubit/Freeway's online customer portal [is] …" USD 3,119,624.81.

48. At paragraph 40 Nathan Christian says that the appointment of restructuring officers of their choice is also supported by "a group of stakeholders who are collectively creditors of the Company in the amount of approximately US$20m." Jordan McErlean of Conyers in an affidavit sworn on "5 September 2022" (I assume that is an error for 2023) exhibits the letters of support at pages 1-76 of JM-1 (paginated pages 462-537).

49. At paragraph 5 of the written submissions of these three entities dated 5 September 2023 from Erik Bodden and Alecia Johns of Conyers it is stated that "it is critically important that independent

officeholders are appointed to the Company without delay, and that they are granted full powers to investigate and take control of the affairs of the Company." At paragraph 7 they add:

> "The Creditors are not in a position to assess the feasibility of any plans which are being explored in the Cayman Islands and/or elsewhere. As far as the Creditors have seen, there is very little detail or substance included with the Company's application."

50. At paragraph 9 they add:

> "... provided that independent officeholders are appointed as a matter of urgency and stakeholders' interests are protected by an order granting any such officeholders extensive powers, the Creditors do not wish to focus on technical defects or the Company's motivations at this stage. Further, the Creditors are open to exploring in the first instance whether a compromise can be reached regarding their outstanding debts. They are therefore in agreement with the appointment of restructuring officers in furtherance of that purpose."

51. At paragraph 26 they state:

> "Further, given the matters set out in the RO Petition, it is probable that this matter may transition into Provisional or Official Liquidation in due course if a compromise cannot be reached ..."

52. Conyers in a letter dated 4 September 2023 to Sinclairs state "... our clients agree with the Company's position, as pleaded in the Petition, that there is a need for investigation and that the Company is, or likely to become, insolvent."

53. Sinclairs' response of 5 September 2023 makes reference to the section 91G moratorium and declines to provide copies of the first and second affidavits of Sadie Hutton.

54. Nathan Christian at paragraph 41of his first affidavit stated:

> "As set out above, the Creditors' present agreement to the appointment of Restructuring Officers is entirely without prejudice to their right to later seek to wind up the Company if

so advised. The Creditors agree to the need for the appointment of independent officeholders as soon as possible with full powers to investigate and take control of the Company's affairs (we note the wide powers included in the RO Petition to this effect). The Creditors are also open to exploring in the first instance whether a compromise can be reached regarding their outstanding debts."

55. In his oral submissions, and having heard my exchanges with counsel for the Company, Erik Bodden (counsel for those specified in the Notice of Appearance) accepted that the approach of the Company in this case, which in effect was seeking to add a preliminary stage to the new statutory regime, was not a proper use of section 91B of the Act. In particular the 2-stage approach was not contemplated by the Act or the Rules.

56. Mr Bodden submitted that the directors had known of substantial losses for a long time. The Company's business is in "new territory" and the directors do not know where the money is and they know the Company is insolvent. They now seek full investigative powers to be given to ROs. They say they need that before they can put forward a restructuring plan and during the entire period the Company would benefit from a moratorium with the board still in place.

57. Mr Bodden attractively submitted that you have to have your restructuring house in order before you even consider filing the petition for the appointment of ROs. You have to have consulted with the creditors. The whole purpose of the regime is to come to a compromise with creditors. The moratorium kicks in immediately as the petition is filed and that can be susceptible to abuse.

Law and procedure

58. I now turn to the relevant law and procedure.

Section 91B

59. Section 91B (1) of the Act provides that:

> "A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company –

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring."

60. Section 93 of the Act provides:

> "Definition of inability to pay debts 93. A company shall be deemed to be unable to pay its debts if — (a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor; (b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

61. Under section 91B (4) of the Act a restructuring officer appointed by the Court shall have the powers and carry out only the functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the Company. Under section 91C (5) (b) of the Act the Court shall set out in the order "the manner and extent to which the powers and functions of the restructuring officer shall effect and modify the powers and functions of the board of directors." Section 91C (5) (c) of the Act also requires the Court to set out in the order "any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions."

The Rules

62. Under Order 1A rule 1 (5) of the Companies Winding Up Rules (2023 Consolidation) (the "Rules") any advertisements shall be made to appear not less than 7 business days after the petition for the appointment of a RO is filed in Court and not less than 7 business days before the hearing date.

63. Under Order 1A rule 1 (6) of the Rules unless the Court otherwise directs, the petition for the appointment of a RO will be heard within 21 days of the petition being filed in Court.

64. Under Order 1A rule 1 (8) of the Rules every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

65. Order Rule 1A rule 2 (1) of the Rules specifies the information which must be contained in the petition.

66. Order 1A rule 2 (2) of the Rules requires the petition to be supported by an affidavit sworn by or on the authority of the company's board containing certain specified information including:

(1) a statement that, having made due enquiry and taken appropriate advice, the company's board of directors believe that the company is or is likely to become unable to pay its debts within the meaning of section 93 and the reasons for their stated belief (O1A rule 2(2)(b));

(2) a statement of the company's financial position, specifying to the best of the directors' belief details of the company's assets and liabilities, including contingent and prospective liabilities and an explanation of how the company will be funded in the event and during the period of the RO's appointment (O1A rule 2(2)(c)); and

(3) a statement of the reasons why the company's directors believe that the appointment of a RO and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof) (O1A rule 2 (2)(e)).

67. Under Order 1A rule 3(1) of the Rules every person who intends to appear and be heard on the hearing of a petition for the appointment of a RO shall give 3 days' notice of that person's intention in accordance with the requirements of the Rule. Rule 3(2) provides that the notice shall be in

CWR Form 4A and should specify certain matters detailed at (a)-(e). Rule 3(3) provides that if a party intends to oppose the appointment of the petitioner's nominee that person must (a) nominate an alternative qualified insolvency practitioner who is willing to act as RO if so appointed by the Court; (b) file a supporting affidavit; (c) serve a notice of appearance and support affidavit upon (i) the company, (ii) the petitioner's attorney and (iii) in the event that the company is carrying on a regulated business, the Cayman Islands Monetary Authority (the "Authority") not less than 3 days before the hearing date.

68. Under Order 1A rule 6 (1) of the Rules it is provided that every order for the appointment of a RO made on the application of the company "shall be in CWR Form No 8A." It is important in the context of the case before the Court to note that CWR Form 8A makes no reference to powers being given to the ROs to collect in assets and documents of the company and undertaking a forensic investigation. There is reference to the ROs preparing a report about the financial condition of the company and preparing and advising upon a scheme of arrangement or other proposal in respect of the company's indebtedness. There is also reference to a provision in respect of the scope of the powers which the directors are authorised to continue to exercise. There is reference to provisions in respect of a further hearing for the purpose of the Court assessing the progress made by the restructuring officers with respect to any compromise or arrangement.

69. Under O1A rule 6 (2) of the Rules the Order shall state:

(a) the full name, address and contact details of the RO;
(b) the powers and functions of the restructuring officer; and
(c) the manner and extent to which the powers and functions of the RO shall affect and modify the powers and functions of the board of directors in relation to the exercise of its powers.

70. Order 1A rule 6 (3) of the Rules provides that the Court may also make orders and directions in respect of certain specified matters including at (j) such other matters as the Court thinks fit.

71. Order 1A rule 8 of the Rules places an obligation on the RO, unless the Court orders otherwise, to send a report to every creditor and contributory of the company and where appropriate to the

Authority within 28 days of that RO's appointment. Under Order 1A rule 8 (2) of the Rules and subject to any order of the Court to the contrary the report must include details of:

(a) the steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;
(b) the financial position of the company at the latest practicable date;
(c) the work done by or on behalf of the RO and the amount of remuneration claimed by the RO;
(d) such other information which is required in order to provide the contributories and creditors (and, where the company is carrying on a regulated business, the Authority) with a proper understanding of the company's affairs, financial position and proposed restructuring; and
(e) such other matters as the Court may direct.

Some earlier cases on Cayman corporate restructurings

72. I provide below a review of some earlier cases on Cayman corporate restructurings. These earlier cases assist in informing the Court as to the proper approach to be taken in respect of the determination of applications for the appointment of ROs.

ICO Global (Kipling Douglas J)

73. The petition of ICO Global Communications (Operations) Limited ("ICO") was dated 27 August 1999 and indicated that on the same day it filed "under chapter 11 of title 11 of the U.S. Bankruptcy Code" to allow it "to consider a refinancing/reorganisation which would result in the Company continuing business." (paragraph 7 of the petition). ICO stated that "in order to assist the refinancing/reorganisation process, it would be in the Company's interests to file a petition for winding up in the Cayman Islands (the place of incorporation of the Company), and to seek the appointment of provisional liquidators and an injunction restraining any and all proceedings against the Company pursuant to section 99 of the Companies Law." (paragraph 8 of the petition). It was noted that there had been success in negotiating a deferment of payment to suppliers but there was a liability in respect of interest payable to bondholders. It was further stated that the Company "is not presently solvent and is unable to pay its debts." (paragraph 9 of the petition). The board of directors considered that ICO needed a period of time to "ascertain whether further financing is available with a view to moving forward to profitability" and in the event that it was not and that

any proposed reorganisation was not successful "ICO will seek a winding-up order on the basis that it is unable to pay its debts." (paragraph 13 of the petition).

74. The Order made on 27 August 1999 (the same day the petition was presented) by Kipling Douglas J, appointed joint provisional liquidators ("JPLs") with powers:

(1) to oversee the continuation of the business of ICO under the control of the board of directors and under the supervision of the courts in the Cayman Islands and the US Bankruptcy Court for the District of Delaware in the United States of America;

(2) to oversee and otherwise liaise with the board of directors in effecting a reorganisation/refinancing of ICO under the supervision of the courts;

(3) to assist ICO as a debtor in possession in the strategy of the Chapter 11 reorganisation;

(4) to consult with ICO regarding the strategy of the Chapter 11 reorganisation;

(5) to receive notices and to be heard on the Chapter 11 case;

(6) to be consulted prior to and have the powers to authorise (i) the disposition of any significant asset of ICO (ii) the incurrence of indebtedness and (iii) the filing of any plan of reorganisation in the Chapter 11 case;

(7) to provide written reports to the Court on the process of the Chapter 11 case;

(8) to retain lawyers;

(9) to render and pay invoices out of the assets of ICO;

(10) to draft any appropriate scheme of arrangement;

(11) if appropriate to seek the assistance of the High Court in England and Wales under the provisions of section 426 of the Insolvency Act 1986; and

(12) to seek to enter into any protocols deemed appropriate for the coordination of legal proceedings and the restructuring of ICO.

75. The Order also refers to sections 99 and 156 of the Companies Law. It provides that the JPLs "will have no general or additional powers or duties with respect to the property or records of" ICO and "the board of directors of the Company shall continue to manage the Company's affairs in all respects". The JPLs were given power to report to the Court if they considered at any time that the board of directors was not acting in the best interests of ICO. ICO was required to provide the JPLs with such information as they may reasonably require and the JPLs were at liberty to submit bills of costs for taxation to the Court. Finally it was ordered that the costs of the petition be paid out of the assets of ICO on a solicitor and own-client basis.

76. No judgment appears to be available.

Fruit of the Loom (Smellie CJ as he then was)

77. Former Chief Justice Smellie in his reasons delivered on 30 October 2000 in *Fruit of the Loom Ltd (in provisional liquidation)* 2000 CILR N-7 referred to the relevant company, which was incorporated in the Cayman Islands, filing for protection under Chapter 11 of Title 11 of the United States Bankruptcy Code to enable the company to continue its business. The company obtained advice that in order to assist the refinancing process it would be in its best interests to file a petition for winding up in the Cayman Islands and to seek the appointment of provisional liquidators and an injunction restraining any and all proceedings against the company pursuant to section 99 of the Companies Law (1998 Revision). The objective was for the group to emerge with a "fresh start" and continue to operate as a going concern. On 30 December 1999 the Grand Court (Graham J) made orders appointing JPLs and vesting them with various powers including (a) to oversee the continuation of the business of the company under the control of the company's directors (b) to oversee and liaise with the directors in effecting a refinancing (c) to provide written reports in respect of the refinancing and (d) if appropriate to prepare and present to the Court for approval a draft scheme of arrangement with the company's creditors to give effect to a refinancing. If these objectives failed the company could be wound up. There had been various adjournments and copies of reports prepared for creditors had been filed with the Court. The former Chief Justice referred to the Court's powers under section 99 of the Companies Law stating:

"This is not the first case in which these powers have been invoked by this Court. Similar orders were made in The Matter of ICO Global Communications (Operations) Limited to allow that Cayman Islands company during provisional liquidation a moratorium on enforcement procedures to be able to refinance and restructure its financial affairs. (See Cause 508 of 1999; Order made on the 27th August 1999)."

78. Former Chief Justice Smellie added at pages 7-8 of his reasons:

"The discretionary power vested in the Court by section 99 of the Companies Law is very wide. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors prior interests, the benefit of shareholders."

79. The former Chief Justice at page 8 felt that it was possible to use "the flexible discretionary power" to "enable the rescue of a company where it is just to do so." He prayed in aid the English first instance authority of *Re English & American Insurance Co Ltd* [1994] 1 BCLC 649 and Harman J's comment at page 650 that it was a "good system" particularly in cases where "there is a hope that in the future there will be a scheme of arrangement."

80. Former Chief Justice Smellie, in a balanced approach, at page 9 added:

"It must be in the nature of the discretion to be exercised that the Court will be concerned to ensure that the protective orders are not abused by a company which is hopelessly insolvent to be allowed to continue to trade."

81. On the evidence before him former Chief Justice Smellie felt that the financial position of the group appeared "to be improving. It is currently the JPLs' view that the creditors' position is being enhanced in the arrangements for refinancing now underway. Liquidation outright is not now indicated to be the advisable route."

82. The former Chief Justice referred to a "three stage test":

(1) the JPLs should be satisfied that a refinancing and/or sale of the business as a going concern is likely to be more beneficial to the creditors than a liquidation realisation of the assets;

(2) there is a real prospect of a refinancing and/or sale as a going concern being effected for the benefit of the general body of the creditors;

(3) that in all the circumstances it is in the best interest of the creditors to try and achieve such a refinancing and/or sale as a going concern.

CW Group (Parker J)

83. In *CW Group Holdings Ltd* (FSD unreported judgment 3 August 2018) Parker J dealt with submissions of counsel in respect of section 104 (3) of the Companies Law pursuant to which a provisional liquidator could be appointed on the grounds that (a) the company is or is likely to become unable to pay its debts and (b) the company intends to present a compromise or arrangements to its creditors. At paragraph 35 Parker J recorded a submission of counsel that "the language of subsection 3(b) only requires that the company 'intends' to present a compromise arrangement to its creditors, not that it has done so, or will do so in the immediate future." Counsel argued that the rationale for that language was to give effect to the practice which had developed of appointing provisional liquidators to provide companies with "breathing space" before the actions of creditors, acting in their own interests, might interfere with its attempts to reach a consensual restructuring or if that should prove not to be possible a scheme of arrangement. Reference was made to *Fruit of the Loom* as "an early example."

84. Parker J in *CW Group* at paragraph 70 accepted counsel's "submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the company …"

85. Parker J at paragraph 74 noted that there had "already been some engagement with creditors with a view to developing the terms of a proposed restructuring. The board wishes to work with restructuring professionals, who, as I say, could importantly also be independent officers of this

Court, to pursue a proposed restructuring which would be likely to involve parallel schemes of arrangement in due course …"

86. At paragraph 76 Parker J on the facts before him felt that to allow the company to continue as a going concern and to have the best opportunity to secure a favourable restructuring was "in the best interests of the body of general creditors as a whole" adding at paragraph 77 that a winding up "is likely to have an adverse impact on the business: on contractual and other relationships; future trading prospects; market reputation and position, and regulatory relationships, all of which would adversely affect the value of the company." At paragraph 78 Parker J referred to the board "with professional advice" warning of a materially worse outcome if there was an insolvent liquidation.

ACL Asean Tower (Kawaley J)

87. In *ACL Asean Tower Holdco Limited* (FSD unreported reasons for decision delivered 8 March 2019) Kawaley J dealt with a winding-up petition and a request to adjourn to explore a restructuring. In that case Ms Dobbyn of Sinclairs appeared for Messrs Kabbani, Al-Ken and Darwish, creditors. JPLs had been appointed and they were "charged with reporting to the Court at the next hearing of the Petition on whether or not the best interests of creditors would be served by pursuing a restructuring in provisional liquidation rather than immediately winding up the Company" (paragraph 5). The JPLs reported with the view that a restructuring of the company's financial obligations within the provisional liquidation was no longer "a viable course of action and recommend that the Company be placed into official liquidation at the earliest opportunity" (paragraph 7). The majority directors and "three past or present directors" opposed the petition and the majority shareholder sought an adjournment. The adjournment was refused and a winding-up order was granted (paragraph 9). Kawaley J in his summary reasons felt that there was no "sufficiently cogent justification for granting the adjournment sought." He felt that the critical question was where do the interest of the unsecured creditors "who do not have any other significant interests which might impact on the position they adopt" lie. Kawaley J felt that the majority shareholder who was also a secured creditor had "commercial interest that is likely to colour the position." (paragraph 10). At paragraph 14 Kawaley J referred to "an important underlying theme of insolvency law" namely "that the wishes of creditors are relevant to any decision this Court may make about the administration of an insolvent company."

88. Kawaley J dealt with an argument that "it is commonplace for winding-up petitions to be adjourned to facilitate restructurings." At paragraph 18 Kawaley J referred to the judgment of Park J in *Re Lummus Agricultural Services Ltd* [2001] 1 BCLC 137 where he brushed aside the opposition of a Mr Koshy, a director of the company and a majority shareholder, and four other creditors to a winding-up order, stating at page 143 d-e:

> "three of the four opposing creditors are associated companies … The fourth are auditors, who are in any event creditors only for a small amount. It would be different if they were independent outside creditors, but, given that they are not, I do not think that their opposition to the petition adds anything much to the opposition of Mr Koshy himself …"

89. At paragraph 19 Kawaley J referred to the argument "that no weight should as a matter of principle ordinarily be given to the views of parties connected to a Company who oppose a winding-up order."

90. Kawaley J at paragraph 21 noted that it was unprecedented for "a common law court to adjourn a winding-up petition to permit the company's management to initially explore the possibility of hypothetical restructuring" in circumstances where JPLs had (a) carried out a preliminary assessment of restructuring prospects and (b) had advised the Court that a winding-up order should be made immediately.

91. Kawaley J at paragraphs 23 and 24 referred to *Re TG Gold Holding Limited* and stated that in that case the company was in the process of developing "a tangible restructuring proposal" with support "from at least some unconnected creditors".

92. Kawaley J at paragraphs 25 and 26 referred to *Re CW Group Holdings Limited* and concluded that "where an insolvent company takes the initiative and seeks to implement a court-supervised restructuring, this Court will accord the company's management a generous margin of appreciation when faced with attempts by creditors to impose a 'full-blown' provisional or official liquidation instead."

93. At paragraphs 27 and 28 Kawaley J referred to *Re Abraaj Holdings* and described it as "a case where the adjournment granted was positively sought by both the joint provisional liquidators and

the majority of creditors in circumstances where active pursuit of a possible restructuring had already been judicially approved."

94. At paragraph 29 Kawaley J referred to the need for "tangible grounds" for an adjournment such as (a) support from the majority of creditors or (b) proactive restructuring steps taken by the company's management.

95. Kawaley J felt at paragraph 30 that Mr El Ard's (the majority shareholder) first opportunity to investigate the company's financial position was when he was formally notified of the appointment of the JPLs. At paragraph 31 Kawaley J felt that Mr El Ard and the company's management had many prior opportunities to "turn their minds to these important matters." Kawaley J did not feel that there was any rational basis to afford the company and Mr El Ard "an opportunity to begin their own investigation into a restructuring proposal at the end of the period fixed by the Court for the JPLs to carry out that very investigation." (paragraph 32).

96. At paragraph 37 Kawaley J, in the context of the adjournment application before him, referred in effect to the need for management to demonstrate "a serious commitment to protecting the interests of unsecured creditors" and the formulation of "at least the broad outline of a credible plan."

Sun Cheong (Smellie CJ as he then was)

97. Former Chief Justice Smellie in *Sun Cheong Creative Development Holdings Limited* 2020 (2) CILR 942 provided helpful guidance.

98. In that case the company was incorporated in the Cayman Islands and was registered in Hong Kong and listed on the Hong Kong Stock Exchange. The company petitioned for its own winding up but on the same date also filed a summons for the postponement of its petition and for the appointment of JPLs to give the company an opportunity to restructure its assets and liabilities under the supervision of the Grand Court instead of being placed into official liquidation by the High Court of Hong Kong. On 31 July 2020 the Grand Court acceded to the company's application. In that case there was before the Court evidence of a "white knight" investor in place willing to inject funding, a wholescale change of the board of directors providing independent, as well as significant financial and distressed asset expertise at Board level, and an independent financial report that

estimated that, on the basis of an immediate winding up, creditors would be unlikely to receive a return of any more than 1 cent on the dollar had been provided (paragraph 4 of the judgment).

99. From paragraph 16 of the judgment there was reference to the details of the restructuring proposals and the existence of the "white knight" investor.

100. From paragraph 27 of the judgment there was reference to the viability of the restructuring proposal.

101. Former Chief Justice Smellie at paragraph 35 stated that under section 104 (3) (appointment of provisional liquidators) and 95 (3) (power to adjourn) of the Companies Law as it then was "the Court has a broad and flexible discretion." Reference was made at paragraph 35 to *Fruit of the Loom*, and at paragraph 36 to *CW Group* and *ASL Asean*. It was indicated at paragraph 37 that there is no prescriptive list of factors to be taken into consideration when considering how the Court's "broad discretion is to be exercised" but matters which the Court may have regard to include:

(1) the express wishes of the creditors (although the Court should be cautious not to "count up the claims of supporting and opposing creditors" per Segal J in *Grand T G Gold Holdings Limited* (unreported 21 August 2016 at 6 (f) (iv));

(2) whether the refinancing is likely to be more beneficial than a winding-up order;

(3) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors;

(4) the considered views of the board as to the best way forward.

102. Former Chief Justice Smellie at paragraph 41 took care to stress that there was "independent evidence before the Court that refinancing is likely to be more beneficial than a winding up order and that there is a real prospect of such a refinancing being effected. There is no better evidence of this than the willingness of the Cachet Group, an experienced distressed debt investor, to invest HK$75m in the proposed restructuring".

103. At paragraph 47 of the judgment it was stated that "the language of s.104 (3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan", adding at paragraph 49 "Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan."

104. At paragraph 50 the well experienced judge noted that there was no reason to doubt the viability of the proposed restructuring and the existence of a "white knight" investor, together with confirmation from independent financial advisors that the proposed restructuring was both viable and in the best interests of the creditors.

105. At paragraph 51 the judge recorded his acceptance that it was appropriate in the circumstances for the Court to exercise its "broad discretion" to adjourn the winding-up petition and appoint JPLs to facilitate the restructuring of the company.

106. I should add that in the context of the Court's discretion to wind up a company it is well established that the decision is not made on the majority decision of creditors. The views expressed by the creditors have to be sound. Snowden J, as he then was, put the position well in *Re Maud* [2020] EWHC 974 (Ch) [2020] Bus. L.R. 1533 where at paragraphs 78 and 79, having summarised the competing submissions at paragraph 73, he stated that the starting point for the Court in determining whether to give effect to the right of the class *ex debito justitiae* to a bankruptcy order or a winding-up order, is to look at the value of debts of the creditors on each side of the disagreement. The Court's role in determining whether or not to give effect to the class remedy is not limited to a question of simple mathematics. The Court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditor's approach is diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company).

107. In the context of applications to adjourn a winding-up petition Neuberger J, as he then was, in the well-known English authority *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 at 637-639 set out various factors to consider and stressed that the Court will give greater weight to the views of

independent creditors as opposed to creditors connected to the company and the Court's discretion will not normally be dependent on mathematical niceties.

Midway (Segal J)

108. Segal J's judgment in *Midway Resources International* (FSD unreported judgment 30 March 2021) is also worthy of attention in particular at paragraphs 65 to 67. In *Midway* Segal J dealt, on the papers, with an application for the appointment of provisional liquidators under section 104(3) of the Companies Act on a light-touch basis and the headnote confirmed that the judgment dealt with the evidence that a company needs to file concerning the proposed compromise or arrangement, the need to provide evidence of the views of creditors and the impact of challenges by creditors to the credibility of the proposed compromise or arrangement and of foreign proceedings which might interfere with the ability of the company's subsidiary to have its restructuring approved by creditors. In that case there had plainly been discussions with creditors and an Administrator's report provided to creditors of the company's operating subsidiary ("Zarara") (see for example paragraphs 17 and 28 of the judgment). The Administrator had concluded that Zarara's creditors should be given an opportunity to consider detailed restructuring proposals which it was in their best interests to accept and approve.

109. In paragraph 65 Segal J noted that there appeared to be a "rational basis" for accepting the Restructuring Proposals.

110. At paragraph 66 Segal J noted that the restructuring negotiations were at a relatively early stage and in view of recent developments in Kenya serious doubts and concerns as to the prospects of success of the Restructuring Proposals had arisen but he was "satisfied that all is not yet lost and there remains a number of ways in which the restructuring negotiations could be put back on track …"

111. At paragraph 67 Segal J, in the circumstances of the case before him, thought it seemed "right and appropriate to appoint PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilize the position and to seek to have constructive discussions with the creditors."

112. Segal J at paragraph 49 referred to section 104(3) of the Act (which was in similar terms to section 91B(1) of the Act) and stated:

> "49. The two sub-paragraphs of section 104(3) establish what must be shown to give the Court the statutory power to appoint JPLs on an application by the Company. They go to jurisdiction. If satisfied, the Court has a wide discretion as to whether to appoint JPLs having regard to the purpose of section 104(3) of the Act and the circumstances of the case."

113. At paragraph 50 Segal J referred to *Sun Cheong* and underlined the need for "a real prospect" of a restructuring being effected for the benefit of the general body of the creditors.

114. At paragraph 51 Segal J referred to *Fruit of the Loom* and again underlined the need for there to be a real prospect of restructuring.

115. At paragraph 52 Segal J noted that section 104(3) did not impose a requirement on the company that it already have a pre-formulated restructuring plan and nor does it require the company to provide evidence of the viability of its restructuring plan. Segal J also underlined the fact that where the Court was in any doubt as to the validity of a restructuring plan it could appoint joint provisional liquidators for the purpose of preparing a report on the prospects of the success of a restructuring plan.

116. Segal J at paragraph 56 referred to the importance of the views of the creditors stating:

> "Creditors' views are relevant and important for determining the prospects of the proposed compromise or arrangement (are key creditors supportive or likely to support the proposed compromise or arrangement?) and as the Chief Justice said in *Sun Cheong* the wishes of creditors are one of the matters to be taken into account when the Court is exercising its discretion under section 104 (3) and deciding whether to appoint JPLs."

Silver Base (Doyle J)

117. In *Silver Base Group Holdings Limited* (FSD unreported judgment 22 November 2021), in the context of an application to appoint provisional liquidators for restructuring purposes, I also relied

upon, amongst other authorities, *Sun Cheong* and *Midway*. At paragraph 3 I referred to the developing case law which stressed the importance of the court taking into account the position of creditors when a company is in the zone of insolvency. Consider now *BTI* v *Sequana* [2022] UKSC 25. In *Silver Base* I was concerned over the lack of notice to the creditors (paragraph 5) and I felt that the creditors should be given more time within which to communicate their views (paragraph 7). I also added that "the Company should positively and constructively engage with all creditors." In a subsequent judgment delivered on 8 December 2021 I again stressed the need to take into account the position of creditors. At paragraph 21 I stated:

> "I cannot see any prejudice to the creditors in appointing JPLs at this stage to monitor the Board, conduct investigations and to consult with creditors in respect of the feasibility of a debt restructuring plan and then to report to the Court in that respect …"

118. At paragraph 24 (2) of *Silver Base* I concluded that the Company was or was likely to become unable to pay its debts and that it intended to present a compromise or arrangement to its creditors. At paragraph 24 (3) I recorded that "there is a plan and information has been provided about the past and potential future of the Company".

119. I required the JPLs to report, after consultation with the creditors, on the feasibility of a debt restructuring before 2pm on 27 January 2022 and if such was not feasible stated that the Court could make a winding-up order on 11 February 2022.

120. On 11 February 2022 I was persuaded to grant a further adjournment and at paragraph 11 noted that "I am willing to provide one further adjournment but, as indicated during my exchanges with counsel this morning, this matter cannot drag on indefinitely and minds need to be focused as to future progress."

121. On 5 May 2022 I refused a request for another adjournment and made a winding-up order stating at paragraph 25:

> "I am not willing to grant a further adjournment. The Company has had plenty of time to progress matters in respect of a restructuring."

Oriente (Kawaley J)

122. Kawaley J in *Oriente Group Limited* (FSD unreported judgment 8 December 2022) gave some very helpful guidance in respect of the new restructuring officer regime. At paragraph 2 Kawaley J, reflecting the importance of creditor involvement, stated:

> "... The Proposed Restructuring appeared to have attracted at a very early stage very significant creditor support, a factor which provided powerful support for the application to appoint restructuring officers to be granted."

123. At paragraph 8 of his judgment Kawaley J adopted counsel's submissions to the effect that the case law authorities in respect of the appointment of restructuring or 'light touch' provisional liquidators are likely to be both relevant and persuasive in respect of the appointment of restructuring officers. Kawaley J did so for two principal reasons. Firstly, the grounds upon which a restructuring petition may be presented under section 91B (1) are expressed in the same terms as the grounds for appointing provisional liquidators for restructuring purposes under the former provisions of section 104 (3) before the restructuring officer regime became operative on 31 August 2022. The solvency test for restructuring purposes is also the same as that applicable to winding-up proceedings (section 93). Secondly the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere.

124. In the case before him Kawaley J felt that the dicta of Smellie CJ (as he then was) in *Sun Cheong Holdings* 2020 (2) CILR 942 at paragraphs 35-37 "applies with equal force to the restructuring officer regime". The dicta cited by Kawaley J emphasised:

(1) the Court has a broad and flexible discretion;
(2) it is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders;
(3) matters to which the Court may have regard include:

(a) the express wishes of creditors (though the Court should be cautious not to "count up the claims of supporting and opposing creditors");
(b) whether the refinancing is likely to be more beneficial than a winding-up order;
(c) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and
(d) the considered views of the board as to the best way forward.

125. Kawaley J at paragraph 11 of his judgment in *Oriente* stated that the jurisdiction to appoint ROs is a "broad discretionary jurisdiction" to be exercised where the Court is satisfied:

(1) the statutory pre-condition of insolvency or likely to become insolvent is met by credible evidence from the company or some other independent source;
(2) the statutory pre-condition 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.

Summary of the relevant law and procedure

126. From a review of this useful prior case law and noting the express provisions of section 91B I would suggest that the courts when considering applications for the appointment of ROs should consider, amongst other issues, the following:

(1) the previous case law authorities in respect of the appointment of restructuring or "light touch" provisional liquidators are likely to be both relevant and persuasive (*Oriente*);

(2) before the Court has jurisdiction to exercise its discretion to appoint ROs both statutory limbs in section 91B(1)(a) and (b) must be satisfied. The burden is on the petitioner to satisfy the Court on a balance of probabilities that it (a) is or is likely to become unable to pay its debts and (b) it intends to present a restructuring plan to its creditors (or classes thereof) (section 91B(1) and *Midway*);

(3) the discretionary power vested in the Court is very wide but is subject to the Court being satisfied that the appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court may use this flexible discretionary power to enable the rescue of a company where it is just to do so. The Court should ensure that the position is not abused by a company which is hopelessly insolvent and continues to trade. The Court must consider whether (a) the restructuring is likely to be more beneficial to creditors than a winding up (b) there is a real prospect of a restructuring being effected for the benefit of the general body of creditors and (c) that in all the circumstances it is in the best interests of the creditors to try and achieve a restructuring (*Fruit of the Loom)*;

(4) the Court has a broad and flexible discretion subject to it being satisfied that the appointment would be for the benefit of those having the financial interests in the company to be rescued. The Court must be satisfied that the appointment would be for the general benefit of creditors and, subject to creditors' prior interests, the benefit of shareholders. Matters to which the Court may have regard include (a) the express wishes of creditors (b) whether the refinancing is likely to be more beneficial than a winding-up order (c) that there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors and (d) the considered views of the board as to the best way forward (*Sun Cheong*);

(5) the company should positively and constructively engage with all creditors. Creditors' views are relevant and important (*Midway*; *Silver Base*);

(6) the Court can exercise its broad discretionary jurisdiction where it is satisfied (a) the statutory pre-condition of insolvency or likely to become insolvent is met by credible evidence from the company or some other independent source (b) the statutory pre-condition of an intention to present a restructuring proposal to creditors or any claims thereof is met by credible evidence of a rational proposal with reasonable prospects of success and (c) the proposal has or will potentially attract the support of the majority of creditors as a more favourable commercial alternative to a winding up of the company (*Oriente*);

(7) the petitioner must first, on credible evidence, establish that it (a) is or is likely to become unable to pay its debts and (b) intends to present a compromise or arrangement to its creditors (or classes thereof) (*Oriente*);

(8) the intention to present a restructuring plan must be a realistic, genuine, *bona fide* held intention on adequate grounds. The Court will need to be persuaded that there is a rational and credible restructuring plan, even if only provided in outline. The Court does not have to be provided with the finished fully grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long;

(9) there is no need for a detailed pre-formulated or finalised restructuring plan. Entirely abstract or hypothetical restructurings are not however sufficient. There must normally be tangible restructuring proposals with support from at least some unconnected creditors. Management, in an insolvency situation, must normally demonstrate a serious commitment to protecting the interests of unsecured creditors and the formulation of at least the broad outline of a credible plan (*CW Group*, *ACL Asean Tower*, *Sun Cheong* and *Midway*);

(10) in some cases the bare genuine bones of a restructuring plan may suffice or at least be persuasive enough to permit the appointment of ROs to report on the viability of a plan but in some cases in the absence of (a) meaningful consultation with outside creditors and their support and (b) independent confirmation from third-party professionals of the viability of the potential plan and the benefits of restructuring as opposed to a winding up, the Court may conclude that there is no genuine intention to move forward with a credible plan that has a reasonable chance of success. In such circumstances the Court will rightly decline to appoint ROs;

(11) in most cases the Court will find a two-phase process (phase (i) gathering assets, information and documents, commencing legal proceedings in that respect if necessary and a forensic investigation and then phase (ii) presenting an informed restructuring plan) unattractive especially if phase (i) would take many months or even years to complete which could be likely if litigation to gather assets, information and documents was vigorously contested;

(12) the Court would normally expect to see evidence of some form of engagement with creditors prior to the petition being presented with a view to developing the terms of a proposed restructuring. In an insolvency situation the position of unsecured independent creditors is often paramount. Prior to presenting petitions for the appointment of ROs companies would be well advised, where circumstances permit, to consult with creditors and provide creditors with advance notice of an intention to make the application and of the date of the hearing (*Sun Cheong*, *Midway* and *Silver Base*);

(13) the Court would normally benefit from some independent evidence on the benefits of a restructuring as against a winding-up order and may be sceptical about the views of management in this respect where if a winding-up order was made management's conduct would come under close scrutiny;

(14) the management of a company should normally be on top of the company's financial position and be in a position to provide the Court with accurate (ideally independently verified) information in respect of the company's financial position;

(15) the Court would normally benefit from up-to-date copies of the company's financial statements (preferably audited or otherwise independently verified) and a list of creditors, specifying whether they are secured or not and if secured the extent of the security and whether the creditors have any connection with the management of the company, their locations, the amounts outstanding and an indication of the extent of the consultation with them and whether they support or oppose the appointment of ROs;

(16) the views of "insider" or management-associated creditors in respect of the appointment of ROs will be considered but normally more weight would be attached to the views of "outside" independent third-party creditors. The Court will obviously have regard to express wishes of creditors but should be cautious not to simply count up the claims of supporting and opposing creditors. The basis on which the creditors' views are expressed should be considered. The Court will have regard to the views of management and the views of creditors but their views have to be sound (*Sun Cheong*, *ACL Asean Tower* and *Maud*);

(17) the Court must be astute to guard against any potential abuse of the new restructuring regime especially insofar as the automatic statutory moratorium is concerned. It would be useful if the petitioner could provide evidence in respect of any actual or pending legal proceedings against the company;

(18) the Court will need to be satisfied that management genuinely require and deserve a "breathing space" to finalise a restructuring plan with creditors which has a reasonable chance of success and would be in the best interests of creditors and enable the company to continue as a going concern. The Court needs to guard against placing any emphasis on any unrealistic "wishful thinking" by management;

(19) a core requirement is that there needs to be a real prospect of a restructuring being effected for the benefit of the general body of the creditors (*Fruit of the Loom*, *Sun Cheong*, *Midway* and *Oriente*);

(20) it is important that petitioners seeking the appointment of ROs should have all their ducks in a row before filing the petition and they should not assume that if their evidence is inadequate the Court will grant them an adjournment;

(21) even if the company and all creditors agree to the appointment of ROs the Court must, nevertheless, of course, be satisfied that it has jurisdiction to make the Order and that making the Order would, in its discretion, be a proper exercise of such jurisdiction. Companies and creditors cannot confer jurisdiction on the Court to appoint ROs simply by consent;

(22) the applicant company has to jump both statutory jurisdictional hurdles before the Court can consider whether in its discretion it is just, fair and appropriate to appoint ROs and if so what functions and powers to give them and the contents of any Order generally and specifically in respect of the circumstances of the case before the Court;

(23) once the two statutory grounds have been satisfied ((a) inability to pay debts and (b) intention to present a restructuring plan) the Court has jurisdiction to make an Order appointing ROs. Once jurisdiction has been established the Court must then consider how to exercise its discretion and if it decides to exercise its discretion in favour of appointing ROs it must consider the appropriate terms of the Order and what powers and functions

should be conferred on the ROs. The Court must also consider what conditions should be imposed on the board of directors in relation to the exercise by the board of directors of its powers and functions;

(24) the petition should contain the information required by the Act, Rules and case law and should clearly specify the grounds of the application. The petition will normally be heard in open court. Sealing orders would not normally be appropriate but may in some exceptional cases be justified. Commercial embarrassment or sensitivity would not normally trump the fundamental principle of open justice (see, albeit in the different context of a winding-up hearing, *Silicon Valley Bank* FSD unreported judgment 29 June 2023, Doyle J). Accompanying the petition should be a draft Order and the petition must be supported by an affidavit or affirmation containing the required information. The affidavit or affirmation should stick to the facts and not contain comments, submissions or arguments. The Company should also file a concise and focused skeleton argument which should simply contain the relevant legal arguments cross-referenced to the paginated hearing bundle. Copies of the core authorities (the Act, the Rules and the case law) should also be provided. A duly paginated hearing bundle should be filed together with a reading list and realistic time estimates for the reading and the hearing. In most cases the Court would also benefit from a chronology, *dramatis personae* and a concise case summary. Anything that can help busy judges to quickly absorb the relevant information, which sometimes arises as a matter of urgency, would normally be of assistance. Late filings will not assist the Court in its preparation for the hearing; and

(25) every case, of course, must be dealt with on its own facts and circumstances.

The need to guard against potential abuse

127. There is a need to guard against potential abuse of the new restructuring regime. It seeks to strike the appropriate balance between relevant stakeholders including the management of the relevant company, its shareholders and creditors. In addition to the safeguards and protections provided for in the new statutory provisions the judiciary has an important role to continue to ensure that the new regime is not abused and that the relevant competing interests are duly balanced. This will also assist in enhancing confidence in the new regime and facilitating the recognition of Orders appointing ROs in relevant foreign jurisdictions. It is important that foreign courts readily provide

recognition and assistance. The protection of the new regime by the judiciary from potential abuse should enhance international judicial cooperation from other countries.

128. There is no doubt that these new statutory provisions enhance the financial services offering of the Cayman Islands.

129. The legitimate and thriving financial services economy of the Cayman Islands is well recognised locally and internationally. It is an economy that is assisted by the existence of appropriate statutory provisions, a competent, independent and impartial judiciary, a professional and highly skilled legal profession and top-quality insolvency and restructuring officers.

130. Lord Reed, the President of the UK Supreme Court and lead Justice on the Judicial Committee of the Privy Council ("JCPC"), in his oral evidence to the Constitution Committee of the House of Lords on 4 July 2023 (the day after Cayman's Constitution Day) stated:

> "The Cayman Islands, for example, is a British Overseas Territory. Its economy is based on international legal and financial services. The prosperity and way of life of the people there depend on their success in attracting enterprises from … China and all over the world to set up their businesses there. For that to be a feasible operation, they have to have high-quality courts to deal with disputes, because colossal amounts of money are being invested. In financial terms, the biggest cases that we deal with are mostly Privy Council cases rather than Supreme Court ones. The Cayman Islands has very good first-instance judges, some of them British and some local. Its Court of Appeal is manned by retired Court of Appeal judges, mostly with a commercial background. Its final court of appeal is of course with us."

131. During the JCPC's visit to the Cayman Islands in November 2022 Lord Reed stressed the importance of the Cayman Islands when he stated in his ceremonial opening remarks on 15 November 2022:

> "… some of the most important cases for the development of the common law around the world, in countries such as Australia, Canada, Hong Kong, New Zealand and Singapore, as well as the UK, are decided by the Privy Council on appeal from the Cayman Islands …. Judgments that we issue in cases from these islands are cited by lawyers and courts around the world, demonstrating the quality of justice available on these islands, and

supporting the excellent work done by the judiciary in the Islands themselves. This is particularly important to the prosperity of the Islands, as confidence in the legal system is an important factor in supporting international investment and the financial services industry."

132. Lady Arden in her speech on *The Judicial Committee of the Privy Council as an important source of financial services jurisprudence* (The Peace Palace 3 February 2020) acknowledged the "importance in today's world in commercial terms" of the Cayman Islands and its "maturity" in terms of financial services law.

133. Lady Arden in her 2022 Guest Lecture delivered on 25 March 2022 in the Grand Court of the Cayman Islands again stressed the issues of international importance dealt with by the JCPC "in relation to cases in the financial services field, particularly from this jurisdiction." (paragraph 85).

134. I note in passing the striking statistic published by Bloomberg as of 26 September 2023 that companies incorporated in the Cayman Islands amount to 61% of the companies where Hong Kong is the primary listing (with a Main Board share at 58% and a GEM share at 82%). It is especially important to the Cayman Islands that the Hong Kong judiciary recognise and provide assistance to ROs appointed by the Grand Court of the Cayman Islands. To enhance confidence in such appointments it is equally important that the Grand Court guard against any potential abuse of the restructuring officer regime.

135. Jurisdictions around the world can have confidence in the judiciary of the Cayman Islands to appropriately consider and balance the interests of all concerned in respect of applications for the appointment of ROs. Foreign jurisdictions should not hesitate to recognise and provide assistance to ROs appointed by the Financial Services Division of the Grand Court of Cayman Islands. They may rest assured that Cayman judges at first instance in the Financial Services Division, reinforced by a strong and internationally well-regarded Court of Appeal and the JCPC, will be vigilant to guard against any potential abuse of the restructuring officer regime.

Moratorium

136. The need to guard against potential abuse is particularly acute in the context of the statutory moratorium.

137. Section 91G of the Act concerns provisions in respect of a stay of proceedings otherwise known as the "statutory moratorium".

138. Section 91G (1) of the Act provides that 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 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.

139. Section 91G (3) of the Act provides that in section 91G of the Act (a) references to a suit, action or other proceedings includes 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.

140. It can be seen from section 91G(1) of the Act that the statutory moratorium kicks in upon the presentation of the petition for the appointment of ROs unlike the position under section 97 (1) of the Act which provides that when a winding-up order is made or a provisional liquidator is appointed no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with leave of the Court and subject to such terms as the Court may impose. There is no automatic statutory stay upon the presentation of a petition for a winding-up order or an upon an application for provisional liquidators to be appointed, whereas there is after the presentation of a petition for the appointment of ROs.

141. In the case which was before me on 6 September 2023 there was no reference in the Petition to claims against the Company.

142. In the first affidavit of Sadie Hutton sworn on 24 August 2023 there is reference to suggestions from others that the Company was engaged in a "ponzi scheme" and alleged misappropriation of funds but the deponent dismissed these allegations as being made "without a shred of evidence". At paragraph 12 of her first affidavit she says:

> "The Board is certain that the appointment of the restructuring officers and the automatic moratorium is in the best interests of the Company and, (sic) its creditors, and also those with an interest in Freeway as the Company's major creditor (such as the holders of the Supercharger Virtual simulations products)."

Adding:

> "… any adverse proceedings whether litigation or provisional liquidation or full winding up proceedings that would bring the Aubit-Freeway brand into disrepute and tarnishes the reputation of the Board and its independent consultants and advisors, would destroy the trust of our business network, who would likely lose all confidence in the Company and the future products we are in the process of developing …"

143. In her second affidavit sworn on 30 August 2023 Sadie Hutton at paragraph 6 (viii) refers to what she describes as "a civil action filed in Wyoming on 9 August 2023, and which was served on the Company (as well as the Freeway Reserves Foundation and Freeway Future Foundation) through Hague Convention channels at its registered office at Sinclair Corporate Services Ltd on Monday 28 August 2023" (the registered office of the Company). She robustly adds that this demonstrates "why a moratorium is needed to prevent further vexatious, speculative lawsuits based only on irresponsible gossip and unfounded allegations from on-line commentators (without a shred of any genuine evidence) asserting among other things that the Company itself was operating a "scam" through Freeway."

144. I simply noted the Company's position in respect of the proceedings in Wyoming and the position of Mr Bodden's clients in that respect. His clients say that they have a good claim against the Company. The Company says otherwise.

145. Having considered the position in respect of the statutory moratorium, I now turn to the evidence before the Court in respect of the two statutory factors in section 91(B)(1) of the Act.

The financial position of the Company – section 91B(1)(a)

146. In respect of section 91(B)(1)(a), there was very limited information concerning the financial position of the Company. No audited financial statements were produced but a couple of pages of somewhat flimsy draft management accounts for March 2022 and December 2022 were amongst the exhibited voluminous documentation.

147. Sadie Hutton in her first affidavit sworn on 24 August 2023 refers at paragraph 6 to Company's assets in the sum of US$60,476,053 as at 31 May 2023. At paragraph 7 based on information provided to her by Bradley Hunt (who has not provided evidence) she refers to the Company's current liabilities which include the amount of US$122,000,000 said to be due to Freeway, US$302,071 fees for legal services (entities not specified), US$11,531 for marketing fees and expenses (entities not specified), US$527,117 for professional advisors including Paul Allmark and other independent contractors (entities not specified), US$291,750 in respect of loans from 3 founding shareholders and directors (herself, Graham Doggart and Peter Neilson) (the "Founders"), US$251,888 in respect of travel and other expenses incurred by the Founders and US$1,800,000 stated to be due to Graham Doggart. The three entities specified in the Notice of Appearance and stated to be owed US$6,324,901.77 were not listed.

148. Sadie Hutton provides some information in respect of liabilities in her first affidavit but does not provide a total figure for the outstanding indebtedness. At paragraph 8 she says that no security is held by any creditor of the company. It is implicit in paragraph 9 of her second affidavit that she is of the view that the "exact financial position of the Company and its potential asset recoveries" are not known.

149. Ms Dobbyn in her oral submissions was at pains to stress that the Company was operating in "a new world". It may be a "new world" but it is still one where the rule of law and good corporate governance should prevail. Those managing companies (such as directors) need to be aware of the financial position and assets of the companies they are managing. That is a very basic principle of good corporate governance. The management of the Company appeared to be unaware of the precise financial position of the Company.

150. In the case presently before the Court inadequate evidence as to the financial position of the Company was provided but the Company conceded that it was unable to pay its debts within the meaning of section 93 of the Act and that section 91B(1)(a) of the Act was duly satisfied.

The "restructuring plan" – section 91B(1)(b)

151. In respect of section 91B(1)(b), there was extremely limited information concerning the proposed "restructuring plan". Paragraph 54 of the Petition simply records that the directors have been actively considering:

> "(a) the options for launching new business lines and digital products (utilizing AIP's proprietary technology including the *Aubit Edge Protocol*) which, depending on the value of all assets recovered by the Restructuring Officers from Ardu Prime, could in due course allow all creditors including Freeway, to be repaid in full; and
>
> (b) alternatively, the potential terms of a proposed consensual restructuring of the Company's financial indebtedness."

152. No detail was provided.

153. In her first affidavit sworn on 24 August 2023 Sadie Hutton provides no meaningful evidence as to any proposed restructuring. She admits at paragraph 17 that:

> "At this juncture, we have only been able to put together a very outline plan which is exhibited at pages 30-35 of the Exhibit SH-1".

154. I studied those pages entitled "Short Restructuring Plan // Confidential". The document is not dated and no one has, understandably, had the courage to identify themselves as the author of the document.

155. On page 1 there is reference "1 Situation" and the following wording appears "Through a lack of capital to maintain cash flow and a lack of information to reconcile profits and losses Aubit International has made the decision to initiate a voluntary restructuring process."

156. It says that the Company "will bring in court authorised professionals from Grant Thornton – Court Restructuring Officers (CROs) to actively recover assets and investigate events to determine the truth, size and nature of the losses as well as to determine what claims may be brought by Aubit International."

157. On page 2 there is a reference to a "2. Restructuring Plan". It states that the Company "proposes to be placed under a Cayman court restructuring regime with Grant Thornton teams in Cayman and Greece as Restructuring Officers." I should record that the proposed ROs gave addresses in the Cayman Islands and not in Greece. It is stated that the Company "proposes to focus itself on recovery of assets through aggressive recovery actions and pursuance of claims." It is not explained why the Company has not focused on this to date or why it needs ROs to commence and pursue claims. It is stated that the Company "will focus future operations on new products." There is reference to the establishment of "Thrivefi"

158. On page 4 there is a heading "7. Funding Plan". The previous heading was "2. Restructuring Plan." There are no headings under numbers 3, 4, 5 or 6 but Ms Dobbyn assured the Court that it had the complete "restructuring plan" before it. There is reference to funding being sought through three routes:

(a) users and shareholders will be contacted and offered the opportunity to lend money ($1 million) to the Company to cover legal and restructuring costs;
(b) investment will be sought to establish "Thrivefi"; and
(c) litigation funding through "traditional means".

That is the "restructuring plan". It is devoid of any meaningful detail. In the circumstances of this case it was difficult to come to the conclusion that there was a genuine intention to present, at least in the near future, a meaningful restructuring plan which would have reasonable prospects of success. I accept that the previous case law acknowledges that in some cases an intention to present a restructuring plan in the near future is not essential. But in a case where a plan may not be produced until many months or some years have elapsed, the Court is right to scrutinise whether there is, on the evidence before the Court, a genuine and realistic intention to present a credible restructuring plan.

159. The 4 slim pages produced in this case did not include a meaningful outline restructuring plan and I doubt any reputable and competent professional accountants would put their names to it as a realistic plan or confirm it as being in a form which could properly be submitted to the Court by way of a credible, meaningful restructuring plan which had reasonable prospects of success.

160. I was not persuaded that the provisions of section 91B(1)(b) had been satisfied.

Reasons for dismissing the Petition

161. I now turn to my reasons for dismissing the Petition.

162. As Ms Dobbyn astutely recognised, this was very much an unprecedented and extreme case. She was trying to push out the boundaries of the new regime in what she considered were the best interests of her client. Ms Dobbyn submitted that this case was unusual in that the Company was not fully aware of its financial position as most companies are when presenting restructuring plans. She submitted that the Company operated in the "new world" and that she was seeking to take the Court into "an additional dimension" and she acknowledged that the wide powers sought had never been granted before.

163. The burden was on the Company under section 91B(1) of the Act to satisfy the Court as to the two statutory grounds for the appointment of ROs namely (1) that it was or is likely to become unable to pay its debts within the meaning of section 93 of the Act and (2) that it intends to present a compromise or arrangement to its creditors (or classes thereof) either pursuant to Cayman law, the law of a foreign country or by way of a consensual restructuring.

164. The Company admitted that it was unable to pay its debts so the first statutory ground was not in issue. In respect of the second statutory ground in my judgment there needed to be a credible intention to present a plan at the time of the presentation of the petition and at the time of the hearing. For reasons which follow I was not satisfied that the second statutory ground had been established by the Company.

165. I was not satisfied that the two-phase process advocated by the Company was appropriate in the circumstances of this case.

166. Considering the former Chief Justice's guidance in *Sun Cheong* (at paragraphs 35-37 of his judgment) I comment as follows:

(1) I noted the Court's broad and flexible jurisdiction once the statutory grounds are established;
(2) I was not satisfied that the appointment of ROs would be for the general benefit of the creditors;
(3) I noted the wishes of the creditors;
(4) I noted the Company's generalised evidence (unsupported by any third-party independent evidence) that a restructuring is likely to be more beneficial than a winding-up order;
(5) I was not persuaded that there was a real prospect of a restructuring being effected for the benefit of the general body of the creditors;
(6) I noted the views of the board as to the best way forward.

167. I deal with the guidance highlighted by Segal J in *Midway* by stating in the case before me that I was not persuaded that there was a real prospect of restructuring being effected for the benefit of the general body of the creditors. Moreover I was concerned that the Company's two-phase approach in this case was not a proper use of the new restructuring officers regime. I did not think it appropriate, in the particular and somewhat unusual circumstances of this case, to appoint ROs to prepare a report on the prospects of success of a restructuring plan. In reality there was no meaningful plan to report upon. There was plainly, on the Company's own evidence, insufficient information available for even an outline plan to be taken forward at this stage.

168. I deal with Kawaley J's guidance in *Oriente* (at paragraph 11 of his judgment) as follows:

(1) I had some doubts as to whether there was credible evidence as to the financial position of the Company but accepted the Company's view that it is insolvent;
(2) there was no credible evidence of a rational restructuring proposal with reasonable prospects of success;
(3) on the evidence before the Court I noted the support of the creditors for the appointment of ROs with wide powers but I was not in a position to conclude that there was a meaningful proposal before creditors or the Court which could lead to a finding that such would be a more favourable commercial alternative to the winding up of the Company.

169. I deal with my creditor notification and consultation points made in *Silver Base* by noting in this case that, although there appeared to be creditor support for the appointment of ROs, it could not be said that they supported a restructuring plan as no meaningful outline plan had been produced.

170. In the case presently before me the main intention appeared to be for ROs to be appointed for the purposes of collecting in assets and documents and to take legal proceedings to facilitate that and to undertake further forensic investigations. Sadie Hutton in her first affidavit at paragraph 13 refers to ROs using "the authority of their positions as officers of the Court to recover the Company's assets from Ardu Prime." She adds at paragraph 15 that giving the ROs powers to "collect all documentation, data and information about the company from Ardu Prime, ClearTech and anyone else, and to conduct a thorough investigation into the affairs of the Company and its dealings with Ardu Prime and ClearTech, the Board wishes to demonstrate to its business network, the good faith, transparency and integrity with which the Company has been managed." Ms Dobbyn in her oral submissions also raised the point that the appointment of ROs would add additional authority to gathering together further pieces of the evidential jigsaw of the Company's financial position. It seemed that the Company wanted the appointment of an officer of the court to assist it in continuing forensic investigations, commencing legal proceedings and obtaining assets, documentation and information and to add respectability and credibility to the management of the Company. This is not a proper use of the restructuring regime.

171. Great care must be taken to ensure that the recently introduced restructuring officer regime is not abused. It should only be used for proper purposes. The clue as to its proper purpose is in the name. It is intended to provide a regime whereby ROs may be appointed to facilitate and finalise a financial restructuring. It is not intended to provide a mechanism whereby the ROs' main role is to recover assets, data, documentation and records of the company (if need be by commencing legal proceedings) and to undertake a forensic investigation into the affairs of the company. To attempt to abuse it in that way risks bringing it into disrepute and adversely affecting the credibility of the new regime internationally. Moreover the restructuring regime is not intended to be used simply to obtain the statutory moratorium and to add credibility and respectability to the company's management.

172. Ms Dobbyn was correct in her written submissions to note that the relief claimed in this case was "unusual, if not unique". Sadie Hutton was right in her second affidavit to acknowledge the "atypical" nature of what was being proposed by the Company in the Petition.

173. Whether one believes the Company and accepts that the financial difficulties arose because of management's engagement of and over reliance upon Ardu Prime or whether one believes Mr Bodden's clients, who allege serious wrongdoing against the management of the Company, management must accept some responsibility for their inability to present a clear picture of the Company's financial position as at 6 September 2023. The Company's management appeared to blame Ardu Prime but Mr Bodden's clients suggested otherwise. Whatever the true position and whoever is responsible for the present unsatisfactory state of the Company's finances I did not accept Ms Dobbyn's invitation to permit a two-phase approach in the circumstances of this case.

174. The major part of the relief sought in the Petition, described as the phase one relief, was plainly inappropriate. It mattered not that those entities specified in the Notice of Appearance (who also recognised that it was probable that this matter "may transition into Provisional or Official Liquidation") also supported the appointment of ROs to "investigate and take control of the affairs of the Company". It also mattered not that other creditors (including many "in-house" creditors connected with management) supported the appointment of ROs with very wide powers. I should also record that Sinclairs were relied upon by the Company as "an independent creditor" and yet Sinclairs were also acting for the Company and seeking relief on its behalf. Mr Bodden raised no conflict of interest points in respect of the involvement of Sinclairs but I have to say I found it difficult to see how Sinclairs could be treated as wholly independent in the circumstances of this case. Even if the Company and all its creditors had, on an informed basis, agreed to the appointment of ROs with very wide powers that would not have made a difference in this case, where no credible outline restructuring plan had been provided and section 91B(1)(b) of the Act had not been satisfied. The Company and its creditors cannot confer jurisdiction on the Court. The Court must itself be satisfied that both statutory grounds in section 91B(1) are met before it can go on to exercise its discretion and appoint ROs and determine the extent of their powers. I was not so satisfied.

175. Reference was made to (a) s 91B(4) of the Act and (b) Order 1A rule 6(2)(c) of the Rules and (c) paragraph 3.14 of the Order in *Oriente* which empowered the ROs to take such steps as they consider necessary or appropriate in respect of any and all proceedings to which the company in

that case was a party and counsel for the Company submitted that it was appropriate in this case to give the ROs wide powers to commence legal proceedings on behalf of the Company. Counsel submitted in effect that the appointment of ROs with additional clout as officers of the Court would speed things up in Greece and encourage the involvement and assistance of the regulators in that jurisdiction. These submissions were insufficient to persuade me that I had jurisdiction to appoint ROs.

176. Counsel for the Company also made reference to a restructuring petition (not included in any of the 7 bundles of material put before the Court) in *Carbon Holdings Limited* FSD 4 of 2023(DDJ) in an endeavour to garner some support for the wide relief the Company sought in this case. I have accessed a copy of the petition counsel referred to. In its petition dated 10 January 2023 Carbon Holdings Limited sought the appointment of ROs. There was reference to the company having negotiated a compromise with creditors. It is correct that in the prayer of the petition a wide power was sought "to request and receive from third parties documents and information concerning the Company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs" (paragraph 4.7 of the petition). No powers were however sought to permit the ROs to commence legal proceedings or to conduct forensic investigations as was requested in the case before me. Moreover in *Carbon Holdings Limited,* as is clear from paragraph 8 of the petition, an "in-principle agreement" had been reached with the creditors. Having checked the court records I note also that on 9 February 2023 I made an order that the company had leave to withdraw the petition and vacated the hearing. That explains why Ms Dobbyn could find no judgment on the judicial website. No judgment was delivered. *Carbon Holdings Limited* did not proceed to a hearing and is of no assistance whatsoever to the Company.

177. I was not persuaded in the circumstances of this case that the Court had jurisdiction to appoint ROs at all never mind ROs with the extremely wide powers sought by the Company. The Company had failed to get out of the starting blocks as in effect on its own admission it could not "at the moment" satisfy the statutory condition in section 91B(1)(b) of the Act. The main purpose of the first phase appeared to enable the Company to satisfy the Court on this condition. Faced with concern from the Court as to how long phase 1 would take to complete, Ms Dobbyn submitted in effect that phases 1 and 2 could progress in parallel. This submission flew in the face of the evidence of Sadie Hutton for the Company who had referred to "two distinct phases" (paragraph 9 of her second affidavit). I found it difficult to see how phase 2 could be properly progressed until phase 1 had

been completed and the Company's financial position was ascertained. If the legal proceedings were vigorously contested phase 1 could plainly take a great deal of time to complete.

178. None of the matters specified in Order 1A rule 6 (3) of the Rules include powers to recover the company's assets, powers to recover the company's data, documentation and records or the power to undertake a forensic investigation as sought in this case which again confirms the inappropriateness of the relief sought in the case. The wide powers sought by the Company were extraordinary.

179. I appreciate the standard Order may have to be varied in some cases and there may be cases where wide powers would be appropriate but the Order sought in this case was in a very different format to the Order at Form No 8A and the Order helpfully attached to Kawaley J's judgment in *Oriente*. This also confirmed the inappropriateness of the relief claimed in this case.

180. Furthermore, the relief sought in the Petition, described as the phase two relief, was seriously premature. The Company provided insufficient evidence as to its financial position and its assets and liabilities. On its own admission it was unable at this stage to provide full and accurate information in that respect. I was concerned that, on their own admission, the directors could not say with any certainty and clarity what the financial position of the Company was. It was difficult to conclude on the basis of the "very outline plan" that had been produced, or as counsel put it in her oral submissions "more outline than normal," that there was any realistic intention to come up, in the reasonably near future, with a rational plan. The financial position must be ascertained before such can be properly progressed. The Company can take steps to do that without the appointment of ROs.

181. Each case is, of course, fact sensitive but in the case currently before me unlike the case before Segal J in *Midway* no restructuring negotiations have even begun and no restructuring proposal with a rational basis had yet been produced.

182. The Company should have taken steps to recover its assets and documents and to ascertain its financial position prior to filing the Petition. If the Company required further forensic investigations to be undertaken it could have instructed independent professional investigators to conduct the same.

183. It was incumbent on the Company to provide sufficient evidence in respect of the Company's current financial position. It failed to do that. Moreover no credible outline restructuring plan was produced.

184. Although section 91B(1)(b) of the Act refers simply to an intention to present a compromise or arrangement to its creditors, it was incumbent on the Company to provide sufficient evidence in respect of the proposed restructuring. It failed to do that. The intention must be a genuine and realistic intention.

185. I accept that Smellie CJ (as he then was) at paragraph 47 of *Sun Cheong* stated that section 104(3)(b) (in substantially similar terms to section 91B(1)(b)) did not require the company to already have a pre-formulated restructuring plan or to provide evidence of the viability of its restructuring plan. He added that where the Court is in any doubt as to the viability of a restructuring plan it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan. Smellie CJ at paragraph 50 stated that in the case before him there was "no reason to doubt the viability of the proposed restructuring", noting that in the case before him "the company comes to the Court with a detailed restructuring plan." In *Sun Cheong* there was already a "white knight" investor in the wings willing to inject a significant amount of money, there had been a wholesale change of the company's board, an independent financial report had been put before the Court and there was independent evidence before the Court that the refinancing was likely to be more beneficial than a winding-up order and there was a real prospect for recovery. The same could not be said in this case on the basis of the evidence before the Court.

186. In *Midway* there had been discussions with creditors. There was reference to the appointment of administrators over the Company's principal subsidiary Zarara Oil & Gas Limited ("Zarara") in Mauritius and meetings of creditors. The administrator produced a report which explained the financial position and his findings and recommendations in respect of a deed of arrangement. Details of the proposed restructuring in respect of Zarara are referred to in the judgment. Segal J at paragraph 55 noted that "the evidence in support of what type of restructuring was envisaged at the Company level was sketchy." Segal J stated that it was clear however that "a restructuring of the Company's debt and equity was dependent on the Restructuring Proposals first being promoted and successfully implemented and on further discussions, in light of the restructuring done at the Zarara level, with creditors and shareholders of the Company". Segal J felt that "the evidence showed that the Company intended to present a compromise or arrangement to its creditors once

there had been progress in obtaining the requisite support for and approval of the Restructuring Proposals." Furthermore "two key creditors" had indicated that they would be receptive to a debt for equity swap if Zarara's Restructuring Proposals were successfully implemented. Segal J felt that at company level there was "a real (or realistic) prospect of a restructuring being agreed."

187. Segal J at paragraph 63 stated that he was satisfied that "the Company has a genuine, *bona fide*, intention to present and negotiate a restructuring both with Zarara's creditors and with its own and that the proper process for conducting those negotiations is now underway." There was also reference to a credible investor "whose involvement is critical to the credibility and viability of the Restructuring proposals." At paragraph 65 Segal J recorded his view that the proposals were "coherent" and there appeared to be a "rationale basis" for accepting them. He was also satisfied that there appeared to be a "reasonable basis for putting into place a restructuring of the Company's debt and balance sheet." The facts of *Midway* were very far removed from the facts in the case before this Court on 6 September 2023.

188. In *Oriente* Kawaley J at paragraph 2 noted that in the company's evidence the "broad parameters" of the proposed restructuring were "sketched out" and it was "confidently asserted that this would generate a better return for unsecured creditors than would be yielded through a traditional liquidation." The evidence supported the submission that approximately 46% by value of the Notes had expressed their support for the proposed restructuring. Kawaley J further noted at paragraph 3 that the only opposition "ultimately advanced rested on a technical jurisdictional challenge" which seemed to him "to be a tactical ploy". Kawaley J was persuaded that it was appropriate to appoint restructuring officers and helpfully appended to the judgment a copy of the Order made.

189. At paragraph 18 Kawaley J noted that: "The Board believes (for reasons which the affidavit plausibly explains) that the company can continue as a going concern and return to profitability if a restructuring occurs." The "precise legal vehicle for implementing the restructuring" had not "yet been worked out" but a "broad outline of the proposal" had been provided.

190. Kawaley J at paragraph 38 referred to the "Company's unchallenged evidence" as being "compelling" adding:

> "A coherent proposal, admittedly only in outline at this stage, had already been put to the Noteholders and nearly 50% of all Noteholders had already communicated positive support

for the idea of a restructuring and the appointment of JROs. This preliminary support lent further credence to the Company's management's view that value for creditors would most likely be best served by ensuring that the Company and the Group continued as a going concern rather than being wound up. It also supported the inferential conclusion that the Restructuring Proposal had realistic prospects of success."

191. Counsel for those specified in the Notice of Appearance stressed that in *Oriente* there was a credible restructuring plan which, at least, had the "preliminary support of the creditors".

192. I have to say that there appeared to have been a lot more meat on the bones in *Oriente* than was provided to me in this case. Indeed if I was left to feast on the bones of the "very outline plan" (paragraph 17 of Sadie Hutton's first affidavit) then frankly I would likely be left to starve. Again, the facts of *Oriente* were far removed from the facts put before the Court on 6 September 2023. Kawaley J had much more meat to chew on in *Oriente*, albeit not a detailed restructuring plan. In this case there was no credible outline restructuring plan placed before the Court. Indeed on the Company's own admission what was presented to the Court in respect of the restructuring was insufficient.

193. The circumstances of this case were very far removed from the circumstances in *Sun Cheong*, *Midway* and *Oriente*.

194. It is important that a company which presents an application for ROs to be appointed presents it on a solid evidential foundation. A petitioning company should not assume that a court will grant it the indulgence of an adjournment if at the hearing the evidence relied upon is inadequate. If insufficient evidence is presented at the hearing it is likely that the petition will be dismissed. The statutory moratorium cannot be allowed to continue indefinitely.

195. In my judgment the presentation of the Petition was seriously premature. Before the Company can present a credible restructuring plan, even in outline, it has a lot of further work to do. It needs to ascertain its financial position and should have done that before filing the Petition. Ms Dobbyn was right not to press for an adjournment as no valid grounds for such existed. It was incumbent on the Company to get all its evidential ducks in a row before applying for the appointment of ROs. Insufficient evidence was presented to enable the Court to conclude that it had jurisdiction and that it was appropriate in all the circumstances to appoint ROs.

196. I considered the two grounds in section 91B(1) of the Act. In respect of ground 91B(1)(a) the Company accepted that it was unable to pay its debts within the meaning of section 93. Statutory ground 91B(1)(b) was however not satisfied. There was no credible evidence of a rational restructuring proposal with reasonable prospects of success. Counsel for the Company rightly accepted that "at the moment" the Company could not satisfy the requirement that there was a real prospect of a restructuring being effected for the benefit of the general body of creditors.

197. I was not satisfied in the particular circumstances of this case that the Court had jurisdiction to grant the relief requested by the Company. I dismissed the Petition for the reasons stated in this judgment.

David Doyle

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT