Michaelmas Term
[2014] UKPC 36
Privy Council Appeal No 0040 of 2014

JUDGMENT

Singularis Holdings Limited (Appellant) *v* PricewaterhouseCoopers (Respondent)

From the Court of Appeal of Bermuda

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Collins

JUDGMENT GIVEN ON

10 November 2014

Heard on 29 and 30 April 2014

Appellant
Gabriel Moss QC
Felicity Toube QC
Stephen Robins
Rod Attride-Stirling
(Instructed by Blake Morgan LLP)

Respondent
David Chivers QC
Paul Smith
Scott Pearman

(Instructed by Herbert Smith Freehills LLP)

LORD SUMPTION:

Introduction

1. This appeal is closely connected with the concurrent appeal in PricewaterhouseCoopers (Bermuda Exempted Partnership No 7420) v Saad Investments Co Ltd ("SICL"). The two appeals concern related companies incorporated in the Cayman Islands, both of which have been ordered by the Grand Court of the Cayman Islands to be wound up. Hugh Dickson, Stephen Akers and Mark Byers of Grant Thornton Special Services (Cayman) Ltd were appointed by that court as the Joint Official Liquidators of both companies. The background to both appeals is set out in the Advice of the Board on that Appeal, delivered by Lord Neuberger, and it need not be repeated here.

2. The common feature of both appeals is that they concern attempts on the part of the liquidators to obtain from the companies' former auditors PricewaterhouseCoopers ("PwC"), information, whether in oral or documentary form, relating to the companies' affairs. The evidence is that the liquidators have been unable to trace certain assets which they consider must have existed, and that relevant information about those assets is likely to be in the possession of PwC. This has not been accepted in terms, but neither has it been disputed. The Board will proceed upon the footing that it is correct.

3. The Grand Court of the Cayman Islands has power under section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Islands, who has a relevant connection to a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company." The Grand Court has made such an order against PwC, and the Board was told that PwC has complied with it. Consistently with the provision conferring the power, it extends only to material belonging to the companies.

4. Both the SICL and the Singularis appeals concern attempts by the Liquidators to obtain material belonging to the auditors themselves, principally their working papers, by invoking the corresponding powers conferred on the Supreme Court of Bermuda. They are in wider terms, which are not limited to information belonging to the company. Section 195 of the Companies Act 1981 of Bermuda provides:

> "Power to summon persons suspected of having property of company etc.
>
> 195. (1) The Court may, at any time after the appointment of a provisional liquidator or the making of a winding up order, summon before it any officer of the company or persons known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the Court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs or property of the company.
>
> (2) The Court may examine such person on oath, concerning the matters aforesaid, either by word of mouth or on written interrogatories, and may reduce his answers to writing and require him to sign them.
>
> (3) The Court may require such person to produce any books and papers in his custody or power relating to the company, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to that lien, and the Court shall have jurisdiction in the winding up to determine all questions relating to that lien."

5. The power of the Bermuda court under section 195 is exercisable only in respect of a company which that court has ordered to be wound up. It was therefore dependent in this case on the existence of a power to wind up a company incorporated outside Bermuda. In the case of SICL the Supreme Court of Bermuda made a winding up order, and then made an order for production and oral examination against PwC in the winding up. However, in the SICL Appeal the Board has advised Her Majesty that the winding up order must be stayed because (with immaterial exceptions) the court had no jurisdiction to wind up a company incorporated outside Bermuda. The consequence is that all proceedings in the winding up of SICL have ceased to be effective, including the order made under section 195.

6. In the case of Singularis a different procedure was adopted. No winding up order was ever sought or made in Bermuda. Instead, Kawaley CJ made an order recognising in Bermuda the status of the Liquidators by virtue of their appointment by the Grand Court of the Cayman Islands, and exercising what he termed a common law power "by analogy with the statutory powers contained in section 195 of the Companies Act" to order PwC and Paul Suddaby (an officer

of PwC) to produce the same documents which they could have been ordered to produce under section 195. PwC were also ordered to have a partner, employee or agent acceptable to the liquidators available to answer oral or written interrogatories. The liquidators were given leave to serve the proceedings on Mr Suddaby and any other "partners or officers" of PwC out of the jurisdiction.

7. The Court of Appeal (Bell AJA, Zacca P and Auld JA) set aside the Chief Justice's order. Bell AJA and Zacca P doubted whether there was jurisdiction to make a section 195 order at common law in circumstances where section 195 did not apply. But the ground of their decision was that it was not in any event an appropriate exercise of discretion, because the court should not make an order in support of a Cayman liquidation which could not have been made by the Cayman court itself. They regarded the Liquidators' claim as "unjustifiable forum-shopping". Auld JA agreed with this, but went further. In his view, there was no jurisdiction because the Bermuda court could not disregard the limitation of section 195 of the Bermuda Act to cases where a winding up order could be and had been made.

8. Accordingly two issues arise on the present appeal. The first is whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form), in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

A common law power?

9. The common law of Bermuda is the same, in every relevant respect, as that of England. The difficulty is that in England the common law concerning cross-border insolvencies has developed to fill the interstices in what is essentially a statutory framework, and the statutory framework differs in significant respects in Bermuda. The main difference is that the English courts have jurisdiction to wind up unregistered companies, including those incorporated outside the United Kingdom. This jurisdiction has existed since it was first conferred by section 199 of the Companies Act 1862. It is currently conferred by section 221 of the Insolvency Act 1986. The Bermuda courts have no equivalent power.

10. The English courts have for at least a century and a half exercised a power to assist a foreign liquidation by taking control of the English assets of the insolvent

company. The power was founded partly on statute and partly on the practice of judges of the Chancery Division. Its statutory foundation was the power to wind up overseas companies. The exercise of this power generated a body of practice concerning what came to be known as ancillary liquidations. The English court would order the winding up in England of a company already in liquidation or likely to go into liquidation under the law of its incorporation, provided that there was a sufficient connection with England and a reasonable possibility of benefit to the petitioners. In theory, the effect of the winding up order was to create a statutory trust of the world-wide assets of the company to be dealt with in accordance with English statutory rules of distribution: *Ayerst v C & K (Construction) Ltd* [1976] AC 167, *Banco Nacional de Cuba v Cosmos Trading Corporation* [2000] 1 BCLC 813, 819-820 (Sir Richard Scott V-C). In practice, as Millett J pointed out in *In re International Tin Council* [1987] Ch 419, 446-447, "Although a winding up in the country of incorporation will normally be given extra-territorial effect, a winding up elsewhere has only local operation." The English courts recognised the limits of the international reach of their own proceedings by treating the English winding up as ancillary to the principal winding up in the country of the company's incorporation. They exercised their power of direction over the liquidator by limiting his functions to getting in the English assets and to dealing with them in such a way as to bring about a distribution of the company's world-wide assets on as uniform a basis as was consistent with certain overriding principles of English insolvency law. The earliest reported case in which the practice was recognised is the decision of Kay J in *In re Matheson Brothers Ltd* (1884) 27 Ch D 225, but it is likely to have been older than that. In these cases, the court is exercising the ordinary powers of the English court to control the winding up of a company, which are wholly statutory. But the court was using them for a purpose which differed from that for which they were conferred, and on principles which departed from those applicable by law in the winding up of an English company. To that extent only, the English courts were exercising a common law power.

11. In Bermuda, the court has no jurisdiction to conduct an ancillary liquidation, except in the (irrelevant) case of a company to which Part XIII of the Companies Act is expressly applied. The question what if any power the court has to assist a foreign liquidation without conducting an ancillary liquidation of its own, must depend on the nature of the assistance sought. Winding up proceedings have at least four distinct legal consequences, to which different considerations may apply. First, the proceedings are a "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established", to use the expression of Lord Hoffmann in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, para 14. Inherent in this function of a winding up is the statutory trust of the company's assets, to which I have already referred, and an automatic stay of other modes of execution. Second, it provides a procedural framework in which to determine what are the provable rights of

creditors in cases where they are disputed. Third, it brings into play statutory powers to vary the rights of persons dealing with the company or its assets by impugning certain categories of transaction. These powers are less extensive in Bermuda than they are in England, but include the avoidance of dispositions after the commencement of the winding up and fraudulent preferences. Fourth, it brings into play procedural powers, generally directed to enabling the liquidator to locate assets of the company or to ascertain its rights and liabilities. In Bermuda these include the power under section 195 of the Companies Act to order the production of information. In England, the corresponding statutory powers would all be exercisable in an ancillary liquidation.

12. The main purpose of the winding up order in England is usually to enable the court to take control of the English assets of the company, so as to remove them from the free-for-all which would have resulted if creditors were entitled to gain priority by levying execution on them. But, even without a winding up, the court could, on ordinary principles of private international law, have recognised as a matter of comity the vesting of the company's assets in an agent or office-holder appointed or recognised under the law of its incorporation. For many years before a corresponding rule was recognised for the winding up of foreign companies, the principle had been applied in the absence of any statutory powers to the English moveable assets of a foreign bankrupt which had been transferred to an office-holder in an insolvency proceeding under the law of his domicile. Moreover, while the same rule did not apply to immovable property, the court would ordinarily appoint the foreign office-holder a receiver of the rents and profits: see Dicey, Morris and Collins, *The Conflict of Laws*, 15th ed, rules 216 and 217. The more difficult question in such cases was whether the court, in the absence of winding up proceedings, could impose a stay on creditors trying to levy execution against the English assets equivalent to the automatic stay that would by statute have followed the initiation of winding up proceedings.

13. That question appears to have been first addressed in the common law world in the important decision of the full court of the Supreme Court of the Transvaal in *In re African Farms Ltd* [1906] TS 373. African Farms Ltd was an English company with substantial assets in the Transvaal. It was in liquidation in England. There was no power to wind it up in the Transvaal because the number of members had fallen below the minimum required to qualify it as a "company" for the purpose of the statutory power of winding up. The leading judgment was given by the great South African judge Sir James Rose Innes, then Chief Justice of the Transvaal. Having recognised the absence of a statutory power to wind up the company, he continued, at p 377:

> "It only remains to consider whether we are justified in recognising the position of the English liquidator. And by that expression I do not mean a recognition which consists in a mere acknowledgment

> of the fact that the liquidator has been appointed as such in England, and that he is the representative of the company here; I mean a recognition which carries with it the active assistance of the Court. A declaration, in effect, that the liquidator is entitled to deal with the Transvaal assets in the same way as if they were within the jurisdiction of the English courts, subject only to such conditions as the Court may impose for the protection of local creditors, or in recognition of the requirements of our local laws. If we are able in that sense to recognise and assist the liquidator, then I thin[k] we should do so; because in that way only will the assets here be duly divided and properly applied in satisfaction of the company's debts. If we cannot do so, then this result follows, that the directors cannot deal with the property here, and that the liquidator cannot prevent creditors seizing it in execution of their judgments. Unnecessary expenses will be incurred, and the estate will be left to be scrambled for among those creditors who are in a position to enforce their claims."

Innes CJ then considered (p 378) the objection that "the grant of assistance to the English liquidator, in a case where the Court could not wind up itself, may possibly be open to the objection that we are doing by indirect means what the law has given us no power to do directly." He rejected the submission because its acceptance would have prevented the court from recognising the power of the liquidator to dispose of property or rights of the company under the law of its incorporation, contrary to ordinary principles of private international law: see pp 378-380. He went on, at pp 381-382:

> "The true test appears to me to be not whether we have the power to order a similar liquidation here, but whether our recognising the foreign liquidation is actually prohibited by any local rules; whether it is against the policy of our laws, or whether its consequences would be unfair to local creditors, or on other grounds undesirable… So far from such circumstances being present here, the case before us is one in which every consideration of equity and convenience demands that the position of the English liquidator should be recognised. Unless that can be done then, as already pointed out, the Transvaal assets are at the mercy of the first creditor who can manage to secure a writ of execution."

In the result, the court recognised the liquidator by virtue of his appointment in England as being entitled to the sole administration of the company's assets in the Transvaal, on terms that the liquidator

> "recognise the right of all creditors in this colony to prove their claims against the Company before the Master; and that the admission or rejection of such claims, the liability of the company therefor to the extent of its assets in the Transvaal, and all questions of mortgage or preference in respect of such assets, shall be regulated by the laws of this colony, as if the Company had been placed in liquidation here."

The proved claims of local creditors were ordered to be satisfied rateably from the local assets and the balance made available for distribution to other creditors. Execution of the local judgment creditor's judgment was stayed to enable this to be done.

14. It is right to point out (i) that the recognition of the English liquidator's power of disposition over the company's assets in the Transvaal was no more than what he was entitled to as a matter of private international law; (ii) that the conduct of what amounted to an ancillary liquidation in the Transvaal was expressed as a discretionary condition of the court's recognition order; and (iii) that the Transvaal court no doubt had the same inherent power as the English court to stay enforcement of its own judgments. But the decision is nevertheless a significant one, because in substance what the court was doing was to direct the assets of the company to be dealt with as if it was in liquidation in the Transvaal, when there was no power to conduct a liquidation there. It also deprived an existing judgment creditor of what was on the face of it an accrued and absolute right under his judgment and exposed him to having his debt written down to a figure consistent with the rateable distribution of assets in the Transvaal. The court therefore unquestionably modified the rights of the company and its creditors. Moreover, the sole basis on which it did so was the inherent power of the court to assist the orderly liquidation of the company's affairs pursuant to a foreign winding up order. As Innes CJ put it, at p 377, "recognition… carries with it the active assistance of the court." Or, in the words of the concurring judgment of Smith J (at p 390), the basis of the order was the recognition and enforcement of rights and the recognition of a status acquired under a foreign law, unless they conflict with the law or policy of the jurisdiction in which they were sought to be enforced.

15. The flexibility and breadth of the English court's powers in an ancillary liquidation, together in more recent times with the incorporation into English law of a number of international schemes of judicial co-operation, have had the effect of arresting the development of the common law in England in this area. However, the issue returned in 2006 with the decision of the Privy Council in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508. In this case the Privy

Council, affirming the decision of the Staff of Government Division in the Isle of Man, held that effect should be given in the Isle of Man to the judicial reorganisation by a Federal Bankruptcy Court in the United States of a group of Liberian ship-owning companies. The effect of the reorganisation was to vest the shares of an Isle of Man company in the committee of creditors, in circumstances where the US court had neither jurisdiction *in rem* over the shares (because they were rights situated outside its territorial jurisdiction) nor jurisdiction *in personam* over the shareholders (because they were not present in the US and took no part in the US proceedings). The principal shareholder, Cambridge Gas, objected on the ground that it was not bound by the decision of the US court. The advice of the Board was given by Lord Hoffmann. He discerned in the English case-law a consistent "aspiration" to produce a result equivalent to that which would obtain if there were a single universal bankruptcy jurisdiction. He regarded this "principle of universality" as having been the foundation of the decision in *In re African Farms*, and considered that it justified the Isle of Man courts in giving effect to the US reorganisation plan: see paras 16-21. In his view, and that of the Board, the absence of jurisdiction *in rem* or *in personam* in the US court was irrelevant, because the jurisdiction was founded not on any obligation on the part of Cambridge Gas to comply with the judgments of the Federal Bankruptcy Court but on the duty of the Isle of Man court to assist a foreign principal liquidation so as to achieve a universal distribution of the assets on, as far as possible, a common basis. At paras 13-14, he said:

> "13. … Judgments in rem and in personam are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person. When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further inquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right.
>
> 14. The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established…"

The essence of the decision and the reasoning which supported it is to be found at paras 20-22:

> "20. …But the underlying principle of universality… is given effect by recognising the person who is empowered under the foreign bankruptcy law to act on behalf of the insolvent company as entitled to do so in England. In addition, as Innes CJ said in the

> Transvaal case of *In re African Farms Ltd* [1906] TS 373, 377, in which an English company with assets in the Transvaal had been voluntarily wound up in England, 'recognition which carries with it the active assistance of the court'…
>
> 21. Their Lordships consider that these principles are sufficient to confer upon the Manx court jurisdiction to assist the committee of creditors, as appointed representatives under the Chapter 11 order, to give effect to the plan…
>
> 22. …At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

The provisions of the domestic system of insolvency of the Isle of Man, which were relevant in *Cambridge Gas,* were the statutory provisions for sanctioning a scheme of arrangement in the course of a winding up. Because the Isle of Man courts would have had power to wind up Navigator and sanction a scheme of arrangement on terms substantially the same as those of the judicial reorganisation approved by the Federal Bankruptcy Court, it could give effect to the reorganisation plan at common law. "Why therefore," asked Lord Hoffmann (para 25), "should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man?" *Cambridge Gas* is authority, if it is correct, for three propositions. The first is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can. The second is that this includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy. The third (which is implicit) is that this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction *in rem* or *in personam* according to ordinary common law principles is irrelevant.

16. The first and second propositions were revisited by Lord Hoffmann in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. HIH was an Australian insurance company in liquidation in Australia. A winding up petition had been presented in England and provisional liquidators appointed to conduct an

ancillary liquidation. The question at issue was whether the English court should accede to a letter of request from the Australian court inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators, in circumstances where they would be distributed there in accordance with statutory priorities which differed from those applicable in a domestic winding up in England. At paras 6-7, Lord Hoffmann said:

> "6 Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives worldwide recognition and it should apply universally to all the bankrupt's assets.
>
> 7 This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508, 517, para 17. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of 'modified universalism': see also *Fletcher*, *Insolvency in Private International Law*, 2nd ed (2005), pp 15–17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

Reviewing the English case-law, Lord Hoffmann discerned in it a "golden thread running through English cross-border insolvency law since the 18th century" which, adopting a label devised by Professor Jay Westbrook, he called the "principle of (modified) universalism" (para 30):

> "That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

17. The Committee in *HIH* was unanimous in holding that the assets should be remitted to Australia, but they were divided in some aspects of their reasoning. Lord Hoffmann, with whom Lord Walker agreed, considered that the court had an inherent power to direct the remittal of the assets at common law. However, that view was not adopted by the rest of the Committee. Lord Scott and Lord Neuberger considered that the power was wholly derived from section 426 of the Insolvency Act 1986. Lord Phillips held that the statutory power was a sufficient jurisdictional basis for the proposed direction, and declined to decide whether jurisdiction could have been established at common law. It is, however, important to appreciate that this difference of opinion related not to the principle of universalism itself, nor to the juridical basis of the power to assist a foreign liquidation in general. The difference was about whether that power could be exercised in a manner which would deprive creditors proving in England of their statutory right under section 107 of the Insolvency Act 1986 to a *pari passu* distribution according to English rules of priority. The principle justifying judicial assistance in a foreign insolvency which was stated in *In re African Farms* and affirmed in *Cambridge Gas* was subject to "such conditions as the court may impose for the protection of local creditors, or in recognition of the requirements of our local laws" (p 377) or, as it was put more broadly in *HIH* itself, "justice and UK public policy" (para 30). The division in the Committee in *HIH* was about whether this meant that it was subject to the mandatory requirements of section 107 of the Insolvency Act 1986. The relevance of section 426 in the view of Lord Scott and Lord Neuberger was that on their construction of that section it authorised the treatment of the assets in accordance with the law of the foreign jurisdiction notwithstanding its inconsistency with mandatory rules of English law: see Lord Scott at para 61, and Lord Neuberger at para 68. Absent that provision, the remittal of the assets to Australia would have been contrary to English law. Lord Phillips did not, any more than Lord Scott and Lord Neuberger, question the principle of modified universalism. Indeed, he regarded it as determinative of the manner in which the discretion should be exercised, albeit leaving open the question of its juridical source: see para 44.

18. *Cambridge Gas* marks the furthest that the common law courts have gone in developing the common law powers of the court to assist a foreign liquidation. It has proved to be a controversial decision. So far as it held that the domestic court had jurisdiction over the parties simply by virtue of its power to assist, it was subjected to fierce academic criticism and held by a majority of the Supreme Court to be wrong in *Rubin v Eurofinance SA* [2013] 1 AC 236. So far as it held that the domestic court had a common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency, its authority is weakened by the absence of any explanation of whence this common law power came and by the direct rejection of that proposition by the Judicial Committee in *Al Sabah v Grupo Torras SA* [2005] 2 AC 333, a case cited in argument in *Cambridge Gas* but not in the advice of the Board. Lord Walker, giving the advice of the Board in *Al Sabah*, had expressed the view that there was no

inherent power to set aside Cayman trusts at the request of a foreign court of insolvency, in circumstances where a corresponding statutory power existed under the Cayman Bankruptcy Law but did not apply in the circumstances. The Board considers it to be clear that although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law. So far as *Cambridge Gas* suggests otherwise, the Board is satisfied that it is wrong for reasons more fully explained in the advice proposed by Lord Collins. If there is a corresponding statutory power for domestic insolvencies there will usually be no objection on public policy grounds to the recognition of a similar common law power. But it cannot follow without more that there is such a power. It follows that the second and third propositions for which *Cambridge Gas* is authority cannot be supported.

19. However, the first proposition, the principle of modified universalism itself, has not been discredited. On the contrary, it was accepted in principle by Lord Phillips, Lord Hoffman and Lord Walker in *HIH*, and by Lord Collins (with whom Lord Walker and Lord Sumption agreed) in *Rubin v Eurofinance SA*. Nothing in the concurring judgment of Lord Mance in that case casts doubt upon it. At paras 29-33 Lord Collins summarised the position in this way:

> "29 Fourth, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings. The common law principle is that assistance may be given to foreign office-holders in insolvencies with an international element. The underlying principle has been stated in different ways: 'recognition… carries with it the active assistance of the court': *In re African Farms Ltd* [1906] TS 373, 377; 'This court… will do its utmost to co-operate with the US Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under ch 11': *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, 117.
>
> 30 In *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827, Millett LJ said:
>
> 'In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention… It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's

jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.'

31 The common law assistance cases have been concerned with such matters as the vesting of English assets in a foreign office-holder, or the staying of local proceedings, or orders for examination in support of the foreign proceedings, or orders for the remittal of assets to a foreign liquidation, and have involved cases in which the foreign court was a court of competent jurisdiction in the sense that the bankrupt was domiciled in the foreign country or, if a company, was incorporated there.

…

33. One group of cases involved local proceedings which were stayed or orders which were discharged because of foreign insolvency proceedings. Thus in *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; cf *In re African Farms Ltd* [1906] TS 373 (execution in Transvaal by creditor in proceedings against English company in liquidation in England stayed by Transvaal court), applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency). Cases of judicial assistance in the traditional sense include *In re Impex Services Worldwide Ltd* [2004] BPIR 564, where a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company."

In the Board's opinion, the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers. What are those limits? In the absence of a relevant statutory power, they must depend on the common

law, including any proper development of the common law. The question how far it is appropriate to develop the common law so as to recognise an equivalent power does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise. On this appeal, the Board proposes to confine itself to the particular form of assistance which is sought in this case, namely an order for the production of information by an entity within the personal jurisdiction of the Bermuda court. The fate of that application depends on whether, there being no statutory power to order production, there is an inherent power at common law do so.

20. The fundamental question is whether a power of compulsion of this kind requires a statutory basis. For this purpose, it is important to distinguish between evidence and information. By evidence, the Board means evidence to prove facts in legal proceedings. The power to compel a person to give evidence in legal proceedings was not originally statutory. Like the power to order discovery, it was an inherent power of the Court of Chancery, devised by judges to remedy the technical and procedural limitations associated with the proof of fact in courts of common law. In England, it was first put on a statutory basis by the Perjury Act of 1563, which extended the power to issue a *subpoena ad testificandum* to all courts of record. In Bermuda, its basis is now section 4 of the Evidence Act 1905. The origins of these powers in the procedural history of the English courts go some way to explain why those courts have always disclaimed any inherent power to compel the furnishing of evidence for use in foreign proceedings: see *Bent v Young* (1838) 9 Sim 180, 192 (Shadwell V-C); *Dreyfus v Peruvian Guano Co* (1889) 41 Ch D 151; *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] 1 All ER 161 (Div Ct), paras 58-63. No such power existed in England until it was created by statute, initially by the Foreign Tribunals Evidence Act 1856.

21. What is sought in this case, however, is not evidence for use in forensic proceedings but information required for the performance of the liquidators' ordinary duty of identifying and taking possession of assets of the company. In *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2014] QB 112, at para 12 the Court of Appeal doubted whether the distinction between evidence and information was helpful, and their doubt was probably justified in that case, where information was being sought for use in foreign proceedings. But the distinction is of broader legal significance. The courts have never been as inhibited in their willingness to develop appropriate remedies to require the provision of information when a sufficiently compelling legal policy calls for it.

22. The classic modern illustration is the jurisdiction recognised by the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. The House, drawing mainly on the earlier decisions in *Orr v Diaper* (1876) 25 WR 23 and *Upmann v Elkan* (1871) LR 12 Eq 140, 7 Ch App 130,

recognised a common law power to order the production of information about the identity of a wrongdoer where the defendant had been involved, even innocently, in the wrong. Such an order, as they recognised, would not have been available to compel the giving of evidence, because of the long-standing objection of courts of equity to a bill of discovery against a "mere witness": see, in particular, pp 173-174 (Lord Reid). In *Smith Kline & French Ltd v Global Pharmaceutics Ltd* [1986] RPC 394, the Court of Appeal in England applied the same principle to information about the identity of a wrongdoer outside the jurisdiction. These decisions were founded not on the procedural requirements for proving facts in English litigation, but on the recognition of a duty to provide the information in certain circumstances. The duty of a person who had become involved in another's wrongdoing was held to be to "assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers": [1974] AC 133, 175 (Lord Reid), cf. p 195 (Lord Cross). It is, however, clear that this duty was of a somewhat notional kind. It was not a legal duty in the ordinary sense of the term. Failure to supply the information would not give rise to an action for damages. The concept of duty was simply a way of saying that the court would require disclosure. Indeed, Lord Morris of Borth-y-Gest (pp 181-182) thought that the duty would not arise until the court had held that the conditions were satisfied. Viscount Dilhorne (p 190) agreed and so, it seems, did Lord Cross (p 198). Lord Kilbrandon, citing with apparent approval the South African decision in *Colonial Government v Tatham* (1902) 23 Natal LR 153, observed (p 205) that the duty lay "rather on the court to make an order necessary to the administration of justice than on the respondent to satisfy some right existing in the plaintiff."

23. The present case is not a *Norwich Pharmacal* case. The significance of *Norwich Pharmacal* in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle. In the Board's opinion, an analogous power arises in the present case. Relief is not being sought by way of assistance to a litigant who can rely on ordinary forensic procedures for the purpose. It is being sought by the officers of a foreign court. The principle of modified universalism is a recognised principle of the common law. It is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction. The basis of that public interest is not only comity, but a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be recognised and effective internationally. This is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation. The courts have repeatedly recognised not just a right but a duty to

assist in whatever way they properly can. The Bermuda court has properly recognised the status of the liquidators as officers of that court. The liquidators require the information for the performance of the ordinary functions attaching to that status. Their acknowledged right to take possession of the company's world-wide assets is of little use without the ability to identify and locate them, if necessary with the assistance of the court. The information is unlikely to be available in any other way. None of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question. The right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation. The recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

24. There are two reported cases in which an order for the production of documents or information has been made by way of common law assistance to a foreign court. The first is *Moolman v Builders & Developers (Pty) Ltd* [1989] ZASKA 171, a decision of the Supreme Court of South Africa. The appeal arose out of the winding up in the Transkei of a company incorporated there, at a period of South African history when the Transkei was in law a foreign country. The liquidator sought an order of the South African court for the examination of certain persons in South Africa with a view to locating assets of the company. Such an order would have been available to him by statute if there had been an ancillary liquidation in South Africa, but there was no statutory power to wind up this particular company in South Africa. The court held that a power to make such an order at common law was within the principle of *In re African Farms Ltd* [1906] TS 373. The second case is *In re Impex Services Worldwide Ltd* [2004] BPIR 564, a decision of the High Court of the Isle of Man. Section 206 of the Isle of Man Companies Act 1931 conferred a power to order an examination but only in relation to a Manx company. Deemster Doyle nevertheless gave effect by way of common law judicial assistance to a letter of request of the High Court in England seeking the examination of persons in the Isle of Man on behalf of the liquidator of an English company. The Board would not wish to endorse all of the reasoning given in these judgments, in particular those parts which appear to support the concept of applying statutory powers by mere analogy in cases outside their scope. But the Board considers that the decisions themselves were correct in principle.

25. In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or

documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers. It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in *In re African Farms Ltd* and in *HIH* and *Rubin*, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in *Norwich Pharmacal* and *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* (at both levels) shows, common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency. Finally, as with other powers of compulsion exercisable against an innocent third party, its exercise is conditional on the applicant being prepared to pay the third party's reasonable costs of compliance.

26. Order 11, rule 1(2) of the Rules of the Bermuda Supreme Court (as applied by order 11, rule 9(1)) authorises the service of an originating summons, petition, notice of motion or similar originating process out of the jurisdiction without leave in respect of any "claim which by virtue of any enactment the Court has power to hear and determine". Because the common law power of the court to compel the production of information in aid of a foreign liquidation is not statutory nor derived from any analogy with the statute, this rule had no application to it. There is a more general power to serve originating process (other than a writ) out of the jurisdiction with the leave of the court under Order 11, rule 9(4), but it is not exercisable against persons whose engagement in the affairs of a foreign company has no connection with Bermuda and there is no implicit statutory authority for such a course: see *In re Seagull Manufacturing Co Ltd* [1993] Ch 345. It follows that on any view the Chief Justice had no power

to authorise the service out of the jurisdiction on Mr Suddaby or other partners or officers of PwC who were not within the jurisdiction of the court. The most that he could do, in a case within the ambit of the power, was order PwC, as the only party present within the jurisdiction, to comply for their own part and to take reasonable steps to procure the co-operation of others.

Application to the present case

27. The Board has summarised the limitations on the common law power to compel the production of information. Of these limitations, two are potentially relevant in the case of Singularis.

28. The first arises from PwC's argument that the order sought against them is not consistent with the law or public policy of Bermuda, because the statutory power to compel the production of information under section 195 of the Bermuda Companies Act impliedly excludes the possibility of an equivalent power at common law. The argument is that because section 195 is limited to cases where the company is being wound up in Bermuda, it would be inconsistent with the statutory scheme to recognise a common law power which, if it existed, would be subject to no such limitation. The Board is not persuaded by this. The existence of a statutory power covering part of the same ground may impliedly exclude a common law power covering the whole of it. But it does not necessarily do so. An implied exclusion of non-statutory remedies arises only where the statutory scheme can be said to occupy the field. This will normally be the case if the subsistence of the common law power would undermine the operation of the statutory one, usually by circumventing limitations or exceptions to the statutory power which are an integral part of the underlying legislative policy: see *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2007] 1 AC 558, para 19 (Lord Hoffmann); *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2011] 2 AC 15, paras 27-34 (Lord Dyson). There is, however, no reason to suppose that the limitation of the power under section 195 of the Companies Act to companies in the course of winding up in Bermuda reflects a legislative policy adverse to assisting foreign courts of insolvency jurisdiction. It simply reflects the limits of the ambit of the Act. The relevant provisions of the Act have been analysed in the advice of the Board in the *Saad Investments* appeal. In summary, the effect of section 4 is that it applies to companies incorporated in Bermuda or authorised to carry on business there. However, the fact that express provision is made for the powers exercisable on the winding up of companies to which the Act applies, does not in the Board's opinion exclude the use of common law powers in relation to other companies which lie outside the scope of the statute altogether.

29. The second limitation which is relevant presents more formidable problems for the joint liquidators. The material which they seek in Bermuda would not be obtainable under the law of the Cayman Islands pursuant to which the winding up is being carried out there. Where a domestic court has a power to grant ancillary relief in support of the proceedings of a foreign court, it is not necessarily an objection to its exercise that the foreign court had no power to make a corresponding order itself. Thus in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, the English court made a world-wide *Mareva* injunction in support of Swiss proceedings against Mr Cuoghi in circumstances where the Swiss court could not have made such an order. But that decision cannot be taken to reflect a universal principle. The critical factors which justified the order in that case were that there was an unqualified statutory power to give ancillary relief and that the Swiss court's inability to make the order was due to the fact that Mr Cuoghi was not resident in Switzerland whereas he was resident in England. Rather different considerations apply to the common law power with which the Board is presently concerned. Its whole juridical basis is the right and duty of the Bermuda court to assist the Cayman court so far as it properly can. It is right for the Bermuda court, within the limits of its own inherent powers, to assist the officers of the Cayman court to transcend the territorial limits of that court's jurisdiction by enabling them to do in Bermuda that which they could do in the Cayman Islands. But the order sought would not constitute assistance, because it is not just the limits of the territorial reach of the Cayman court's powers which impede the liquidators' work, but the limited nature of the powers themselves. The Cayman court has no power to require third parties to provide to its office-holders anything other than information belonging to the company. It does not appear to the Board to be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law. This was in substance the ground on which the liquidators failed in the Court of Appeal when they characterised the present application as "forum-shopping". In the opinion of the Board it is correct.

30. The liquidators have not contended at any stage of this litigation that the order which they seek can be justified at common law independently of the power of the Bermuda court to assist a foreign court of insolvency jurisdiction. Moreover, they have accepted before the Board that the information which they seek belongs to PwC and was therefore properly excluded from the order made by the Grand Court of the Cayman Islands. Whether this was correct was not therefore a point argued before the Board. Nonetheless, the Board would not wish to part with this case without expressing their doubts about whether information which PwC acquired solely in their capacity as the company's auditors can be regarded as belonging exclusively to them simply because the documents in which they recorded that information are their working papers and as such their property.

Conclusion

31. The Board will humbly advise Her Majesty that this appeal should be dismissed.

LORD COLLINS:

Introduction

32. In my opinion the appeal should be dismissed because the ground on which the joint liquidators based their appeal is unsupportable, namely that the court has at common law the ability to exercise powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but which do not apply in the international context. This opinion is intended to explain why that conclusion is inescapable in the light of the relationship between the judiciary and the legislature.

33. As the Supreme Court confirmed in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 the court has a common law power to assist foreign winding up proceedings so far as it properly can. In my view, in common with Lord Sumption and despite Lord Mance's powerful opinion to the contrary, the Bermuda court has the power to make an order against persons subject to its personal jurisdiction in favour of foreign liquidators for production of information for the purpose of identifying and locating assets of the company, provided they have a similar right under the domestic law of the court which appointed them. I therefore agree with Lord Sumption that this was not a proper case for exercise of that power.

34. The existence of a common law power to order information (otherwise than by analogy with local statutory powers) was not pursued by the liquidators on the appeal, and it was virtually disclaimed by them until questioning by the Board (quoted in Lord Mance's opinion at para 128) may have led them to adopt it as a subsidiary basis for their appeal.

35. Consequently the parties are entitled to have the views of the Board on the argument which was actually put before it, in essence whether *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26, [2007] 1 AC 508 ("*Cambridge Gas*") correctly decided that the court has a common law power to assist foreign winding up proceedings by exercising powers which are analogous to statutory powers which would have been exercisable in the case of a domestic insolvency, but do not apply to the international insolvency.

36. The primary way in which the case was put by the liquidators was that the common law develops to meet changing circumstances and that in international insolvencies the common law should be developed by the adoption of a principle that where local legislation does not provide for relevant assistance to a foreign officeholder, the legislation should be applied by analogy "as if" the foreign insolvency were a local insolvency. This argument was accepted by the Chief Justice. But it involves a fundamental misunderstanding of the limits of the judicial law-making power, and should not go unanswered.

37. A second reason for dealing with the main point of the liquidators' appeal was that the question whether local legislation could be applied by analogy arose in an appeal in the Cayman Islands Court of Appeal, and that court gave only an interim judgment pending the decision of this Board on this appeal: *Picard v Primeo Fund*, April 16, 2014. That case, as will appear below, involved anti-avoidance proceedings for the recovery of assets, and not (as in the present case) proceedings to obtain information to recover assets. On the principal argument of the liquidators, there is no material difference between this case and the Cayman Islands case. In each case the argument was that the local legislation should, if it does not apply according to its terms (and there is a question about this in the Cayman Islands case), be applied by analogy or on an "as if" basis. The Board took the view that it would be failing in its duty if it did not reach this question on this appeal, and simply left the Cayman Islands Court of Appeal to decide the matter with a possible further appeal to the Privy Council. That appeal has recently been settled, but the point of principle may still arise.

38. In my judgment the answer to the present appeal is to be found in the following propositions. First, there is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised through the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy "as if" the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case.

The practical issue

39. Both the Cayman Islands and Bermuda have statutory provisions for the examination of persons connected with an insolvent company. In England the statutory power is contained in the Insolvency Act 1986, section 236.

40. This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542, the authorities (including, among others, the Lord Chancellor and the Chief Justices) were given power to examine on oath persons who were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day.

41. The provisions of neither the Cayman Islands nor Bermuda statutes apply to the material sought by the liquidators in this case. That is because: (1) the power in section 103 of the Cayman Islands Companies Law to order any person, whether or not resident in the Cayman Islands, who has a relevant connection with a company in liquidation (including its former auditor) to "transfer or deliver up to the liquidator any property or documents belonging to the company" extends only to material belonging to the companies (subject to what Lord Sumption says at para 29); and (2) the power to summon persons suspected of having property of company etc. in section 195 of the Companies Act 1981 of Bermuda does not apply because the power is exercisable only in respect of a company which that court has ordered to be wound up, and in the SICL appeal the Board has advised that the winding up order must be stayed because the court has no jurisdiction to wind up a company incorporated outside Bermuda, to which Part XIII of the Companies Act is not expressly applied.

42. The problem in this and other similar or analogous cases has arisen largely in relation to those British colonies, dependencies, and overseas territories, such as Bermuda, and the Isle of Man, which do not have the statutory powers to assist foreign officeholders which exist under United Kingdom law. Consequently, except in a rare situation to which I will revert, the practical result of this appeal is largely confined to such countries, or those countries (such as the Cayman Islands) where the extent of the statutory powers is controversial.

43. Some of these territories do have such powers. The British Virgin Islands has given effect to the UNCITRAL Model Law in the Insolvency Act 2003, Part XIX, which contains powers to assist foreign officeholders, but only from countries or territories which are designated by the Financial Services Commission. There are 9 such countries or territories, including the United States and the United Kingdom. Section 470 of the Insolvency Act 2003 preserves the power of the court to provide assistance under any other rule of law.

44. The Cayman Islands Companies Law, section 241, gives the court power to make orders ancillary to a foreign bankruptcy proceeding (including the power to

require a person in possession of information relating to the business or affairs of a bankrupt: section 241(1)(d)). But the application of these powers to anti-avoidance proceedings has been controversial. The Cayman Islands Court of Appeal reserved pending the outcome of this appeal the question whether the anti-avoidance provisions of its law can be used at common law (in addition to, or alternatively to, its statutory power to do so) in aid of a US bankruptcy proceeding: *Picard v Primeo Fund*, April 16, 2014. As mentioned above, the appeal has recently been settled.

45. In the United Kingdom, except where the EU Insolvency Regulation (Council Regulation (EC) 1346/2000) applies, the English court has a very wide power to wind up foreign companies, and where a foreign company is being wound up in England the liquidator is generally free to invoke the relevant provisions of the Insolvency Act 1986 in discharge of his functions, which would include the power to ask for examination under the Insolvency Act 1986, section 236.

46. Where the foreign company is not being wound up in England, under the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which give effect to the UNCITRAL Model Law, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives (article 25(1)). By article 21(1) of the 2006 Regulations, upon recognition of a foreign proceeding, the English court may grant appropriate relief, including the examination of witnesses, and the taking of evidence or the delivery of information concerning (inter alia) the debtor's assets. Secondary proceedings may be opened in the United Kingdom, but only where the debtor has an establishment in the United Kingdom and only as regards assets in the United Kingdom.

47. Under section 426 of the Insolvency Act 1986 the English court with jurisdiction in relation to insolvency is to assist the courts having the corresponding jurisdiction in any other part of the United Kingdom "or any relevant country or territory" (section 426(4)) by applying the law of either jurisdiction (section 426(5), a very difficult section: see Dicey, Morris and Collins, *Conflict of Laws*, 15th ed 2012, paras 30-110 *et seq*). These powers apply to only a limited numbers of countries (including Australia, the Bahamas, and the Isle of Man).

48. An order for examination may be made under this section in aid of a foreign liquidation. In *England v Smith* [2001] Ch 419 it was held, in a case of an order for examination under Australian law of a person concerned with the affairs of a company, that application of the law of the requesting state should not be circumscribed by limitations to be found in the corresponding provisions of section 236 of the 1986 Act unless some principle of English public policy were infringed.

49. Where the EU Insolvency Regulation applies, a foreign officeholder may exercise all the powers conferred on him by the law of the state of the opening of proceedings (article 18(1)).

50. Accordingly the statutory powers of the UK courts to assist foreign officeholders to trace assets are very extensive. It follows that the existence of a common law power to order examination will almost certainly never arise in England, and the same is true of the other statutory powers of which foreign officeholders may wish to take advantage. This is subject to what is said below about *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61, where clawback under the Insolvency Act 1986, section 423 (transactions at an undervalue) was sought and granted, in a case where the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

Assistance at common law in international insolvency

51. The UK Supreme Court accepted, and re-confirmed, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 that at common law the court has power to recognise and grant assistance to foreign insolvency proceedings: para 29.

52. In my judgment in *Rubin v Eurofinance SA*, at para 29, I quoted what Millett LJ had said in *Credit Suisse Fides Trust v Cuoghi* [1998] QB 818, 827:

> "In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

53. The common thread in those cases in which assistance has been given is the application or extension of the existing common law or statutory powers of the court.

54. Most of the cases fall into one of two categories. The first group consists of cases where the common law or procedural powers of the court have been used to stay

proceedings or the enforcement of judgments. Several of these cases were mentioned in *Rubin v Eurofinance SA* at para 33. They include (subject to what is said below) *Re African Farms Ltd* [1906] TS 373, where execution in Transvaal by a creditor in proceedings against an English company in liquidation in England was stayed by the Transvaal court, which was applied in *Turners & Growers Exporters Ltd v The Ship Cornelis Verolme* [1997] 2 NZLR 110 (Belgian shipowner in Belgian bankruptcy: ship released from arrest); and *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112, where an English injunction against a Texas corporation in Chapter 11 proceedings was discharged; and two cases in Hong Kong: *Modern Terminals (Berth 5) Ltd v States Steamship Co* [1979] HKLR 512 (stay in Hong Kong of execution against Nevada corporation in Chapter 11 proceedings in United States federal court in California), followed in *CCIC Finance Ltd v Guangdong International Trust & Investment Corpn* [2005] 2 HKC 589 (stay of Hong Kong proceedings against Chinese state-owned enterprise in Mainland insolvency).

55. In my judgment too much has been read into *In re African Farms Ltd* [1906] TS 373. It was not mentioned in any English case until it was cited in argument in *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213, 219, for the proposition that the English court will not allow funds to be transmitted to the jurisdiction of the foreign court of the principal winding up without first making provision for the local secured, preferential and statutory creditors, and then subsequently approved in *Cambridge Gas*. It had never been mentioned in the classic company law texts, Buckley, Gore-Browne, and Palmer (nor in Williams on Bankruptcy), nor in Fletcher, *Insolvency in Private International Law* (2nd ed 2005). It received only a passing mention in the successive editions of Forsyth on South African private international law now called *Private International Law: The Modern Roman-Dutch Law* (now 5th ed 2012, p 456), although it has been mentioned (obiter) with approval by the Supreme Court of Appeal of South Africa: *Gurr v Zambia Airways Corp Ltd*, 1998 2 All SA 479 (A).

56. Apart from the stay of execution ordered against a secured creditor (Standard Bank) which had obtained a judgment, the only part of the order in *In re African Farms Ltd* which is relevant for present purposes is the order that all questions of mortgage or preference be regulated by Transvaal law as if the company had been placed in liquidation in the Transvaal. It is not stated how that was to be achieved, but it is significant that the Chief Justice said: "Such conditions are not easy to devise; and it is possible that to place the foreign liquidator in such a position as to ensure beyond doubt a distribution such as I have indicated would require reciprocal legislation in the two countries" (at p 382). Even though the company could not have been wound up in the Transvaal, the decision is certainly not authority for the proposition that local statutory law may be applied by analogy.

57. *In re Impex Services Worldwide Ltd* [2004] BPIR 564 also falls into the category of the use or extension of the existing powers of the court. In that case a Manx order for examination and production of documents was made in aid of the provisional liquidation in England of an English company. That was referred to in *Rubin v Eurofinance SA* at para 33 as a case of judicial assistance in the traditional sense because the order was based on a request by the English court, but the decision was not the subject of examination before the Supreme Court and cannot be said to have been approved by it. The request could not be accommodated under the Manx Companies Act 1931, or under the inherent jurisdiction of the court, but the order was made at common law without articulation of its basis.

58. A second group of cases is where the statutory powers of the court have been used in aid of foreign insolvencies. The best known example is the use of the long-standing power to wind up foreign companies which are being wound up (or even have been dissolved) in the country of incorporation. In *In re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213 Sir Richard Scott V-C conducted an exhaustive analysis of the cases on ancillary liquidations, and concluded (at p 246): (1) Where a foreign company was in liquidation in its country of incorporation, a winding up order made in England would normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation. (2) The winding up in England would be ancillary in the sense that it would not be within the power of the English liquidators to get in and realise all the assets of the company worldwide: they would necessarily have to concentrate on getting in and realising the English assets. (3) Since in order to achieve a pari passu distribution between all the company's creditors it would be necessary for there to be a pooling of the company's assets worldwide and for a dividend to be declared out of the assets comprised in that pool, the winding up in England would be ancillary in the sense, also, that it would be the liquidators in the principal liquidation who would be best placed to declare the dividend and to distribute the assets in the pool accordingly. (4) None the less, the ancillary character of an English winding up did not relieve an English court of the obligation to apply English law, including English insolvency law, to the resolution of any issue arising in the winding up which was brought before the court.

59. *In re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 also falls within this category because the majority in the House of Lords decided that the power of the English court to accede to the letter of request from the Australian court, inviting it to direct the English provisional liquidators to remit the assets in their hands to the Australian liquidators derives from section 426 of the Insolvency Act 1986.

60. As part of the majority in *HIH* Lord Scott (at para 59) re-affirmed what he had said in *In re Bank of Credit and Commerce International SA (No 10)*: "The English courts have a statutory obligation in an English winding up to apply the English statutory scheme and have, in my opinion, in respectful disagreement with my noble and learned friend Lord Hoffmann, no inherent jurisdiction to deprive creditors proving in an English liquidation of their statutory rights under that scheme." See also Lord Neuberger at para 72.

The liquidators' argument and the Chief Justice's decision

61. The primary argument of the liquidators before the Board, which had found favour with the Chief Justice as the principal ground of his decision (which he described as "more principled" at para 49), was that the Bermuda court should apply directly the examination provisions of section 195 of the Companies Act 1981 by analogy.

62. That was said to be based on what Lord Hoffmann had said in *Cambridge Gas* (at para 22):

> "What are the limits of the assistance which the court can give? … At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

63. In the Court of Appeal in the present case Auld JA had described the development of the common law jurisdiction to grant assistance to a foreign liquidator as if the foreign company were being wound up locally as amounting to impermissible "legislation from the bench." In answer, the liquidators in their argument to the Board relied on many dicta to the effect that the common law develops to meet changing circumstances.

64. In my view to apply insolvency legislation by analogy "as if" it applied, even though it does not actually apply, would go so far beyond the traditional judicial development of the common law as to be a plain usurpation of the legislative function.

Judicial law-making

65. The liquidators are plainly right to say that the common law develops, sometimes radically, to meet changing circumstances. It hardly requires citation of authority to make that point. No-one now doubts that judges make law, although English and Scottish judges were slow to acknowledge it until the seminal writings by Lords Reid, Denning and Devlin, citation of which is unnecessary. But there are limits to their power to make law. In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 Lord Goff of Chieveley said (at p 378):

> "When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions. Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this 'only interstitially,' to use the expression of O. W. Holmes J. in *Southern Pacific Co. v. Jensen* (1917) 244 U.S. 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole. In this process, what Maitland has called the 'seamless web,' and I myself (*The Search for Principle*, Proc. Brit. Acad. vol. LXIX (1983) 170, 186) have called the 'mosaic,' of the common law, is kept in a constant state of adaptation and repair …."

66. What Justice Holmes said in the passage to which Lord Goff referred was: "I recognise without hesitation that judges do and must legislate, but they can do so only interstitially." The point was developed by Justice Cardozo in *The Nature of the Legal Process* (1921), at pp 103, 113:

> "We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges throughout the centuries of the common law have set to judge-made innovations … We do not pick our rules of law full-blossomed from the trees… "[The judge] legislates only between gaps. He fills the open spaces in the law ..."

67. More recently similar points have been made by eminent judges of our time. Judge Richard Posner said in *How Judges Think* (2008), at p 86:

> "The amount of legislating that a judge does depends on the breadth of his 'zone of reasonableness' – the area within which he has discretion to decide a case either way without disgracing himself."

68. And Lord Bingham said, in *The Business of Judging* (2000), p 32:

> "On the whole, the law advances in small steps, not by giant bounds."

69. The approach which is articulated by Lord Sumption is itself an example of the development of the common law since, as Lord Mance's opinion clearly shows, it goes beyond what has previously been understood to be the power of the court to order information.

The judiciary and legislation

70. But that is not the issue on this part of the appeal, which is whether, as the liquidators argue, legislation may be extended by the judiciary to apply to cases where the legislature has not applied it. It raises a much more radical question than the familiar question whether a common law rule should be extended or developed or whether the extension or development should be left to Parliament.

71. The latter question arises frequently and yields different answers. In the human rights context, it was the subject of intense debate in the recent case on assisted suicide: *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 [2014] 3 WLR 200. In the private law area, for example, the majority in *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398 decided to remove immunity from expert witnesses. The minority thought that that was a question which should be left to consideration by the Law Commission and reform by Parliament.

72. By contrast, in *Rubin v Eurofinance SA* the majority considered that a change in the law relating to foreign judgments to apply a different rule (removing the need for a jurisdictional basis) in the context of insolvency was a matter for the legislature. Similarly members of the present Board have at various times made the same point in other contexts: *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, para 83 (Lord Neuberger); *Test Claimants in the FII Group*

Litigation v Revenue and Customs Comrs [2012] UKSC 19, [2012] 2 AC 337, para 200 (Lord Sumption); *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 AC 383, para 174 (Lord Mance).

73. But I emphasise that that is not the issue here. Nor is the issue the question whether legislation may influence the development of a common law rule. A famous early example where that was regarded as legitimate was *R v Bourne* [1939] 1 KB 687, where a direction was given that the eminent obstetrician Aleck Bourne was entitled as a defence to an abortion charge to rely by analogy on the provision of the Infant Life (Preservation) Act 1929 that infanticide could be justified to preserve the life of the mother.

74. The question of the extent to which statutes may influence the development of the common law is a well-known and controversial one. Professor Atiyah addressed the questions in this way (*Common Law and Statute Law* (1985) 48 MLR 1, 6):

> "...is [it] possible for the courts to take account of statute law, in the very development of the common law itself? Can the courts, for instance, use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law?"

75. In each of those situations it is not difficult to find cases which justify the forms of reasoning which Professor Atiyah identifies. But none of them comes anywhere near what the Board is asked to do in this case.

76. Nor is the issue whether a statutory rule may be taken into account in the exercise of a discretion. An example is the use of statutory limitation periods in the exercise of the equitable doctrine of laches: *P & O Nedlloyd BV v Arab Metals Co (The UB Tiger)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] 2 WLR 355, at para 12.

77. Nor is the issue whether the courts may develop the common law by entering or re-entering a field regulated by legislation. As Lord Nicholls said in *Re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, para 30, the courts have been slow to do that because "otherwise there would inevitably be the prospect of the common

law shaping powers and duties and provisions inconsistent with those prescribed by Parliament."

The equity of a statute

78. What the liquidators propose is very much more radical. It is that the court should apply legislation, which ex hypothesi does not apply, "as if" it applied.

79. That proposition is reminiscent of the concept of the "equity of a statute." When used properly today, it means no more than interpreting a statute by reference to its purpose or the mischief which it was designed to cure: e.g. *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] Ch 73, 88.

80. But it once meant something which "has been relegated to the limbo of legal antiquities" (Loyd, *The Equity of a Statute* (1909) 58 U Penn L Rev 76), and had been formulated in this way: "Equitie is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth ..." (Co. Litt. Lib. 1, Ch II, para 21, quoting Bracton).

81. Under that doctrine the courts felt themselves free to enlarge a statute so as to apply it to situations which were not covered by the words of the statute but were regarded by the courts as within its spirit and analogous: Burrows, *The relationship between common law and statute in the law of obligations* (2012) 128 LQR 232, 241; Atiyah, *Common Law and Statute Law* (1985) 48 MLR 1, 7-8. That concept of the "equity of a statute" fell into disfavour in the eighteenth century and was abandoned by the beginning of the nineteenth century, and the judges were no longer able in effect to exercise a direct legislative function.

82. The liquidators' argument is that the common law rule of assistance in insolvency matters extends to the application of local legislation even though as a matter of its legislative scope it does not apply to the case in hand. In the present case the argument is that, even if section 195 of the Companies Act 1981 does not apply to foreign companies, it should be applied by analogy or "as if" the Cayman Islands company were a Bermuda company.

83. In my judgment, that argument is not only wrong in principle, but also profoundly contrary to the established relationship between the judiciary and the legislature. To the extent that it depends on some part of the opinion in *Cambridge Gas*, that decision was not only wrong in its recognition of the New

York order regulating the title to Manx shares, as decided in *Rubin v Eurofinance SA*, it was also wrong to apply the Manx statutory provisions for approval of schemes of arrangement by analogy or "as if" they applied.

Cambridge Gas

84. The essence of the decision in *Cambridge Gas* was that the New York order would be recognised, and would be given effect because a similar scheme could have been sanctioned as a scheme of arrangement under the Isle of Man law.

85. The facts of *Cambridge Gas* are set out in *Rubin* at paras 36 et seq. For present purposes it is only necessary to recall that a gas transport shipping business venture ended in failure, and resulted in a Chapter 11 proceeding in the US Bankruptcy Court in New York. The question for the Privy Council on appeal from the Isle of Man was whether an order of the New York court was entitled to implementation in the Isle of Man. The New York court had rejected the investors' plan and accepted the bondholders' plan.

86. The corporate structure of the business was that the investors owned, directly or indirectly, a Bahamian company called Vela Energy Holdings Ltd ("Vela"). Vela owned (through an intermediate Bahamian holding company) Cambridge Gas, a Cayman Islands company. Cambridge Gas owned directly or indirectly about 70% of the shares of Navigator Holdings plc ("Navigator"), an Isle of Man company. Navigator owned all the shares of an Isle of Man company which in turn owned companies which each owned one ship.

87. The New York order vested the shares in Navigator (the Isle of Man company) in the creditors' committee, which subsequently petitioned the Manx court for an order vesting the shares in their representatives. The Manx Staff of Government Division acceded to this petition by making an order under the Manx Companies Act 1931, section 101, rectifying the share register by entering the creditors' committee as shareholders. In the Privy Council, Lord Hoffmann rejected this solution on this basis: the power was exercisable when "the name of any person is, without sufficient cause, entered in or omitted from the register". But for that purpose it was necessary to show that by the law of the Isle of Man the company was obliged to do so. The source of such an obligation could be found only in an order of the court, pursuant to its common law power of assistance, which required the company to make such an entry. Consequently, the argument based on section 101 was therefore circular. The prior question was whether the court has power to declare that the Chapter 11 plan should be carried into effect.

88. The Privy Council held that the plan could be carried into effect in the Isle of Man. The reasoning was as follows. First, if the judgment had to be classified as in personam or in rem the appeal would have to be allowed, but bankruptcy proceedings did not fall into either category. Second, the principle of universality underlay the common law principles of judicial assistance in international insolvency, and those principles were sufficient to confer jurisdiction on the Manx court to assist, by doing whatever it could have done in the case of a domestic insolvency. Third, exactly the same result could have been achieved by a scheme of arrangement under the Isle of Man Companies Act 1931, section 152.

89. In *Rubin* a majority of the Supreme Court (Lords Collins, Walker and Sumption) decided that *Cambridge Gas* was wrongly decided because the shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. Consequently the property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man. Lord Mance, in his concurring judgment, left the correctness of the decision open, and Lord Clarke, dissenting, thought that it was correctly decided.

90. I have already quoted the passage in *Cambridge Gas* (at para 22) in which Lord Hoffmann said that "the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency" and that the purpose of recognition of the foreign officeholders was to "to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

91. The effect of this part of the opinion in *Cambridge Gas* was to make an order equivalent to one which could have been made under a Manx scheme of arrangement without going through the statutory procedures for approval of a scheme. The passages in the opinion which are relevant are these:

> "24 In the present case it is clear that the New York creditors, by starting proceedings to wind up the Navigator companies and then proposing a scheme of arrangement under section 152 of the Companies Act 1931, could have achieved exactly the same result as the Chapter 11 plan. The Manx statute provides:

‘(1) Where a compromise or arrangement is proposed between a company and its creditors … the court may on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors … to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors … agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors … and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.’

25 The jurisdiction is extremely wide. All that is necessary is that the proposed scheme should be a ‘compromise or arrangement' and that it should be approved by the appropriate majority. Why, therefore, should the Manx court not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man? …

26 … [A]s between the shareholder and the company itself, the shareholder's rights may be varied or extinguished by the mechanisms provided by the articles of association or the Companies Act. One of those mechanisms is the scheme of arrangement under section 152. As a shareholder, Cambridge is bound by the transactions into which the company has entered, including a plan under Chapter 11 or a scheme under section 152. It is the object of such a scheme to give effect to an arrangement which varies or extinguishes the rights of creditors and shareholders. Thus, in the case of an insolvent company, in which the shareholders have no interest of any value, the court may sanction a scheme which leaves them with nothing …. The scheme may divest the company of its assets and leave the shareholders with shares in an empty shell. It may extinguish their shares and recapitalise the company by issuing new shares to others for fresh consideration. Or it may, as in this case, provide that someone else is to be registered as holder of the shares. Whatever the scheme, it is, by virtue of section 152, binding upon the shareholders when it receives the sanction of the court. The protection for the shareholders is that the court will not sanction a scheme, even if adopted by the statutory majority, if it appears unfair. And no doubt the discretion to refuse assistance in the implementation of an equivalent plan which has been confirmed in a foreign

> jurisdiction would be exercised on similar lines. But no such question arises in this case. Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would therefore not be unfair for the plan to be carried into effect. Their Lordships therefore consider that the Court of Appeal was right to order its implementation."

92. It is to be noted that Lord Hoffmann said that the New York creditors *could have achieved* exactly the same result as the Chapter 11 plan by a scheme of arrangement under the Companies Act 1931, section 152, and asked why the Manx court could not provide assistance by giving effect to the plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man.

93. Those proceedings required the calling of meetings and the passage of appropriate resolutions. The majority of the UK Supreme Court decided in *Rubin v Eurofinance SA* that *Cambridge Gas* was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company. The question whether there was any lawful basis for applying the legislation on an "as if" basis, or of dispensing with the statutory procedure, did not therefore arise in *Rubin v Eurofinance SA*. But for the reasons I have given, in my judgment there can be no doubt that, unless Manx law allowed the relaxation of the statutory procedures for the approval of schemes of arrangement, the judiciary was not entitled to apply those procedures by analogy at common law.

The application of Cambridge Gas

94. It follows in my view that those courts which have relied on these passages to apply legislation which the legislature had not itself seen fit to apply are wrong, including the decision of the Chief Justice in the present case.

95. That conclusion also applies to the decision in *Re Phoenix Kapitaldienst GmbH* [2012] EWHC 62 (Ch), [2013] Ch 61. In that case a company incorporated in Germany for the apparent purpose of investing individuals' funds in futures trading was used as a vehicle for a worldwide fraud. The German administrator applied for relief pursuant to the Insolvency Act 1986, section 423 (transactions at an undervalue) against former investors of the company who were resident in England, claiming back initial investment funds and fictitious profits for the

benefit of the company's creditors by setting aside transactions entered into at an undervalue.

96. As I have said, the EU Insolvency Regulation did not apply because the German company involved was an investment undertaking; the UNCITRAL Model Law did not apply because the 2006 Regulations were not in effect at the relevant time; and Germany was not a relevant country for the purposes of section 426(4).

97. Proudman J decided that the court had the power at common law to recognise a foreign administrator and to provide him with the same assistance as it was entitled to provide in a domestic insolvency; and that since proceedings to set aside antecedent transactions were central to the purpose of an insolvency the court therefore had jurisdiction to authorise the administrator to invoke section 423. Applying *Cambridge Gas* Proudman J held that the power to use the common law to recognise and assist an administrator appointed overseas "includes doing whatever the English court could have done in the case of a domestic insolvency" (at para 62).

98. In my judgment that decision is wrong because it involved an impermissible application of legislation by analogy.

99. In *Picard v Primeo Fund*, January 14, 2013 the US bankruptcy trustee of the principal Bernard Madoff company sought to claw back payments made by the company to a Cayman Islands company. The claims were based on US law (fraudulent transfers and preferential payments) and on Cayman law (preferential payments). The Cayman Islands have mutual assistance provisions (Companies Law (2012 Revision), sections 241-242), but the judge (Jones J) held that they did not apply because the power to make orders "ordering the turnover to a foreign representative of any property belonging to a debtor" did not apply to property which was only recoverable under transaction avoidance provisions.

100. The judge then went on to decide that the Cayman court was able to apply the Cayman voidable preferences provision of its law (section 145) to the payments made by the US company to the Cayman company, by applying *Cambridge Gas* and *In re Phoenix Kapitaldienst GmbH* [2013] Ch 61.

101. On April 16, 2014 the Court of Appeal of the Cayman Islands (consisting of Sir John Chadwick P and Mottley and Sir Anthony Campbell JJA), reversed Jones J on the first part of the case and held that the Cayman court was entitled to apply the Cayman anti-avoidance provisions under the assistance provisions of Cayman company law, because the making of a transaction avoidance order

restores to the debtor the property which is the subject of that order, and so enables the court to order the "turnover" of that restored property to the foreign representative: para 45.

102. The Court of Appeal did not reach the question whether Jones J was entitled to apply the Cayman anti-avoidance provision at common law. The court had been informed that an issue central to that question, namely whether *Cambridge Gas* should be followed, was before the Court of Appeal of Bermuda. Because the matter was before this Board and shortly to be heard, the Court of Appeal was invited to hand down an interim judgment dealing only with the issues on the mutual assistance statutory provisions. The appeal has now been settled. It follows from what I have said that the decision of Jones J on the present aspect of the case was wrong.

Al Sabah v Grupo Torras SA

103. There was also a prior opinion of the Privy Council, in which what was said is directly contrary to the approach in *Cambridge Gas* advocated by the liquidators. In *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333 the trustee in bankruptcy of a debtor in the Bahamas obtained from the Bahamian court a letter of request directed to the Grand Court of the Cayman Islands seeking its aid in setting aside two Cayman trusts established by the debtor. The Grand Court (affirmed by the Court of Appeal of the Cayman Islands) held that it had jurisdiction to provide such assistance under either section 156 of the Bankruptcy Law of the Cayman Islands or section 122 of the Bankruptcy Act 1914 (which provided for mutual assistance between bankruptcy courts throughout the UK and the Empire) or under the court's inherent jurisdiction, and that it should as a matter of discretion grant the Bahamian trustee powers under section 107 of the Cayman Bankruptcy Law to enable him to set aside the trusts. The Privy Council held that (i) section 156 of the Cayman Bankruptcy Law did not apply, but that (ii) section 122 had not been repealed in its application to the Cayman Islands and did apply, so that there was jurisdiction to authorise the Bahamian trustee to exercise the statutory power even though it might not have been available to him if the trusts had been governed by Bahamian law.

104. But the Board in an opinion given through Lord Walker said (at para 35):

> "The respondents relied in the alternative … on the inherent jurisdiction of the Grand Court. This point was not much developed in argument and their Lordships can deal with it quite shortly. If the Grand Court had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent

> power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by section 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. The non-statutory principles on which British courts have recognised foreign bankruptcy jurisdiction are more limited in their scope [citing what is now Dicey, Morris and Collins, *Conflict of Laws*, 15th ed (2012), vol 2, paras 31R-059 *et seq*] and the inherent jurisdiction of the Grand Court cannot be wider."

105. The Board plainly considered that the court had no power to apply the Bankruptcy Law "in circumstances not falling within" the Law. *In re Phoenix Kapitaldienst GmbH*, above, Proudman J distinguished this clear statement on the basis that she should follow what she described as "the later and more considered views expressed by Lord Hoffmann and approved by Lord Walker" in the *HIH* case, namely that the court was able, if consistent with justice and UK public policy, to achieve the aim of a unitary and universal bankruptcy law. In *Picard v Primeo Fund* Jones J explained the dictum in *Al Sabah* as meaning that the common law cannot be invoked to apply provisions of the Bankruptcy Law to achieve an objective outside its scope.

106. Neither of these supposed distinctions is valid. There is nothing in *HIH* to support Proudman J's suggestion that Lord Walker had changed his view, and Jones J's suggestion that Lord Walker was only directing his intention to objectives outside the scope of the Bankruptcy Law is wholly inconsistent with Lord Walker's plain words that the court does not have an inherent jurisdiction to exercise the powers conferred by the Bankruptcy Law "in circumstances *not falling within the terms* of that section" (emphasis added).

107. In my judgment Lord Walker's dictum in the opinion in *Al Sabah v Grupo Torres* (in which, among others, Lords Hoffmann and Scott concurred) was plainly right, and, to the extent it is inconsistent with the passage in *Cambridge Gas* applying the Isle of Man scheme of arrangement provisions on an "as if" basis, it is to be preferred to *Cambridge Gas.*

108. I would therefore humbly advise Her Majesty not only that the appeal should be dismissed, but also that to have allowed it on the basis of the liquidators' primary argument would have involved Her Majesty's judges in a development of the law and their law-making powers which would have been wholly inconsistent with established principles governing the relationship between the judiciary and the legislature and therefore profoundly unconstitutional.

LORD CLARKE:

109. I agree that this appeal should be dismissed for the reasons given by Lord Sumption. I add a short judgment of my own on the first issue raised by Lord Sumption in para 8, namely whether the Bermuda court has a common law power to assist a foreign liquidation by ordering the production of information (in oral or documentary form) in circumstances where (i) the Bermuda court has no power to wind up an overseas company such as Singularis and (ii) its statutory power to order the production of information is limited to cases where the company has been wound up in Bermuda. The second issue is whether, if such a power exists, it is exercisable in circumstances where an equivalent order could not have been made by the court in which the foreign liquidation is proceeding.

110. I have reached the conclusion that, for the reasons given by Lord Sumption, the answer to the first issue is that the Bermuda court does have such a power. The steps which lead me to that conclusion are these. While the recognition of such a power in an ancillary liquidation has not thus far been recognised at common law, it is common ground that the common law has developed step by step and that it may be extended or developed in appropriate circumstances. It follows that the question is whether the circumstances are appropriate to justify the recognition of such a power in this class of case.

111. As Lord Sumption demonstrates in para 20, significant developments have been made by the common law in the past. They included the power to compel a person to give evidence, which was not originally statutory. As Lord Sumption puts it, like the power to order discovery, it was an inherent power of the Court of Chancery devised by judges to remedy the technical and procedural limitations associated with the proof of facts in courts of common law. I agree with Lord Sumption (at para 23) that the significance of the *Norwich Pharmacal* case in the present context is that it illustrates the capacity of the common law to develop a power in the court to compel the production of information when it is necessary to do so in order to give effect to a recognised legal principle.

112. The recognised legal principle in the present case is the principle of modified universalism derived from *Cambridge Gas*: see paras 19 and 23 in Lord Sumption's judgment. I agree with him that it is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a world-wide basis notwithstanding the territorial limits of their jurisdiction. An important aspect of that public interest is a recognition that in a world of global businesses it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on a basis that will be

recognised and effective internationally. I also agree with Lord Sumption at para 23 (i) that this is a public interest which has no equivalent in cases where information may be sought for commercial purposes or for ordinary adversarial litigation; (ii) that the Bermuda court has properly recognised the status of the liquidators as officers of that court; (iii) that the liquidators require the information for the performance of the ordinary functions attaching to that status; (iv) that the information is unlikely to be available in any other way; (v) that none of the reasons which account for the common law's inhibition about the compulsory provision of evidence have any bearing on the present question; (vi) that the right and duty to assist foreign office-holders which the courts have acknowledged on a number of occasions would be an empty formula if it were confined to recognising the company's title to its assets in the same way as any other legal person who has acquired title under a foreign law, or to recognising the office-holder's right to act on the company's behalf in the same way as any other agent of a company appointed in accordance with the law of its incorporation; and (vii) that the recognition by a domestic court of the status of a foreign liquidator would mean very little if it entitled him to take possession of the company's assets but left him with no effective means of identifying or locating them.

113. These are powerful factors. What then are the limits? I agree with Lord Sumption that, as he puts it at para 25, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information but that the limits of this power are implicit in the reasons for recognising its existence. He gives four reasons. (1) It is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. (2) It is a power of assistance and exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers; so that it is not available to enable them to do something which they could not do even under the law by which they were appointed. (3) It is available only when it is necessary for the performance of the office-holder's functions. (4) It is subject to the limitation that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. I further agree with Lord Sumption that it follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. Common law powers of this kind are not a permissible mode of obtaining material for use in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept with all their limitations. Moreover, in some jurisdictions, it may well be

contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency.

114. I further agree with Lord Sumption, for the reasons he gives in para 28, that the common law power is not impliedly excluded by reason of section 195 of the Bermuda Companies Act but that it cannot be applied on the facts of this case because there is no similar power in the Cayman Islands and it would not be a proper use of the power of assistance to make good a limitation on the powers of a foreign court of insolvency jurisdiction under its own law.

115. Like Lord Sumption, I appreciate that it is important that this development should not open the floodgates to different unrelated classes of case. However, I see no reason why it should. I appreciate that Lord Mance has reached a different conclusion. I do not pretend that it is possible to predict precisely how the development of the principle, which has been identified by Lord Sumption and which both Lord Collins and I support, will proceed. I agree with Lord Mance that it is a step forward but do not agree that it is a step leap. I also agree with him (at para 137) that courts have tended to confine remedies of the kind we are discussing to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. However, there is no reason why the common law should not be developed, provided that the development is measured and supports a recognised principle.

116. It will not always be easy to draw the line between permissible applications and impermissible applications. However, Lord Sumption has identified, not only the policy, but also the principle derived from the policy and some of the limitations to its exercise, which to my mind provide a sensible approach for the future. I respectfully disagree with Lord Mance when he says at para 146 that this is a development which is neither permissible nor appropriate. In doing so, I express no view on Lord Mance's concerns (expressed in paras 120 and 121) as to the breadth of the terms of the order and as to the lack of safeguards to protect against costs or loss. These may well be sound and can be investigated in a case where such issues fall for decision. That is not this case because of the narrow ground upon which the appeal must be dismissed.

LORD MANCE:

117. There are two potential issues of importance on this appeal:

a. whether the common law power to assist a foreign (Cayman Islands) liquidation enables the Bermudian courts to order anyone within its jurisdiction who may have relevant information or documentation about the company's assets (or, possibly also, its affairs generally) to attend for questioning about and disclose the same;

b. whether, if this power exists, it should be exercised by ordering such disclosure and questioning when the Cayman Islands courts have no equivalent power over persons within their jurisdiction.

118. I agree with Lord Sumption that the short answer to the second question is negative. So it is unnecessary on this appeal to answer the first question, although Lord Sumption has devoted the major part of his Opinion to this question. I understand why it might be helpful if the Board could give a clear answer to it, but I think it unfortunate that it should try to do so on this appeal, bearing in mind the limitations in the way in which the question has been argued at all lower stages (see para 122 below) and its largely unexplored ramifications (see generally paras 130 to 145 below).

119. Before addressing the second issue in detail, it is relevant – and in my view important – to note three points. The first is the Chief Justice's order which the Court of Appeal set aside, and which the appellants ask the Board to restore. The respondents, PwC, were (by clause 3a) ordered within 14 days to provide to the joint official liquidators ("JOLs")

> "all information they may have, including information and documentation in their possession, power, custody or control, concerning the promotion, formation, trade, dealings, affairs or property of the Company [and] for the avoidance of doubt, such information and documentation to be provided is not to be limited to audit information".

In addition PwC was (by clause 3d)

> "required to have a partner and/or employee or agent acceptable to the JOLs, examined on oath forthwith, within ten (10) days of being called upon to meet by the JOLs, concerning the matters aforesaid, by word of mouth and on written interrogatories, and be required to reduce his/her answer to writing and require him/her to sign this".

By clause 3e the JOLs were given leave to serve "Paul Suddaby and any other partners or officers of PwC … out of the jurisdiction", specific liberty was given to examine Paul Suddaby and he was specifically ordered to produce information in accordance with clause 3a.

Clause 3f provided that

> "If PwC … does refuse to comply with any of the orders set out herein, it and its partners and officers shall be in contempt of court and they may be imprisoned, fined or their assets seized."

120. No doubt in case clause 3 did not go far enough, clause 4 provided:

> "Further and without limiting the generality of the foregoing, that the documentation referred to in Exhibit HD-7 of Hugh Dickson's third affidavit dated 7 February 2013 be produced within 7 days by PwC…, in relation to SHL ….
>
> "That the JOLs be able to obtain all information and documentation described herein that is in the possession, power, custody, or control of PwC …., whether this be in Bermuda, Dubai, or wherever it may be located. …"

Redaction was only to be permitted where necessary to protect information of a confidential nature belonging to third parties, and clause 4b required that

> "the relevant partners and officers of PwC … do confirm on oath that all the documents requested have been produced."

The only exempt documents were to be those required to be produced in the Cayman Islands - that is documents actually belonging to SHL.

121. No provision was made for the JOLs to meet, still less secure, any costs that PwC or its partners, officers or agents would incur complying with such an order, and no undertaking was given to meet any such costs or any other loss or liability that might result from doing so – even though PwC had asked the Chief Justice to deal with this aspect. This omission was raised in the Court of Appeal, where it remained relevant in relation to the order against SICL which that court upheld. PwC suggested that costs could be in the order of $500,000 and the JOLs argued that management time spent in compliance could not be recovered. The Court of

Appeal declined to make any order or require any undertaking "in the absence of authority" and "particularly in circumstances where the cost of compliance is far from clear". "Absence of authority" is hardly surprising in relation to an order which was itself effectively unprecedented. PwC's costs of compliance would clearly be likely to be very substantial. Whether or not they were or could be quantified when the order was made, PwC should have been protected in respect of them. Common justice and established practice relating to freezing injunctions, *Anton Pillar* orders and *Norwich Pharmacal* relief should have confirmed the need for an appropriate order or undertaking in that respect.

122. The second point is that, in respect of SHL, the only basis of Kawaley CJ's order against PwC and its officers was that the Bermudian courts have a common law power to grant assistance in aid of the Cayman Islands liquidation by applying local procedural remedies, in particular either "by directly applying" or "by analogy with" section 195 of the Bermudian Companies Act 1981, although it was common ground that this section does not in terms apply. This was also the only case put by the JOLs' written submissions to or adjudicated upon by the Court of Appeal as well as the only basis on which permission was sought to appeal to the Board. Kawaley CJ considered that he could nonetheless rely directly on section 195 by virtue of inter alia *In re African Farms* [1906] TS LR 373, *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 and *Rubin v Eurofinance SA* [2013] 1 AC 236 (paras 8 and 49 to 74), or alternatively that he could proceed "by analogy with" it (paras 8 and 36 to 48). The Court of Appeal held the contrary (see para 52, per Bell AJA, para 1, per Zacca P, and paras 4 to 59, per Auld JA). There is a hint in paras 49(1) and 50 of Auld JA's case that the JOLs may have begun to put their case more widely in oral submissions by suggesting some wider power based on "modified universalism" and independent of the Bermudian statutory power. But, if this is so, it can have received little prominence. Only before the Board has focus been directed to such an argument. As to the submission which was pursued below and accepted by Kawaley CJ, I agree with Lord Sumption and Lord Collins that there is no basis for judicial re-fashioning of, or action outside the bounds of but by analogy with, domestic legislation such as section 195. The Chief Justice's order cannot therefore be justified on the basis on which he made it. But it is perhaps ironic that so firm a rejection of any possibility of the domestic court exercising the powers conferred on domestic liquidators should be replaced by an embrace of the possibility of the domestic court giving effect to the wishes and/or powers of foreign liquidators: see paras 130 et seq below.

123. Neither court below addressed any observations to the question whether any jurisdiction existed, or if it existed, could properly be exercised to make orders against and serve Paul Suddaby and other partners or officers of PwC outside the jurisdiction of the Bermudian court. As paras 119 and 120 above show, the Chief Justice's order did that, though without joining Mr Suddaby or any other officer

or partner in their personal capacities. In their written submissions before the Court of Appeal, the JOLs submitted that section 195 gave jurisdiction to serve abroad and relied on the English authority of *In re Seagull Manufacturing Co Ltd* [1993] Ch 345 (decided under a section of the Insolvency Act 1986 using similar terms to section 195). Once one concludes, as the Board has, that section 195 is applicable neither directly nor by analogy, the question becomes whether there can be any such common law jurisdiction to order service out, on pain of sanctions, as that for which the JOLs argue.

124. Approaching the matter on that basis, it is clear that the Chief Justice's order must on any view have gone well beyond any jurisdiction which exists at common law in relation to PwC's partners and officers outside the Bermudian jurisdiction, as opposed to PwC itself which was within such jurisdiction. The area was examined in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2009] UKHL 43, [2010] 1 AC 90, para 12, where the House of Lords (in a judgment given by myself with which all other members of the House concurred) spoke in these terms of:

> "…. the limitation of the court's power to enforce the attendance of witnesses or fine defaulting witnesses. From the Statute of Elizabeth 1562…onwards, this had been regulated by statute and had never extended beyond the United Kingdom. The procedure enacted in relation to other jurisdictions involves the taking of evidence, on commission or otherwise, with the assistance of the foreign court. The service of a writ of subpoena is still only possible under section 36 of the Supreme Court Act 1981 in respect of persons in one of the parts of the United Kingdom. The limitation of the court's power in this respect corresponds with the principle of international law, summarised robustly by Dr Mann in his Hague lecture 'The Doctrine of Jurisdiction in International Law', *Recueil des Cours*, 1964-I, *The Definition of Jurisdiction,* p 137):
>
> > 'Nor is a state entitled to enforce the attendance of a foreign witness before its own tribunals by threatening him with penalties in case of non-compliance. There is, it is true, no objection to a state, by lawful means, inviting or perhaps requiring a foreign witness to appear for the purpose of giving evidence. But the foreign witness is under no duty to comply, and to impose penalties upon him and to enforce them either against his property or against him personally on the occasion of a future visit constitutes an excess of criminal jurisdiction and

> runs contrary to the practice of states in regard to the taking of evidence as it has developed over a long period of time.'"

125. The issue in *Masri* was whether a power under rules (CPR r 71) made under statutory authority extended to enable an order for examination of an officer of a judgment creditor company, who was out of the jurisdiction. The House held that, in view of the presumption against extra-territoriality, it did not. In the course of so doing, it considered prior authority on other powers with a statutory basis. In *Ex p Tucker* [1990] Ch 148, section 25(1) of the Bankruptcy Act 1914 gave the court power to summon before it for examination "any person whom the court may deem capable of giving information respecting the debtor, his dealings or property". But the Court of Appeal set aside an order obtained by a trustee in bankruptcy for the examination of the debtor's brother, a British subject resident in Belgium. Dillon LJ, after noting the limitations of the powers to serve out of the jurisdiction (then contained in RSC Ord 11) and to subpoena witnesses, said against this background that he "would not expect section 25(1) to have empowered the English court to haul before it persons who could not be served with the necessary summons within the jurisdiction of the English court" (p 158E-F).

126. In contrast, in *In re Seagull Manufacturing Co Ltd* [1993] Ch 345, section 133 of the Insolvency Act 1986 authorised the public examination of a narrower category of persons, viz "any person who - (a) is or has been an officer of the company; or (b) has acted as liquidator or administrator of the company or as receiver or manager …; or (c) not being a person falling within paragraph (a) or (b), is or has been concerned, or has taken part, in the promotion, formation or management of the company", and rule 12.12 of the Insolvency Rules 1986 gave the court express authority to order service out of the jurisdiction of any process or order requiring to be so served for the purposes of insolvency proceedings. The Court of Appeal upheld an order made for the public examination of a former director living in Alderney. Peter Gibson J, with whose judgment the other members of the court concurred, said (p 354F-H) that:

> "Where a company has come to a calamitous end and has been wound up by the court, the obvious intention of this section was that those responsible for the company's state of affairs should be liable to be subjected to a process of investigation and that investigation should be in public. Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice."

127. Although the House in *Masri* regarded impracticability of enforcement as a factor of greater significance than Peter Gibson J had suggested, it acknowledged the public interest served by section 133, and referred (in para 23) to "The universality of a winding up order, in the sense that it relates at least in theory to all assets wherever situate". That factor being absent in *Masri*, it could lend no assistance to the argument that CPR r 71 extended extra-territorially. But the important feature of all these cases is that they turned on express statutorily conferred powers. There was no suggestion in any of them of any relevant common law power in any of the areas discussed.

128. The third point is that the JOLs' case has been at all times and is advanced solely on the basis that PwC have documents and information which it would help the JOLs to inspect and about which it would be helpful for them to be able to question PwC and its officers. The basis is not that PwC have property or assets of SHL (beyond the documents which they have already been ordered by the Cayman Islands court to produce); nor is it that PwC have themselves done anything wrong or that they have been or are mixed up in any third party's wrongdoing. The House of Lords authority of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 was not relied upon, or even among the authorities put, before the Supreme Court. It was mentioned in passing during the final oral submissions in reply of Mr Moss QC for the JOLs, when the transcript records this exchange:

> "LORD MANCE: If they are accountants, as you told me earlier that they were, then on the face of it there is an advisory relationship and if you wish to know something which you yourself have mislaid or don't have from your accountant advisers one might think there was quite a good case for saying they owed a duty to disclose it to you, to help you.
>
> MR MOSS: There might be an arguable case relating to that advice, but what we're interested in are these audit documents which go to the assets of the company. I don't know whether the accounting had anything to do with that at all.
>
> LORD COLLINS: Is there nowhere a *Norwich Pharmacal* order can be obtained?
>
> MR MOSS: Well, yes. We've had a discussion about this. The problem with *Norwich Pharmacal* is that it is based on fraud.
>
> LORD COLLINS: Any wrongdoing, I think.

LORD SUMPTION: It is based on wrongdoing generally.

MR MOSS: Yes, but it does involve alleging wrongdoing. You would have to allege that PwC became innocently mixed up in that wrongdoing –

LORD CLARKE: They only have to be innocently mixed up

MR MOSS: Yes.

LORD SUMPTION: That's a fairly low threshold, after all the Customs & Excise were about as innocent mixed up people almost that you could probably want.

MR MOSS: Yes. The result of that would be if we can get *Norwich Pharmacal* relief, then the Bermuda courts do have common law powers to give us exactly the type relief that we have here. It actually comes to the same thing. It wouldn't make much sense to send us right back to the Chief Justice to then ask for *Norwich Pharmacal* relief –

LORD MANCE: It may not be as easy as that. You haven't formulated it as *Norwich Pharmacal*.

MR MOSS: Yes, it would have to be abandoned and reformulated as a *Norwich Pharmacal*, but in substance it comes to the same sort of end. What that perhaps illustrates is that what we have and what we seek to maintain, or rather we have at one stage and the Court of Appeal have taken it away on a rather narrow ground, but we seek to have back is not something that radical in these types of circumstances, where there is a gigantic deficit, there has clearly been wrongdoing, documents have been taken and not available. It's exactly the kind of context in which one would expect relief to be given. It's not extravagant in any shape or form."

129. Contrary to Mr Moss's submission, the JOLs are seeking to do something very radical, and there is a deep dividing line between the basis on which they put their case and *Norwich Pharmacal*. The JOLs are seeking (a) to justify a far wider and more stringent order than could ever be obtained in *Norwich Pharmacal* proceedings and (b) to do so on the basis of an unverified assertion

that they would, if they had tried, have been able to obtain a *Norwich Pharmacal* and without exposing themselves to the trouble and difficulty of showing that PwC were mixed up in any sort of wrongdoing about which they have any relevant information or documentation. I see neither force nor attraction in Mr Moss's invitation to prejudge the outcome of normal procedures by short-cutting them.

130. In the light of these points, I come to the substance of the argument now presented. That is that a common law power exists to assist any foreign liquidation by ordering any person (whether or not an officer or agent of the company) to attend and be interrogated and produce documentation and information, on pain of contempt, in the manner which the JOLs advocate. The only explicit limits to the jurisdiction for which the JOLs now contend is that it should not be inconsistent with the law or policy of the forum. The negative answer which the Board is giving to the second issue on this appeal means that there would exist a further limitation, that the jurisdiction would not exist or be exercisable to enable an order which could not be made against a person within the jurisdiction of the country of the insolvency.

131. Lord Sumption now suggests that the principle should be further limited to any court-ordered liquidation (though that, in turn, leaves uncertain the status of any winding up under supervision in any jurisdiction where that possibility, which existed formerly under section 311 of the English Companies Act 1948, still exists). Although Lord Sumption speaks at one point of this as a "means of identifying or locating" assets (para 23), elsewhere he speaks of "enabling [foreign] courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers" (para 25). The order in fact made by the Chief Justice was, as noted, of great width. The scope of the proposed common law jurisdiction is therefore uncertain.

132. The suggested jurisdiction is said to follow from the principle of "modified universalism". This is a principle developed in English common law over the last 20 years with the strong support of Lord Hoffmann, though recognised over a 100 years ago in a Transvaal case which was itself until recently lost in (unfair) obscurity. *In re African Farms* [1906] TS 373, was decided by Sir James Innes, who in addition to his own great legal distinction was grandfather of the distinguished wartime humanitarian lawyer Helmuth James von Moltke. The essence of the principle consists, as Lord Sumption notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order restraining their disposition or seizure inconsistently with the foreign liquidation. The novelty of this decision lay in the making of such an order in circumstances where there was no power to wind up the company in the domestic forum. In this respect, therefore, the cooperation extended in *In re African Farms* went a step

further than that demonstrated in *In re Matheson Bros Ltd* (1884) 27 Ch D 225, where Kay J was, in the light of the fact that the English courts would have had power to wind the relevant foreign company up in England, prepared to secure English assets to prevent English creditors executing against them, pending steps in the company's winding up in its country of incorporation to make the assets available for the company's English creditors *pari passu* with its foreign creditors.

133. The principle may also justify an order for the remission of the assets out of the jurisdiction to the foreign liquidator, if the foreign liquidation rules would distribute them in the same way as the domestic jurisdiction. Even if the foreign liquidation rules would distribute them differently, but there is express statutory power enabling the remission to take place nonetheless, the principle may lend support to the exercise of that express statutory power. Beyond that, I do not read the majority of the House in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 as going, and anything that any of its members did say more widely about the existence or scope of a common law power was on any view obiter, since the appeal was decided on the basis that there existed express statutory authority for a remission although the assets would be distributed in the Australian liquidation differently from the way in which they would have been distributed in the English liquidation.

134. I agree with Lord Sumption and Lord Collins that the second and third propositions for which *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings Plc* stands cannot be supported. A domestic court does not have power to assist a foreign court by doing anything which it could properly have done in a domestic insolvency; and it cannot acquire jurisdiction by virtue of any such power. As to the first proposition, for reasons which I explained in *Rubin v Eurofinance SA* [2013] 1 AC 236, *Cambridge Gas* can, if correct, stand for no more than the proposition that a domestic court should, so far as it can consistently with its own law, recognise a foreign bankruptcy order and deal with identifiable assets within its jurisdiction consistently with the way in which the foreign insolvency would deal with them. In another earlier decision of the Board, *Al Sabah v Grupo Torras SA* [2005] UKPC 1, [2005] 2 AC 333, para 35, Lord Walker said, aptly in my view, that the Cayman court "might have had some limited inherent power" to act in aid of the Bahamian winding up, but that it could not have the suggested power to set aside a voidable disposition modelled on a section in the Cayman Island bankruptcy legislation governing domestic liquidation which did not in terms apply in relation to a Bahamian winding up.

135. Where I part company with Lord Sumption is in his assertion that the hitherto limited principle of modified universalism which I have just described extends to or justifies (or would be "an empty formula" without) the assumption or

exercise of a common law power to "haul" anyone before the court (to use Dillon LJ's word in *Ex P Tucker*), to be interrogated and to produce documentation on pain of being in contempt, simply because it would be useful for the foreign liquidator to be able to do so and might enable him to locate some assets (or better understand the company's affairs). There is a step leap between enforcing rights to identifiable assets and obliging third parties to assist with documentation and information in order to discover a company's assets (or, still more widely, in order to enable insolvency practitioners to understand a company's affairs). Lord Sumption relies in para 23 on the House of Lords' decision in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 as illustrating "the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognised legal principle." But the reference to "a recognised legal principle" begs the question whether the principle of modified universalism extends beyond the protection of identifiable assets within the jurisdiction, to enable orders to be made compelling third parties to assist with the provision of information and documentation which may assist the tracing of such assets (or otherwise assist the insolvency practitioners in their understanding of the company's affairs).

136. Information is a precious commodity, but it is not one which is generally capable of being extracted in court from private individuals without special reason; and the potentially intrusive, vexatious and costly nature of the exercise of any power to do so is apparent from the form of the Chief Justice's order in this case. The common law has not hitherto accepted any such jurisdiction. The existence of foreign insolvency proceedings, conducted for the benefit of creditors, does not appear to me to provide any justification for doing so now. The mere fact that insolvency practitioners are, at least in a compulsory liquidation, officers of the foreign court charged with winding up its affairs seems quite insufficient at common law, though it may be a factor which assists determine the scope of Parliament's likely intention where relevant legislation exists. There are many ordinary creditors, litigants and other persons who would like a facility to gather information to discover or trace assets or to assist them to pursue claims or to conduct their affairs generally. It is unclear what the logic is or would be for restricting the suggested common law power to foreign insolvencies. However much it may be intended, by using adjectives like "promiscuous", to discourage attempts to bring within this new jurisdiction either domestic insolvencies (if and where no complete common law scheme exists) or situations entirely outside the insolvency context, such attempts seem bound to occur. In the absence of any clear justification for giving insolvency practitioners the unique common law privilege which the JOLs now claim, such attempts may well be difficult to resist. Although I disagree with it, such attempts can only be encouraged by the statement at the end of para 21 of Lord Sumption's opinion that "The courts have never been as inhibited in their willingness to develop appropriate remedies to

require the provision of information when a sufficiently compelling legal policy calls for it."

137. In reality, far from displaying uninhibited willingness to develop appropriate remedies requiring the provision of information, courts have in my view been careful to confine such remedies to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. Thus:

    i) A court has jurisdiction to protect identifiable property rights, which would include ordering a person shown to be likely to have property belonging to the company to deliver it up or disclose its whereabouts.

    ii) A sustainable case of wrongdoing is the basis for the well-established jurisdiction to order the disclosure of information by or in conjunction with the making of an asset freezing (formerly *Mareva*) order or a search (*Anton Pillar*) order.

    iii) The legal principle recognised in *Norwich Pharmacal* is that persons innocently mixed up in wrongdoing could be expected to disclose a limited amount of information and documentation about it to assist the victims.

138. On this appeal, no case has been advanced under any of these heads. The first could cover the disclosure by an agent of information which he held for, or owed a duty to pass to, his principal. As the transcript extract quoted in para 128 above confirms, no case is advanced on any such basis. Moreover, auditors are not agents, they are independent contractors engaged to review a company's accounts and report in accordance with statutory and professional requirements - in which connection there has been no suggestion of any failure or shortcoming on PwC's part. The second and third situations depend upon evidence of wrongdoing, which has again not been asserted or attempted to be established. The third situation in particular bears no resemblance to the present case, in which it is said that innocent third parties can be compelled to produce information and documentation, without any allegation or evidence of wrongdoing, upon insolvency practitioners showing that this could be useful to enable them to locate assets or better to understand the company's affairs.

139. It is notable that, even in the context of wrongdoing, the courts have been at pains to emphasise the narrow scope of the *Norwich Pharmacal* jurisdiction. It is "an exceptional one": *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033, para 57, per Lord Woolf CJ. It depends upon the existence of wrongdoing. The

person with information must have been mixed up, however innocently in wrongdoing: *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2013] EWCA Civ 118, [2014] QB 112. Originally the jurisdiction was confined to discovery of the identity of the wrongdoer: *Ashworth Hospital Authority*, para 26, per Lord Woolf CJ; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911, 914, per Hoffmann J, emphasising that it was "no authority for imposing upon 'mixed up' third parties a general obligation to give discovery or information when the identity of the defendant is already known."

140. More recently, the Divisional Court has said that *Norwich Pharmacal* may extend beyond the discovery of the identity of a wrongdoer or of a "missing piece of the jigsaw", but under the strict caveat that "the action cannot be used for wide-ranging discovery or the gathering of evidence and is strictly confined to necessary information": *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 1)* [2009] 1 WLR 2579, para 133, cited by the Court of Appeal in *R (Omar) v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1587, paras 4 and 18.

141. Lord Sumption suggests (para 20) that it will be possible in the present situation to draw a distinction between information which can permissibly be sought and evidence which cannot. At least two problems arise in this connection. First, it is, as I have noted, unclear whether any distinction or limitation is proposed between on the one hand information and documentation relating to assets and on the other hand information and documentation relating more generally to the company's affairs. Any such distinction or limitation seems likely in any event to be in practice illusory. An insolvency practitioner is ultimately only interested in assets and their distribution. Any questioning put, or information or documentation sought, will be scrutinised with a view to identifying assets, in whatever form, even if they only consist of potential claims for maladministration or negligence.

142. The second problem is that the distinction between information and evidence seems likely also to be illusory. Evidence is at least confined to the issues in identified litigation, domestic or foreign. In contrast, the proposed relief sought against PwC is completely unconfined, in nature and scope. The later *Omar* case [2013] EWCA Civ 118, [2014] QB 112 highlights (para 12) a justified scepticism about maintaining a distinction between information and evidence which gives cause for caution about further extension by analogy of the *Norwich Pharmacal* jurisdiction to circumstances where identifiable wrongdoing is not in issue. The Chief Justice's remark in para 80 that "PwC… is not an overt target for adverse litigation brought by the JOLs at this stage" was I think also shrewd. Who can doubt that the JOLs would, in their examination both of the working papers and other documents and information disclosed by PwC and in their questioning of the partners and officers attending under an order such as that made by the Chief

Justice, have a close eye on the possibility that this might show some possible claim against PwC as auditors? The Chief Justice's ensuing comment that the court should take "a healthily sceptical approach in evaluating the complaints made about the validity and scope of the Ex Parte Orders", because "it seems clear that a combative and sophisticated defensive strategy has been engaged" appears to me in contrast unjustified. The jurisdiction to make or justification for such an order cannot depend upon the defensive strategy adopted to resist it.

143. The principle now advanced by the JOLs lacks any substantial authority. The two first instance authorities cited by Lord Sumption in para 24 offer the weakest of encouragement for the novel jurisdiction now proposed. *Moolman v Builders & Developers (Pty) Ltd* [1989] ZASCA 171 treats the issue as one of applying *In re African Farms*, giving as the only reason that information is necessary if the ultimate aim of recovery of assets is to be realised. The court then in fact applied the statutory provisions of the forum on an "as if" basis: see sub-paragraph (d) on pp 5-6 and p 23. That I agree with Lord Sumption and Lord Collins is not a sustainable approach.

144. The judgment in *In re Impex Services Worldwide Ltd* [2004] BPIR 564 suggests a breadth of common law power which would again be completely unlimited in its scope, enabling the Manx court "if it thinks fit" to make "an order summoning before it any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings and affairs or property of the Company": para 106(8). Deemster Doyle explained this on the basis that (para 107):

> "Friendly and sophisticated jurisdictions which respect the rule of law and human rights need to be aware that if things go wrong in their jurisdiction and entities in the Isle of Man have information, documentation and evidence in their possession custody control or power that would assist them, then the Manx courts, in a proper case and subject to suitable safeguards and protections where necessary, will offer judicial co-operation and assistance where that is reasonably requested by the judicial authority in that friendly jurisdiction. When the call for help comes the Manx courts will, in proper cases, answer the call positively and provide the necessary co-operation and assistance."

English liquidators were the beneficiary of the far-reaching principle thus promulgated, but I cannot accept that it represents English or Bermudian common law. If there might seem to be a hint in the Deemster's phrase "if things go wrong" that the reasoning and order may have been based on wrongdoing, that does not appear to be borne out by the full account of the background and

proposed questions given earlier in his judgment. Like the order made by the Chief Justice in the present case, the Deemster's ready acceptance of the scope of the assistance which might be provided as extending to any information about the company's promotion, formation, trade, dealings and affairs or property as well as to evidence once again indicates the difficulty that there could be in keeping this novel power within bounds.

145. Lord Collins's approving dictum in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 33, quoted by Lord Sumption in his para 19, is found in a paragraph listing a series of authorities on modified universalism, in circumstances where there was no examination in argument or in the Board's opinion of differences between them, or between situations where identifiable assets were in issue and other situations. But another dictum of Lord Collins in that case is in my view relevant. At para 129, he said that:

> "The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, 'if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it': *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 489."

That stands in stark contrast with the development of common law powers which the majority on this appeal supports.

146. The description of *In re Impex* as a case of "judicial assistance in the traditional sense" can be seen now to be on any view unsustainable, and Lord Sumption himself says (para 24) that he "would not wish to endorse all of the reasoning given" in the judgments in either *Moolman* or *In re Impex*. He instances "in particular" those parts which appear to support the concept of applying statutory powers by mere analogy. That leaves open - in the context of the JOLs' present case that the Bermudian court can assist the Cayman Islands' liquidation without relying on Bermudian law - how far his approach accepts or disapproves the breadth of the reasoning and orders in *In re Impex* (see the previous paragraph) - or indeed in the present case (see paras 119 and 120 above). That is another of the unresolved uncertainties about the scope of the proposed new jurisdiction.

147. In these circumstances, and although anything said may be obiter, I am not at present persuaded that it is appropriate to extend the common law power to assist by ordering the provision of information beyond categories which have some

recognisable basis in current law, that is cases where there is (a) evidence that the person ordered to provide the information or documentation has property belonging to the insolvent company, or (b) evidence of some wrongdoing by the person so ordered or (c) evidence of some wrongdoing by another person in which the person so ordered was or is innocently mixed up. A general common law power to order the disclosure of information and documentation by, and the questioning of, anyone, either because a foreign liquidator shows that this may assist him identify or recover assets anywhere in the world or, a fortiori, because it would enable him understand the company's affairs, goes not only beyond anything which it is necessary to contemplate on this appeal, but is also beyond anything that I can, as at present advised, regard as permissible or appropriate.

148. I therefore consider that the appeal must be dismissed, because of the negative answer given to the second issue. But I would, if necessary, also have considered that it should be dismissed on the ground that a negative answer should be given on the first issue.

LORD NEUBERGER:

149. I agree with the other members of the Board that we should humbly advise Her Majesty that this appeal should be dismissed. However, there is an issue which divides the members of the Board. It is whether, as Lord Sumption, Lord Clarke and Lord Collins consider, the appeal should only be dismissed on the grounds (i) that there is no common law power to apply legislation which applies to domestic insolvencies by analogy to foreign insolvencies, and (ii) that the Bermudian courts should not exercise a common law power ("the Power") described by Lord Sumption in para 25, because, as he explains in paras 29-30, the Cayman Islands courts have no such power, or whether, as Lord Mance concludes, the appeal should also be dismissed on the ground (iii) that the common law power in question does not exist. On that issue, if it is appropriate to decide whether the alleged power exists, I would be in agreement with Lord Mance.

150. As this is a judgment which dissents from the majority view on ground (iii), and there is little which I wish to add to the judgment of Lord Mance, I can express my reasons relatively shortly.

151. It is unnecessary to decide whether the Power exists, because we are all agreed that, even if it does, it should not be exercised. I accept, of course, that we can decide (albeit, at least arguably, strictly only obiter) whether the Power exists. However, as it is not necessary for us to rule on that issue in order to dispose of this appeal, we should, in my opinion, be very cautious of doing so. While judges

in a final court of appeal, perhaps particularly in a common law system, should give as much guidance as they can as to the substantive and procedural law in any area, they must always bear in mind the risks inherent in determining issues which do not have to be decided in order to dispose of the case before them.

152. As new problems arise, and as societal values and practices, technological techniques and business practices change, it is inevitable that judges can and should introduce new common law principles or procedures or make alterations to established common law principles and procedures. However, such developments should always be adopted cautiously, not least because, even with the benefit of submissions from advocates and consideration of previous cases, textbooks and articles, the wider implications of any new principle or alteration to an existing principle are very hard to assess. The need for caution in this connection is, in my view, supported by the judicial observations cited by Lord Collins in paras 65-68, although those observations were made in relation to a different aspect of the need for caution.

153. In the present case, there is obvious force in the point that the Board should determine whether the common law power alleged by the liquidators exists, as it is an important issue upon which the sooner an authoritative decision is given the better, especially in the light of the somewhat confused state of the law as revealed in the judgments in this case.

154. However, that very confusion underlines the need for caution. The extent of the extra-statutory powers of a common law court to assist foreign liquidators is a very tricky topic on which the Board, the House of Lords and the Supreme Court have not been conspicuously successful in giving clear or consistent guidance – see the judgment of Lord Hoffmann on behalf of the Board in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, all five opinions in the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, and the judgment of Lord Collins for the majority of the Supreme Court in *Rubin v Eurofinance SA* [2013] 1 AC 236, discussed by Lord Sumption at paras 16-19, and the judgment of Lord Collins in this case.

155. The message I take from those cases is that, at least in this area, it would be better for the Board to approach any case in this field with a view to deciding it on a relatively minimalist basis, rather than by seeking to lay down general principles which it is not necessary to determine, particularly when those principles involve extending the court's powers in a way which may have substantial ramifications. While Lord Sumption's explanation of the nature and extent of this alleged common law power appears very attractive, I think it could lead to all sorts of problems and uncertainties, as is implicit in the qualifications which Lord

Sumption makes in para 25. It is all very well saying that they can be dealt with when they arise, but the fact that it is apparent that there will be problems and complications if the law is developed in a certain way suggests to me that the development should not be adopted unless it is necessary to do so. Accordingly, as it is unnecessary to decide whether the common law power exists, I would have preferred to leave the issue to be decided when it needs to be – with the benefit of the powerful arguments either way contained in the judgments on this appeal, which, with all respect to counsel, range more widely and deeply than the arguments which the Board heard during the hearing.

156. If, however, it is incumbent on me to express a view, I would conclude, in agreement with Lord Mance, that the alleged common law power does not exist. He has set out the grounds for that conclusion convincingly, and they include reasons both of principle and of practicality. Accordingly, I do not propose to repeat those reasons, but there are one or two points I would like to emphasise.

157. The extreme version of the "principle of universality", as propounded by Lord Hoffmann in *Cambridge Gas*, has, as Lord Sumption explains, effectively disappeared, principally as a result of the reasoning of Lord Collins speaking for the majority in *Rubin*, and speaking for the Board in this appeal. However, as with the Cheshire Cat, the principle's deceptively benevolent smile still appears to linger, and it is now invoked to justify the creation of this new common law Power. It is almost as if the Board is suggesting that, while we went too far in *Cambridge Gas* and should pull back as indicated in *Rubin*, we do not want to withdraw as completely as we logically ought. In my view, the logic of the withdrawal from the more extreme version of the principle of universality is that we should not invent a new common law power based on the principle.

158. The limitation of the Power to insolvency cases may be seen by many to be questionable. More specifically, the limitation to liquidations which are being conducted by officers of a foreign court seems to me to be potentially arbitrary. Companies may be in court-imposed liquidation in many jurisdictions when it is "just and equitable" to wind them up, even if they are solvent: I do not see why liquidators in such a case should be able to invoke the Power when other people running solvent companies could not do so. Further, there is no reason why a statutory regime should not provide that voluntary liquidations are to be conducted under the aegis of the court, and, if so, the Power would seem to apply in such cases. And the status of administrators in administrations may be unclear in this connection.

159. The need to make subtle distinctions also concerns me. Thus, the distinction between information and documentation which is obtainable under this Power, and "material for use in actual or anticipated litigation", appears very likely to

give rise to difficult practical problems. I appreciate that these problems can arise in other circumstances, but that is not a reason for extending the circumstances in which these problems may arise; and, as the facts of this case suggest, I suspect that they are particularly likely to arise in relation to the exercise of the Power. Similarly, the question what is necessary for the performance of a liquidator's functions, which is said to be a prerequisite for the exercise of the Power, seems to be a fertile area for uncertainty and dispute.

160. More broadly, these distinctions seem to me to embody the sort of requirements one would expect to see in a statutory code rather than in judge-made law. As the judicial observations cited by Lord Collins suggest, judge-made law should be limited to "very modest development[s] … of existing principle", and should be made "in small steps" or "within … interstitial limits". Although I accept that the United Kingdom courts have been prepared to recognise a new common law right in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, the right involved was only exercisable in very specific circumstances where a serious wrong had been committed. I do not consider that that decision alters the fact that the creation of the Power would represent a development in the law which is, as Lord Mance puts it, "radical". It may not seem radical in the sense that it can be said to be a fairly routine feature of the extreme "principle of universality" enunciated by Lord Hoffmann in *Cambridge Gas*, but that view is no longer maintainable given that extreme principle has now been rejected by Lord Collins, speaking for the majority of the House of Lords in *Rubin* and for the Board on this appeal.

161. The contention that judges should not be creating the Power is reinforced when one considers the extent of domestic statutory law and international convention law in the area of international insolvency. Examples of such laws are described and discussed in paras 40-50 of Lord Collins's judgment. In this highly legislated area, I consider that the power which is said to arise in this case is one which should be bestowed on the court by the legislature, and not arrogated to the court of its own motion.

162. I acknowledge the force of the arguments the other way, which are so clearly set out by Lord Sumption. However, as already intimated, while I agree with the judgment of Lord Collins and otherwise agree with the judgment of Lord Sumption, I would for my part reject the existence of the Power, if it is appropriate to decide that issue at all.

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 238

IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

BETWEEN:

STEPHEN JOHN HUNT

Applicant

-and-

TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

Respondent

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr Lewis Preston, Kennedys Chudleigh Ltd, for the Applicant**
	Mr Tom Smith QC, Mr Keith Robinson, Carey Olsen Bermuda Limited, for Transworld Payment Solutions Limited
Dates of Hearing:	**11 – 12 February 2020**
Date of Judgment:	**6 March 2020**

JUDGMENT

Cross-border insolvency; recognition of a liquidator appointed in the jurisdiction of incorporation of the company; application to set aside the recognition order on the ground that the purpose of such recognition was to obtain evidence in relation to contemplated proceedings in a foreign court; alleged failure to make full and frank disclosure at the application to obtain the recognition order

Introduction

1. On 19 July 2019 the Court made an ex parte Order that the appointment on 17 November 2014 in England and Wales of Stephen John Hunt, a partner of Griffins, (the **"Liquidator**") as liquidator of Transworld Payment Solutions U.K. Limited (the "**Company")** pursuant to a compulsory winding up Order made in the High Court of England and Wales on 22 September 2014, be recognised in this jurisdiction.

2. The Court also made an order that, save with the leave of the Court or with the consent of the Company:

    1. No proceedings may be commenced within the jurisdiction of the Court for the winding up of the Company;
    2. No receiver or administrative receiver over any part of the property or undertaking of the Company within the jurisdiction shall be appointed;
    3. No attachment, sequestration, distress or execution shall be put in force against the property or effects of the Company within this jurisdiction;
    4. Where any claim against the Company secured by a charge on the whole or any part of the property, effects or income of the Company within this jurisdiction, no action may be taken to realise the whole or any part of such security;
    5. No steps may be taken to repossess goods within the jurisdiction in the Company's possession under any hire purchase agreement; and
    6. No proceedings within this jurisdiction may be commenced or continued in relation to the Company by any person other than the Liquidator or the Company.

3. By summons dated 11 October 2019, Transworld Payment Solutions Limited (**"TWPS"**), a company incorporated in Bermuda, applies for an order discharging the ex parte Order made by the Court on 19 July 2019 on the grounds that:

    1. The recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition

is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

2. Further, the information requests are barred by the terms of certain settlement agreements entered into by Mr Hunt and the issue as to the effect of these agreements is presently pending before the Curaçao courts.

3. There was a breach by Mr Hunt of his duty to provide full and frank disclosure at the hearing at which the ex parte Order was made.

The Background

4. The background to this matter is set out in the First Affidavit of Richard Charles East dated 11 September 2019 sworn on behalf of TWPS. The Company is one of a number of Transworld companies which are ultimately owned by Mr John Deuss. Through his ownership of Transworld Energy Limited ("**TEL**"), which is a Bermuda entity, Mr Deuss was the ultimate beneficial owner of the Company. Mr Deuss was not at any stage a director, officer, employee, consultant or agent of the Company.

5. Mr Deuss was also the President and CEO of the First Curaçao International Bank NV ("**FCIB**"). FCIB was formerly a commercial bank in Curaçao and has been subject to a statutory winding down mechanism since 2006. As part of this procedure, the Central Bank of Curaçao and Sint Maarten ("**CBCS**") exercises FCIB's managing and supervisory powers through proxy holders who were appointed on its behalf to run FCIB. Pursuant to a service agreement with FCIB, prior to 2006, the Company introduced prospective customers and intermediaries to FCIB and its products and services.

The Missing Trader Intra-Community Fraud

6. Before this Court Mr Hunt maintains that the Company has been presented with a number of claims from companies involved in the missing trader intra-community fraud ("**MTIC**") VAT fraud. In short, MTIC fraud involves the theft of VAT from the government by exploiting the differences in how VAT is treated in different jurisdictions. In simple MTIC cases, fraudsters sell the goods and charged the VAT to buyers without remitting the value to the tax authorities. In more complex cases, known as carousel frauds, the goods are imported and sold through a series of companies before being exported again with the first company in the domestic chain charging VAT to a customer, but not paying this to the government, becoming what is known as a "missing trader". The subsequent exporters of these goods then claim and receive the reimbursement of VAT payments that never occurred.

7. In the present case, it has been alleged that the fraud was facilitated by the banking services provided by FCIB. It is also said that the Company has liability "*for dishonestly assisting in the frauds by, amongst other things, "on boarding" them as customers of FCIB without conducting effective due diligence and without properly carrying out the compliance duties assigned to the Company by FCIB".*

The Earlier Settlement Agreements

8. TWPS considers the proposed claims to be particularly surprising as Mr Hunt has previously participated in settlement arrangements with FCIB (and it is asserted by extension, Mr Deuss) concerning the same MTIC fraud.

9. Mr East explains that the British authorities' investigations into some of FCIB's customers for MTIC fraud led to the British authorities asking the Dutch authorities to investigate and prosecute FCIB in connection with the alleged MTIC fraud, to which the Dutch public prosecutor agreed. Since FCIB could no longer function as a bank because of the actions of the Dutch public prosecutor, FCIB voluntarily underwent "emergency measures"

whereby it was subject to the direct control of the CBCS and wound down. There arose the question of what to do about the account balances of the companies that had engaged in MTIC fraud, many of which were placed into liquidation on account of the sums owed to HMRC. Whilst the companies sought access to the deposits held on their behalf, FCIB sought recompense for the companies' role in its collapse.

10. Both Mr Hunt and his colleague at Griffins, Mr Bramston, are, or have been, liquidators (both jointly and individually) of a number of these companies that allegedly engaged in the MTIC fraud and held accounts at FCIB (the "**Griffins Companies**"). Throughout 2014, Mr Hunt, Mr Bramston and/or their English solicitors took the lead to engage in negotiations with FCIB and the Central Bank in respect of the Griffins Companies' involvement in MTIC fraud. There were other companies in a position similar to that of Griffins Companies that were in liquidation and their respective insolvency practitioners (from firms such as Baker Tilly, Grant Thornton and Kingston Smith) also participated in parallel negotiations throughout 2014. These negotiations culminated in a series of settlements entered into on or about 6 February 2015 (the "**Settlement Agreements**") between, *inter alia*, the Griffins Companies and their officeholders and FCIB under which the companies released FCIB and related parties from any and all claims and demands in exchange for receiving a percentage of account balances held at FCIB.

11. Mr East contends that the intended effect of the Settlement Agreements was to release, *inter alia*, FCIB, its former officers, directors and employees, and any corporation or entity under common control with any of them from any new claims or demands, such as requests for examination, from insolvency practitioners such as Mr Hunt or Mr Bramston. The IP Settlement Agreements, which are subject to Curaçao law and the jurisdiction of the Curaçao courts, were entered into almost a year before the present claims were asserted on behalf of the Company.

The Appointment of Mr Hunt as the Liquidator

12. The appointment of Mr Hunt, as the liquidator of the Company, took place in unusual circumstances. On 27 May 2010, the directors of the Company applied for voluntary striking off under section 1003 of the English Companies Act 2006. On 5 October 2010, pursuant to that application, the Company was dissolved. Mr East explains that unbeknownst to the directors of the Company, Chubb Electronic Security Ltd ("**Chubb**") had obtained a judgment in default in the sum of £1,833.06 in the Kingston-upon-Thames County Court on 26 May 2010.

13. On 27 June 2014, and for reasons that remain unclear to TWPS, the judgment debt is said to have been assigned by Chubb to TC Catering Supplies Limited (in liquidation) ("**TC Catering**"). Mr Bramston of Griffins was the liquidator of TC Catering at the time and has since been replaced by Mr Kevin Goldfarb, also of Griffins. Instead of approaching the former directors of the Company with a request to pay the £1,833.06 judgment debt, in a petition dated 6 August 2014, TC Catering applied to restore the Company to the register of companies and to wind it up on the basis that the judgment debt assigned by Chubb remained outstanding. Mr Bramston paid £1, 250 (by way of deposit for the winding up petition) in respect of the recovery of the debt of £1,833.06. On 22 September 2014, the High Court ordered that the Company should be restored to the register of companies and wound up. The Secretary of State appointed Mr Hunt (also of Griffins) as the liquidator of the Company on 17 November 2014. Counsel for TWPS complains that none of this was revealed by Mr Hunt to FCIB prior to the signing of the IP Settlement Agreements in February and April 2015.

14. At a meeting of the Company's creditors held on 30 September 2015, the creditors approved a remuneration policy whereby Mr Hunt is to receive 50% of all realisations in the liquidation of the company. The Liquidator's Progress Report for the period ending 16 November 2015 suggests that TC Catering (acting by way of its liquidator, Mr Bramston also then of Griffins) was the only creditor of the Company and accordingly it appears that

Mr Hunt's entitlement to receive 50% of all realisations was, in effect, approved by his partner, Mr Bramston.

Litigation in England

15. It appears that the sole asset and the sole object of the liquidation of the Company is to pursue potential claims against FCIB and other entities or individuals. Thus, in Mr Hunt's Annual Progress Report to Members and Creditors for the year ending 16 November 2017 Mr Hunt notes that: *"The principal activity in the last year has been to continue to undertake investigations in support of the Company's claim against the First Curaçao International Bank ("FCIB")".* Mr Hunt further states that he had to date received unsecured creditor claims of just under £1 billion and that based on information requests from at least another 50 potential creditors, the value of claims against the Company could double to £2 billion. In that report Mr Hunt anticipates claims of at least £180 million will be made against FCIB.

16. On 5 February 2016 a letter before action was sent by Blake Morgan solicitors, on behalf of Mr Hunt as the liquidator of the Company to, *inter alia*, FCIB. The letter advised that the Company faced claims from companies which had been involved in the MTIC fraud, and that Mr Hunt and/or the Company in turn had claims against FCIB for fraudulent trading under section 213 of the Insolvency Act 1986 and unlawful means conspiracy.

17. Subsequently Mr Hunt expanded his claims both against FCIB and Mr Deuss. The expanded claims are set out in a draft Particulars of Claim settled by Mr Christopher Parker QC and provided on 9 April 2018 and the letter from Gowling WLG ("**Gowlings**"), acting for the Company, to Quinn Emanuel, acting for Mr Deuss, dated 21 May 2019. In these documents, Mr Hunt claims that FCIB and Mr Deuss dishonestly assisted the MTIC fraud, that Mr Deuss breached fiduciary duties which he owed as a de facto and/or shadow director of the Company and made claims under section 213 of the Insolvency Act 1986 and section 1 of the Civil Liability (Contribution) Act 1978. The letter dated 21 May 2019 requested a response by 4 pm on 19 July 2019. The letter ended by advising: *"We hereby*

put you on notice that, in the absence of either your firm and/or FCIB's solicitors providing our clients with sufficient reason not to, it is our clients' intention for me to commence the Claim after the period set out at paragraph 6.1 above [4 pm on 19 July 2019] has expired."

18. In the anticipated English proceedings Jones Day, acting on behalf FCIB, has raised a number of concerns in relation to threatened claims and in respect of requests for information from both FCIB and Mr Deuss.

19. In its letter of 23 May 2018 Jones Day states that Mr Hunt's position as liquidator of the Company is clearly in direct conflict with his position, and that of his partner, Mr Goldfarb, as liquidators of all but one of the English claimants. In his capacity as the liquidator of the Company, Mr Hunt has accepted claims from the English claimants notwithstanding that those same companies are entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. This is particularly so in circumstances where Mr Hunt's remuneration as liquidator of the Company is to be 50% of all recoveries. This means that, were he to succeed in his claim against FCIB, he would be paid approximately £90 million fees alone. This, contends Jones Day, creates a clear personal incentive for Mr Hunt to accept claims from the English claimants (which are companies almost exclusively under his control and that of his colleague).

20. Second, Jones Day asserts that the issue of Mr Hunt's conflict of interest is exacerbated by the fact that Mr Hunt has accepted claims that are plainly time-barred from companies entirely under his control and/or that of his partner at Griffins, Mr Goldfarb. Jones Day states that almost all of the English claimants' claims are out of time but Mr Hunt has confirmed that he has accepted those claims nevertheless.

21. In a letter dated 26 September 2017 Blake Morgan, acting for Mr Hunt, reconfirmed his desire to interview Mr Deuss in relation to the affairs of the Company. In a letter dated 9 October 2017 Jones Day contended that such an interview would be oppressive in the present circumstances. Jones Day pointed out that given the clear intention by Mr Hunt to issue proceedings against FCIB and Mr Deuss and that such threatened claims involve

allegations of fraud, the request to interview Mr Deuss is in reality an attempt to obtain pre-action disclosure. In the circumstances, Jones Day contended, that such a request for an interview and/or information is oppressive and would not be complied with.

The Recognition Application

22. The application for recognition of the appointment of Mr Hunt, as the liquidator of the Company, was supported by Mr Hunt's First Affidavit dated 18 June 2019. In that affidavit Mr Hunt explained that in order to progress the liquidation, he needs to be in a position where he has appropriate authority to continue the investigations involving the MTIC fraud into the Company's activities and dealings worldwide, both with third parties and within its own group of companies, including Bermuda.

23. In relation to Mr Deuss, Mr Hunt stated that while he was never a *de jure* officer of the Company, from his review of the Company's documents during the course of his investigation, it has become apparent that Mr Deuss was involved in the formation and management of the Company and exercised control over it and its *de jure* directors, who were accustomed to acting in accordance with his strategic and tactical direction. Mr Hunt stated that recognition in Bermuda may prove necessary to enforce compliance with any orders made in other proceedings and/or to give him the authority to request the relevant document from Mr Deuss in the absence of his cooperation in the liquidation.

24. Mr Hunt also referred to the statutory annual accounts of the Company for the years 2005 – 2009 and stated that as the liquidator he may need to investigate these transactions and recharges between the Company and other companies within the Group.

25. Mr Hunt concluded that recognition in Bermuda at this stage of the liquidation would provide the necessary authority to enable him at the appropriate time to continue his investigations and work in respect of persons, entities, documents, information, accounts and assets in Bermuda.

26. Counsel for Mr Hunt (Mr Potts QC) supported the application for recognition on the following factual grounds.

27. First, the claims brought by the liquidator of the entities involved in the MTIC fraud against the Company are for dishonest assistance in those frauds by the Company "onboarding" those entities as customers of FCIB without conducting effective due diligence and failing to apply adequate procedures to prevent the frauds during the lifetime of the accounts. Mr Hunt wishes to continue his investigations in Bermuda to determine the validity of claims made against the Company and to determine what consequential claims it may have against other entities and persons.

28. Second, Mr Hunt wishes to investigate the transactions the Company apparently entered into with other entities in the Group and to determine what is owed by and to those entities.

29. Third, Mr Hunt also wishes to investigate whether there are computer systems or data belonging to the Company and the source of funds for the payment of its employees.

30. Counsel submitted that these investigations may involve engaging with some or all of the Bermudian companies and residents and Mr Hunt seeks recognition by the Bermudian Court in order to pursue his investigations in Bermuda with the Court's authority.

Recognition is inappropriate and would serve no legitimate purpose

31. Mr Tom Smith QC for TWPS submits that the recognition of Mr Hunt's appointment in Bermuda is inappropriate and would serve no legitimate purpose because the principal purpose of the recognition is to facilitate the use of the powers of the Bermudian Court for information gathering, but the Bermudian Court would be bound to refuse such a relief since the information is sought in support of litigation which Mr Hunt has already determined to bring.

32. I accept, as submitted by Mr Smith QC, that the concepts of *recognition* and *assistance* are different. The concept of recognition simply involves recognising, in accordance with principles of private international law, the authority of the foreign officeholder, such as the liquidator or trustee in bankruptcy, to deal with the assets of the debtor located in the foreign jurisdiction. The general rule is that the court will recognise at common law only the authority of the liquidator appointed under the law of the place of incorporation of the company: *Dicey, Morris & Collins, The Conflict of Laws, 15th ed, para 30 R-100.* In this regard Lord Mance stated in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675 at para 132 *: "the essence of the principle consists, as Lord Sumption JSC notes in his para 14(i), in the recognition by one court of the foreign liquidator's power of disposition over the company's assets in the domestic jurisdiction. That justified an order [in In re African Farms [1906] TS 373] restraining the disposition or seizure inconsistently with the foreign liquidation."*

33. In the present case, there could be no dispute over Mr Hunt's authority, as a matter of Bermudian private international law, as the liquidator appointed by the English court of the Company, a company incorporated under English law, to deal with any assets of the Company in Bermuda. Indeed, the Court made the Order recognising Mr Hunt's authority precisely on this basis in its Ruling made on 19 July 2019. However, Mr Smith QC submits, there is no evidence or suggestion that the Company has any assets and therefore there would be no basis for making an order recognising Mr Hunt for this reason. Mr Preston, appearing for Mr Hunt, confirmed to the Court that the Company has no assets within the jurisdiction. Accordingly, Mr Hunt cannot rely upon the existence of assets within the jurisdiction to support his application for recognition.

34. The other reason why recognition may be sought by a foreign officeholder is that it carries with it the active assistance of the court, within the limits explained by the Privy Council in *Singularis.* Mr Smith QC submits that it is clear that the real reason why an order for recognition was and is sought, is not in order to establish Mr Hunt's authority to deal with the assets of the Company in the face of some dispute, but rather to provide a platform by which Mr Hunt can then seek assistance from the Bermudian Court to obtain the

information which he wants, or simply to be able to support his request by being able to claim that he has the "*authority*" of the Bermudian Court. Mr Smith QC further submits that there is no proper basis for Mr Hunt obtaining any form of relevant assistance from this Court.

35. In *Singularis* Lord Sumption considered the limits of the common law power to assist a foreign officeholder at [25]:

> *"In the Board's opinion, there is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up. In recognising the existence of such a power, the Board would not wish to encourage the promiscuous creation of other common law powers to compel the production of information. The limits of this power are implicit in the reasons for recognising its existence. In the first place, it is available only to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers. It would not, for example, be available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court. Secondly, it is a power of assistance. It exists for the purpose of enabling those courts to surmount the problems posed for a world-wide winding up of the company's affairs by the territorial limits of each court's powers.* ***It is not therefore available to enable them to do something which they could not do even under the law by which they were appointed****. Thirdly, it is available only when it is necessary for the performance of the office-holder's functions. Fourth, the power is subject to the limitation in In re African Farms Ltd and in HIH and Rubin, that such an order must be consistent with the substantive law and public policy of the assisting court, in this case that of Bermuda. It follows that it is not available for purposes which are properly the subject of other schemes for the compulsory provision of information. In particular, as the reasoning in Norwich Pharmacal and R (Omar) v Secretary of State for Foreign and Commonwealth Affairs (at both levels) shows with all their,* ***common law powers of this kind are not a permissible mode of obtaining material for use***

in actual or anticipated litigation. That field is covered by rules of forensic procedure and statutory provisions for obtaining evidence in foreign jurisdictions which liquidators, like other litigants or potential litigants, must accept limitations*"* (emphasis added).

36. The last sentence in the above passage in Lord Sumption's judgment makes clear that there is a specific restriction on not using the common law powers to obtain material for use in actual or anticipated foreign litigation.

37. As noted above [33], the Company has no assets in Bermuda. Indeed, there is no suggestion that the Company has any assets in any jurisdiction. The sole aim of the liquidation of the Company is to pursue claims against FCIB and Mr Deuss arising out of the MTIC fraud. This has been confirmed in all the Annual Reports produced by Mr Hunt. In the latest Annual Progress Report for the year ending 16 November 2019 Mr Hunt confirms that:

> *"The principal activity in the last year has continued to be of the undertaking investigations in relation to the Company's claim against First Curaçao International Bank ("FCIB") and defending the action brought by FCIB in Curaçao.*
>
> *My investigations have also been extended in relation to an additional claim…*
>
> *Overall I am able to report that investigations have continued to make progress with enquiries now spanning four jurisdictions. There remain a number of obstacles to recovery of further information but I am confident that, with the assistance of the courts, additional evidence will become available in support of claims.*
>
> *…*
>
> *The overarching strategy at the current time remains to investigate necessary issue claims against FCIB and Mr Deuss"* (emphasis added).

38. The allegations made in the draft Points of Claim against Mr Deuss and FCIB are based on allegations that they participated in and assisted in the marketing and promotion by the Company of FCIB's banking services to customers who were involved in MTIC fraud. The basis of the claim is that these activities have exposed the Company to liability which it is

entitled to recover from FCIB and Mr Deuss. It seems reasonably clear from the terms of the information requests, which have been made by Kennedys on behalf of Mr Hunt since the ex parte Order, that those requests are in aid of the contemplated proceedings against FCIB and Mr Deuss. Thus, many of the questions appear to be directed at establishing that TWPS exercised control over the Company, so that it can be alleged that FCIB and/or Mr Deuss exercised control over the Company through TWPS.

39. The letter from Kennedys to TWPS dated 15 August 2019 states in the opening paragraph that Mr Hunt has "*been recognised in Bermuda by an ex parte Order of the Supreme Court of Bermuda, dated 19 July 2019.*" The letter advises that the Mr Hunt's office requires him to investigate the MTIC fraud, and the general affairs of the Company including establishing *"who controls (or controlled) the Company at all relevant times"*.

40. The letter advises that it appears from Mr Hunt's investigation that "*the Company, its directors and staff received instructions from time to time from Transworld Payment Solutions Limited ("TWPS Bermuda") and/or its directors, controllers or employees"*. The letter then proceeds to elicit the following detailed information:

> *"1.Explain the business activities of TWPS Bermuda and describe the commercial relationship between TWPS Bermuda and the Company.*
> *2. Provide a copy of any contract(s) and/or service level agreement(s) that has/have existed between TWPS Bermuda and the Company.*
> *3. Explain the basis on which control was exercised over the Company in respect of guidance issued by TWPS Bermuda in relating to "knowing your customer".*
> *5. Unless otherwise detailed on invoices, provide full details of service(s) provided between TWPS Bermuda and the Company.*
> *7. Provide details of any and all tax advice taken in respect of the transactions between the Company and TWPS Bermuda that was shared between the parties.*
> *9. Confirm whether, and who, of the staff employed by TWPS Bermuda were also employed by the Company or otherwise contracted by TWPS Bermuda to the Company.*

10. Confirm whether anyone, and who, was seconded from TWPS Bermuda to work within the structure of the Company.

11. Confirm how much money each member of staff working in furtherance of the Company's activities were paid by TWPS Bermuda between 2004 and 2010, with a breakdown of each such staff member's salary and bonus.

13. Provide full details of the information technology ("IT") support function provided by TWPS Bermuda to the Company, including website maintenance, with a copy of any contractual agreement.

15. Explain the role of TWPS Bermuda in reviewing and monitoring FCIB customer and applicant complaints, and the legal capacity in which TWPS Bermuda communicated guidance on those issues to the Company.

16. Explain the legal basis upon which TWPS Bermuda had access to FCIB data for transmission to the Company.

17. Confirm whether, and, if so, how, TWPS Bermuda was involved in establishing the parameters of a long-term bonus plan for those working, both directly and indirectly, for the Company.

21. Identify and confirm whether TWPS Bermuda, or anyone acting on its behalf, ever raised concerns about the legitimacy of the activities undertaken by the Company, its staff or directors? If so, when and what concerns were raised, and to whom?

22. Confirm what information concerning the relationship between TWPS Bermuda, the Company and FCIB has been provided (voluntarily or under compulsion) to the curator acting for the Central Bank of Curaçao and St Maarten and/or the Fiscale Inlichtingen-en OpsporingsDienst ("FIOD") in the Netherlands since October 2006.

23. Provide a copy of all email communications between TWPS Bermuda and the Company staff and/or directors or otherwise confirm the current exact location of computer and/or hardcopy records evidencing the relationship and transactions between them."

41. The letter ends with the statement: *"Please provide this information and these documents and records to us within 21 days, failing which Mr Hunt will consider making an application for assistance from the Bermuda Court".*

42. Following the ex parte Order dated 19 July 2019 letters were written by Kennedys in similar terms and requesting similar information from Transworld Oil Inc, and Mr Victor N Farag, who Mr Hunt identified as having previously acted as a Managing Director for FCIB under ultimate authority of the Chairman of the Supervisory Board, Mr Deuss.

43. Having regard to all the circumstances outlined above, it is clear to me that the sole purpose of obtaining the recognition Order was to clothe Mr Hunt with the authority of this Court so that he could obtain information and evidence for use in the contemplated proceedings in England against FCIB and Mr Deuss. This is clear from the requests for information and evidence made by Kennedys in their letters to TWPS, Transworld Oil Inc and Mr Farag.

44. The judgment of Lord Sumption in *Singularis* sets out that the common law power of providing assistance to a foreign officeholder cannot extend to or be utilised for the purposes of gathering evidence to be used in foreign proceedings. The obtaining of evidence to be used in foreign proceedings by an officeholder must comply with the mandatory requirements of sections 27P-27S of the Evidence Act 1905 and Order 70 of the Rules of the Supreme Court 1985. The officeholder, in this regard, does not stand in any privileged position.

45. The Court has a discretion to refuse recognition if satisfied that the applicant is abusing that process for an illegitimate purpose (*In re OGX Petroleo e Gas SA* [2016] Bus LR 121, Snowden J at [60]). The use of a recognition order to obtain evidence to be used in contemplated foreign proceedings is an illegitimate use of the procedure and if there is no other legitimate reason for granting recognition the court would refuse to make such an order. In my judgment there is no other legitimate reason for the recognition order and accordingly, I discharge the ex parte Order dated 19 July 2019.

46. In this regard I have not ignored the other grounds advanced in support of granting the recognition Order. In my judgment the other grounds are makeweights and on examination, lack any substance.

47. In the letter dated 15 August 2019 to TWPS, Kennedys raise certain questions in relation to historic intercompany transactions relating to recharges, debits or credits, between TWPS and the Company. In particular, Kennedys seek an explanation as to the basis for the Company paying expenses of £146,722 on behalf of TWPS between 2004 and 2008; explanation as to why in 2008 TWPS allowed the Company bad debt recharge of £44,458 to its own accounts; and explaining the basis for TWPS making payments of £468,132 between 2006 and 2008 for expenses on behalf of the Company which were recharged and requesting evidence that the Company repaid those recharges.

48. It is not clear what useful purpose this investigation in relation to historical transactions can achieve. These three transactions relate to the Company's accounts for the period 2004 to 2009 and on any basis any potential cause of action arising from these transactions would be statute barred. It seems reasonably clear that there can be no viable cause of action arising from an investigation of these historical transactions.

49. Second, the relevant inter-company charges have been audited by the Company's auditors, Ayers Bright Vickers based in Worthing, West Sussex, England. The Auditors Report dated 27 September 2007, for the year ended 31 December 2006, is attached as an exhibit to Mr Hunt's First Affidavit dated 18 June 2019. The firm of Ayers Bright Vickers is still in existence and if Mr Hunt has any questions arising out of the audited accounts, there is no reason why he should not approach the auditors in the first instance.

50. Mr Hunt says that he does not know whether some of the charges have been repaid to the Company. The Company's auditors based in Worthing should be able to provide that confirmation. Furthermore, the Company had a bank account in the United Kingdom and Mr Hunt, as the liquidator, should be able to confirm whether payments were indeed received by the Company by analysing its bank account statements.

51. In his Second Affidavit dated 7 November 2019, Mr Hunt advances another justification in support of obtaining a recognition order. He says that he was contacted by representatives of a former employee of the Company seeking confirmation about the employee's rights under the Company's pension scheme. He says this is just a single example of a myriad of general statutory duties that the liquidator has from taking office and which will be pursued until he is satisfied that no such records exist. It should be noted that there is no mention of any pension scheme in any of the letters written by Kennedys. Mr Smith QC advised the Court that there was no pension scheme.

52. In his First Affidavit dated 18 June 2019, Mr Hunt says that the global IT manager for the Transworld Group was based in Bermuda, and there is evidence of IT security advice being provided to the Company from TWPS. He then conjectures that "there may be computer equipment or data belonging to the Respondent in Bermuda". This is pure speculation on Mr Hunt's part and if he wishes to pursue this line of enquiry he should write to the relevant party dealing with this particular issue.

53. I have also not ignored the fact that Mr Hunt states in his Third Affidavit dated 5 December 2019, that he has sought detailed information concerning all accounts, facilities, agreements with and securities held by Butterfield Bank, Clarien Bank, HSBC Bank Bermuda, and the Bermuda Commercial Bank on behalf of the Company. Mr Preston confirmed to the Court that the Company has no such accounts in Bermuda.

54. Likewise I have not ignored the fact that Mr Hunt states in his Third Affidavit that he has sought information from the Land Title Registry in Bermuda concerning the land the Company might possess. It would be surprising if a company incorporated in the United Kingdom, without a permit to carry on business in Bermuda under section 134 of the Companies Act 1981, would be granted permission to own land in Bermuda under the provisions of the Bermuda Immigration and Protection Act 1956. Again Mr Preston confirmed that the Company owns no land in Bermuda.

55. In setting aside the ex parte Order dated 19 July 2019 the Court makes it clear that it will of course entertain an application for such an order if it can be shown that it will serve a useful purpose in aid of a legitimate object.

56. Mr Smith QC also argues that the use of the recognition Order to obtain evidence for the contemplated English proceedings also falls foul of the restriction in *Singularis,* that the common law power of assistance *"is not therefore available to enable them to do something which they could not do even under the law by which they were appointed."* In the present case, Mr Hunt is appointed under English law and Mr Smith contends that as a matter of English law, Mr Hunt would not be entitled to relief from the English court to compel the production of information which he now seeks. This is because, he says, such requests would be considered oppressive, as they are evidently in large part for the purpose of gathering information to support litigation which Mr Hunt has already decided to commence.

57. The relevant English statutory provision is section 236 of the Insolvency Act 1986, which is the equivalent to section 195 of the Bermudian Companies Act 1981. Mr Smith relies upon the leading authority in *British & Commonwealth Holdings plc v Spicer and Oppenheim* [1993] AC 426, in relation to the exercise of the Court's discretion for these purposes. In this case the House of Lords decided:

> (1) Although there is no requirement that the documents sought by the officeholder must be for the purposes of reconstituting the company's knowledge, this is one of the purposes which may most clearly justify the making of an order.
>
> (2) The power under section 236 it is an extraordinary power and the discretion must be exercised only after a careful balancing of the factors involved.
>
> (3) This involves balancing the reasonable requirements of the officeholder to carry out his task against the need to avoid making any order which is unreasonable, unnecessary or oppressive to the person concerned.
>
> (4) The applicant must satisfy the court that, after balancing all relevant factors, there is a proper case for such an order be made. The proper case is one where the

administrator reasonably requires to see the documents to carry out his functions and the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the officeholder's requirement.

58. Mr Smith QC argues that in the present case, the information requests which Mr Hunt apparently intends to make would be considered oppressive. First, Mr Hunt has clearly decided that he will sue Mr Deuss and FCIB. He has prepared the draft Points of Claim settled by Leading Counsel pleading claims against Mr Deuss and FCIB. Thus the effect of any information requests which go to the subject matter of the claim will be to allow Mr Hunt to gain advantages in the intended litigation which are not available to ordinary litigants.

59. Mr Preston, for Mr Hunt, submits that the Court is required to undertake a fact sensitive detailed analysis to weigh the various factors and consider all the circumstances in relation to each particular application for disclosure. In the circumstances he submits that the Court should not assume what type of disclosure, if any, the liquidators might ask the Court to grant in these proceedings and determine, pre-emptively, that all of those remedies would be oppressive in the circumstances of this case.

60. I have already ruled that the ex parte Order should be discharged on the ground that its use to obtain evidence for contemplated proceedings in England was an illegitimate purpose and that the Court will not exercise its common law power of assistance to aid the obtaining of evidence for use in contemplated foreign proceedings. In light of that ruling it is unnecessary to express a concluded view as to whether Mr Hunt would be entitled to relief from the English Court to compel the production of the information which he now seeks in the Kennedys letters. The Court can state that Mr Smith QC's submission that such an application would be considered oppressive by the English Court, is strongly arguable.

The scope of the ex parte stay

61. Mr Smith QC argues that there was no proper basis for Mr Hunt obtaining assistance from the Court by way of the stay order contained in paragraph 2 of the ex parte Order.

62. First, he submits that the evidence provided by Mr Hunt does not disclose any basis for granting such relief as there was no evidence of apprehended hostile creditor action or potential jeopardy to assets.

63. Second, he argues that at common law there is no basis for granting an order in terms of paragraph 2 of the ex parte Order which seeks to apply generally against unidentified persons. In this regard Mr Smith QC relies upon the decision of Barrett J in the New South Wales Supreme Court in *Independent Insurance Company Ltd* [2005] NSWSC 587, where Barrett J explained that such an order is "*express to be binding on the whole world in the manner of legislation*" and is therefore inappropriate for the court to make.

64. Third, he submits that at the ex parte hearing, the Court was misinformed by counsel into believing that the grant of such relief is a standard part of the recognition Order in England. Most recognition applications in England take place under the provisions of the Cross-Border Insolvency Regulations 2006, which implement the UNCITRAL Model Law on Cross-Border Insolvency into English law. When a foreign insolvency proceeding is recognised under the Regulations as a foreign main proceeding, then an automatic moratorium on creditor action arises. However, Mr Smith QC submits, this was nothing to do with recognition at common law, and therefore has nothing to do with the position in Bermuda.

65. In light of the fact that I have already discharged the entire ex parte Order, I can deal with these points shortly.

66. If necessary, I would have set aside paragraph 2 of the ex parte Order on the ground that it serves no legitimate purpose as there are no assets of the Company in the jurisdiction.

67. In light of my earlier ruling it is unnecessary to decide whether it is always inappropriate to order a stay of proceedings in respect of creditor claims by the general body of creditors of the insolvent company, as appears to be suggested by Barrett J in *Independent Insurance.* Such orders can serve a useful purpose when there are assets within the jurisdiction and there is justifiable apprehension that actions are likely to be commenced by some, as yet unidentified, creditors of the insolvent company. This would appear to be the reasoning of Kawaley CJ in *Funding Partners Global Fund Ltd* [2009] Bda LR 35, although the point was not in contention and not fully argued by counsel.

Settlement Agreements

68. TWPS argues that the Settlement Agreements were intended to draw a final line under the issues relating to alleged MTIC fraud. The intended effect of the Settlement Agreement, in particular, was to release FCIB, its former officers, directors and employees and any corporation or entity under common control with any of them from any new claims or demands, such as requests for information from insolvency practitioners, such as Mr Hunt.

69. Mr Smith QC contends that the Company is not itself referenced in the Settlement Agreements because Mr Hunt failed to tell FCIB that he had been appointed as liquidator of this Company and, as far as the Transworld Group was concerned, it had been dissolved in 2010.

70. The application of the Settlement Agreements gives rise to two issues of Curaçao law: whether TWPS is a releasee under Article 2(1) of the Settlement Agreements; and whether the Company is bound by the release. These issues of Curaçao law are presently pending before the Curaçao courts.

71. Mr Smith QC submits that if TWPS and FCIB are correct in their interpretation of the Settlement Agreements, then this would be a further reason why it would not be open to Mr Hunt to pursue information requests in Bermuda, and a further reason why any recognition of his appointment in Bermuda would be unnecessary and inappropriate. Mr

Smith submits that in the circumstances, the recognition Order should be discharged, or alternatively stayed pending the outcome of the Curaçao proceedings.

72. In light of my earlier ruling I can deal with this point briefly. The Court is not in a position to express any view in relation to the merits of the position taken by the parties under Curaçao law. The Court assumes that the respective positions of the parties are arguable. In the circumstances, assuming the application for the recognition Order would otherwise be justified for a legitimate purpose, the Court would not have refused recognition merely by reference to the existence of the Curaçao proceedings in relation to the Settlement Agreements.

Material Non-Disclosure

73. TWPS contends that there was very material non-disclosure by Mr Hunt at the ex parte hearing and that this is therefore a freestanding reason why the ex parte Order should be set aside. Reliance is placed upon the principles governing the requirement on an applicant to give full and frank at an ex parte hearing as summarised by Popplewell J in *Fundo Soberano de Angola v Dos Santos* [2018] EWHC 2199 at [50]-[52].

74. First, TWPS contends that there was a complete failure in both Mr Hunt's affidavit and counsel's skeleton argument to explain any of the very unusual background to the liquidation of the Company including (i) the very questionable circumstances in which it was placed into liquidation; (ii) the failure to disclose Mr Hunt's appointment as liquidator of the Company to FCIB at the time of entry into the Settlement Agreements; (iii) the extraordinarily generous remuneration payable to Mr Hunt and the fact that this appears to have been approved by a creditor under the control of an associate; (iv) the fact that the creditors of the Company whose claims are being relied on to support the claims against FCIB and Mr Deuss are controlled by Mr Hunt and/or his associates.

75. Second, Mr Hunt did not adequately explain the existence and relevance of the release clauses in the Settlement Agreements and the existence of the proceedings pending in Curaçao.

76. Third, there was a failure to give proper disclosure of the information requests which had been made by Mr Hunt in England and the repeated and detailed explanations given by FCIB's lawyers, Jones Day, that such a requests were oppressive given that Mr Hunt had already decided to commence proceedings against FCIB and Mr Deuss.

77. Again I can deal with this issue briefly. At the ex parte hearing the Court was aware, *inter alia*, from the Quinn Emanuel letter dated 9 July 2019 that (i) Gowlings had written a letter before action asserting claims against FCIB and Mr Deuss; (ii) there were proceedings pending in the Curaçao courts the outcome of which was materially likely to affect Mr Hunt's ability to prosecute claims against Mr Deuss; (iii) Mr Hunt had made an application to the English Court seeking public examination of Mr Deuss; and (iv) it was contended on behalf of Mr Deuss that the requested public examination was incompatible with the proceedings threatened in the letter before action.

78. I accept that the Court was not made fully aware of the circumstances of Mr Hunt's appointment as liquidator of the Company or the details of his compensation. In all the circumstances, I have come to the view that I would not have discharged the ex parte Order on the grounds of non-disclosure if I had otherwise taken the view that it was properly granted for a legitimate purpose.

Conclusion

79. Having regard to my conclusion expressed in paragraphs 43 to 45, I discharge the ex parte Order dated 19 July 2019 recognising the appointment of Mr Hunt as the liquidator of the Company and granting stay of proceedings.

80. I will hear the parties in relation to the issue of costs, if required.

Dated this 6 March 2020

NARINDER K HARGUN

CHIEF JUSTICE

1890

PINK v. FLEMING.

on that footing. In principle the case appears to me to be governed by the decision in *Taylor* v. *Dunbar*. (1) The evidence shews that the damage to the fruit was due to the joint operation of the handling and the delay. When the policy is looked at, there are no words applicable to a loss occasioned by these causes.

BOWEN, L.J. I am of the same opinion. Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case and the delay in the other. The case appears to me to be undistinguishable in principle from *Taylor* v. *Dunbar*. (1) For these reasons, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Courtenay, Croome, Son, & Finch.*
Solicitors for defendant: *Waltons, Johnson, & Bubb.*

E. L.

[IN THE COURT OF APPEAL.]

June 26.

ANTONY GIBBS & SONS *v.* LA SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Contract—Conflict of Laws—Foreign Bankruptcy or Liquidation, Discharge by—Lex Loci Contractus—Law of Domicil—Stay of Proceedings—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5, *s.* 39.

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

APPEAL from the judgment of Stephen, J., at the trial.

The action was for non-acceptance of certain quantities of copper purchased by the defendants, a French company, from the plaintiffs, who were merchants carrying on business in London.

The facts, so far as material, were as follows:—

Contracts for the purchase of copper by the defendants from the plaintiffs had been effected through a broker on the London

(1) Law Rep. 4 C. P. 206.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Metal Exchange, who in each case drew up and sent to the parties bought and sold notes in the usual way, which were retained by such parties. By these notes the contract was expressed to be subject to the rules and regulations of the London Metal Exchange indorsed thereon; the copper was to be delivered at Liverpool; and payment was to be made in cash in London against warrants. (1) The defendants were a trading company created under and by virtue of certain statutes and articles of association according to the law of France and which carried on business in Paris. It appeared that such company had, since the making of the contracts and before the action, gone into liquidation in France, a judgment of judicial liquidation having been pronounced against it by the Tribunal of Commerce of the Seine. The failure to accept a portion of the copper contracted to be purchased by the defendants had taken place before the judgment of liquidation; but the deliveries of the remainder of the copper did not become due until after such judgment. The defendants gave notice to the plaintiffs that they should not accept such copper, which was therefore not tendered. Notice having been given to the plaintiffs by the liquidator in France that they must come in and prove any claim they had against the defendants or such claim would be barred, and they would be excluded from any share in the distribution of the assets, the plaintiffs thereupon sent in a claim in the liquidation for damages in respect of the loss sustained on resale of the copper. Such claim however contained a reservation of all rights in regard to the action in England which was then pending. The liquidator rejected so much of the claim as concerned the portion of the copper delivery of which was not due until after the judgment of liquidation, on the ground

(1) It has been thought sufficient for the purposes of this report to summarize the effect of the facts with regard to the making of the contracts as above. A question was raised in argument whether they ought to be considered as made in England, and therefore English contracts, or not; but the Court, as will be seen, were clearly of opinion on the facts that the contracts were English contracts. This question turned on the detailed facts of the transactions, which were somewhat more complicated than as above; but it has not been thought that this point involved any question of law such as called for a report.

that no such claim was admissible according to French law. The plaintiffs thereupon commenced proceedings in the French Court to establish their right to claim in the liquidation for the full amount claimed, which proceedings were still pending. Evidence was given by French experts as to the effect of the liquidation proceedings in France according to the French law. It was contended for the defendants, in substance, that the evidence shewed that such proceedings had the effect of dissolving the company for all purposes but liquidation, vesting the entire administration of its assets and affairs for the purposes of the liquidation in the liquidator, and preventing any action from being maintainable against the company; and further, that with regard to the copper of which delivery did not become due until after the judgment of liquidation, the French law was that the vendors might deliver the copper to the liquidator and prove for the price; but as they had not done so, and the copper was not delivered, the contract was cancelled and no claim for damages for non-acceptance was admissible. (1) It was, therefore, contended that either the liquidation proceedings were a defence to the action, or that they formed a ground on which the judge ought to order a stay of proceedings. The learned judge gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

Kennedy, Q.C., and *H. Tindal Atkinson*, for the defendants. It may be that there was no discharge of the defendants from liability in the technical sense in which the term is used in English bankruptcy law; but the effect of the French law of liquidation is that the company is dissolved for all purposes but liquidation, and no action will lie against it, the administration of all its assets and affairs being vested in the liquidator; and therefore the same question arises substantially as in the case of a discharge of the

(1) The evidence given with regard to the French law of liquidation was lengthy, and its effect not altogether clear; but it has not been thought necessary to go into it in detail, because, as will be seen, the judgment of the Court proceeded on the footing that, even if there were in French law what amounted to a discharge of the defendants from liability, it would not be a defence to the action.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

defendant by the bankruptcy law of a foreign country. This company was domiciled in France, and only existed by French law, and after the judgment of liquidation the company was in French law non-existent for the purpose of being sued. With regard to the breaches of contract subsequent to the liquidation, by the French law the contracts were cancelled and no claim could be made for damages for non-acceptance. Therefore, with respect to those breaches there was what was equivalent to a discharge of liability. The result of the authorities is that, where a debtor is domiciled in a foreign country, and by the bankruptcy or liquidation law of such country the administration of the assets of such debtor is vested in a trustee in bankruptcy or liquidator, and an action against the debtor is rendered not maintainable, the law of England, in accordance with the principles of international law on the subject, recognises and gives effect to the foreign bankruptcy or liquidation; and therefore that the effect of the liquidation in this case is to operate as a bar to the action in England. The English law recognises the title of the trustee or liquidator in the foreign bankruptcy or liquidation, and therefore the creditor is not to have a right to the assets in this country, which ought to go to such trustee in bankruptcy or liquidator abroad, to be administered in the bankruptcy or liquidation there. The plaintiffs here have proved in the French liquidation, and therefore have assented to the jurisdiction of the French court and are bound by the French law. If the liquidation in France is not technically an actual defence to the action, it is submitted that the pendency of that liquidation and of the claim of the plaintiffs under it, affords, at any rate, a ground for staying proceedings in the action under s. 24, sub-s. 5, of the Judicature Act, 1873. Under that section and s. 39, the learned judge at the trial had power to grant, and ought to have granted, a stay of proceedings on that ground before judgment, or at any rate it ought to be granted after judgment, and this Court can grant it now. [They cited *Ellis* v. *McHenry* (1); Story, Conflict of Laws, ss. 340, 342; *Phillips* v. *Allan* (2); *Ex parte Robertson* (3);

(1) Law Rep. 6 C. P. 228. (2) 8 B. & C. 477.
(3) Law Rep. 20 Eq. 733.

Bartley v. *Hodges* (1); *Solomons* v. *Ross* (2); *Sill* v. *Worswick* (3); *In re Davidson's Settlement Trusts* (4); *Phosphate Sewage Co.* v. *Lawson & Sons' Trustee* (5); Westlake, Private International Law, ss. 125, 226; *In re Artola Hermanos* (6); *Baldwin* v. *Hale* (7); *Quelin* v. *Moisson* (8); *Quin* v. *Keefe* (9); *Smith* v. *Buchanan* (10); *Lewis* v. *Owen* (11); *Ogden* v. *Saunders* (12); *Edwards* v. *Ronald.* (13)]

R. T. Reid, Q.C., and *R. S. Wright*, for the plaintiffs. The evidence does not shew that the defendants were discharged by the French law. But, if they were, it would be no defence to the action or ground for staying proceedings. These contracts were English contracts, made and to be performed in England. There is no authority to shew that a party to such a contract in England can be discharged by the law of a foreign country, whether the country of his domicil or not. The plaintiffs are not bound by the law of France, and cannot be taken to have contracted with reference to it. The consequences of the proposition for which the defendants contend would be most startling. It would mean that, whenever an Englishman makes a contract in England with a subject of some foreign country, he is liable to have such contract cancelled by the law of such foreign country however unjust or unreasonable, though he could have enforced it in his own country. *Smith* v. *Buchanan* (10) is an authority which is directly to the contrary. The proof sent in by the plaintiffs in the liquidation was conditional only, and reserved all rights in the action. It did not involve any assent to the French law. [They cited Foote, Private International Jurisprudence, p. 381.]

Kennedy, Q.C., in reply.

LORD ESHER, M.R. In this case the defendants, a French company, entered into negotiations for the purchase of copper

(1) 1 B. & S. 375.
(2) 1 H. Bl. 131.
(3) 1 H. Bl. 665.
(4) Law Rep. 15 Eq. 383.
(5) 5 Court Sess. Cas. 4th Series, 1125, 1138.
(6) 24 Q. B. D. 640.
(7) 1 Wallace, 223.
(8) 1 Knapp, P. C. C. 266.
(9) 2 H. Bl. 553.
(10) 1 East, 6.
(11) 4 B. & A. 654.
(12) 12 Wheaton, 213, 366.
(13) 1 Knapp, P. C. C. 259.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the

purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith* v. *Buchanan* (1), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of

(1) 1 East, 6.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported. Is there any authority to that effect? I think that the point has been decided by what Lord Kenyon said in *Smith* v. *Buchanan*. (1) I agree with the observation of Mr. Westlake, who says that Lord Kenyon's view was that the defendant's domicil was immaterial, and I think that he put the case upon the principle that the law of the country of the contract was the law that governed not only the interpretation of the contract, but also all the subsequent conditions by which it was affected as a contract. It has been suggested that, in the case of *Bartley* v. *Hodges* (2), Lord Blackburn has doubted the correctness of this view, and has used expressions indicating that a discharge in the country of the defendant's domicil would be recognised in an English court, although the contract was not made in that country. I do not give much weight to what he said merely during the argument. I agree with the suggestion of the plaintiffs' counsel as to this, viz., that he was criticising the language of the plea which said that the defendant was resident, not that he was domiciled in Victoria. But, when I come to the judgment which he ultimately gave, my view of it is that he meant to accept the view taken by Lord Kenyon, and since adopted by several text-writers on the subject. He said, in giving judgment: "The law on this subject is laid down in Story, Conflict of Laws, s. 342, 5th ed. Having stated in previous sections that the discharge of a contract by the law of the place where it was made or to be performed will be a discharge every-

(1) 1 East, 6.

(2) 1 B. & S. 375.

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lord Esher, M.R.

where, he goes on to say: 'The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country. Thus it has been held in England that a discharge of a contract made there under an insolvent Act of the State of Maryland is no bar to suit upon a contract in the Courts of England.' For this he cites *Smith* v. *Buchanan* (1), and proceeds: 'In America the same doctrine has obtained the fullest sanction.' In addition to that, we have the same doctrine pretty distinctly laid down and acted on in *Phillips* v. *Allan*." (2) It seems to me clear that the meaning of what Lord Blackburn so said is, that he accepted the law as laid down by Story, for which the decision of Lord Kenyon in *Smith* v. *Buchanan* (1) was an authority so far as regards this country. With regard to the case of *Edwards* v. *Ronald* (3), the ground of the decision there was, in my opinion, that the Act of Parliament relied upon, being an Act of the English Imperial Parliament, was binding in Calcutta, and, that being so, it was for this purpose the law of the country in which the contract was made and was being sued on. That ground of decision does not apply here. The case of *Quelin* v. *Moisson* (4) was a somewhat peculiar case, and has not much bearing, in my opinion, upon the present case. There the bankrupt had made a promissory note in favour of a French woman in Nantes. He became bankrupt in France, and the payee of the note proved under the bankruptcy. Then, under circumstances which are not clearly stated—but one is inclined to suspect not very honestly on the part of the payee—the note was indorsed over, and immediately indorsed by the indorsee to a person in Jersey. Negotiable instruments, such as notes and bills of exchange, are peculiar instruments, and give rise to several contracts. There is the original contract by the maker of a note or acceptor of a bill with the payee or drawer, as the case may be. Then, if there is an indorsement over, that gives rise to a contract between the maker or acceptor and the indorsee, as well as to a distinct contract between the indorser and indorsee. When the indorsee is

(1) 1 East, 6.
(2) 8 B. & C. 477.
(3) 1 Knapp, P. C. C. 259.
(4) 1 Knapp, P. C. C. 265.

suing the maker of the note or acceptor of the bill, he is suing on the contract made by such maker or acceptor, which will be governed, I should say, by the law of the country to which such contract belongs. Difficulties may, no doubt, arise with regard to cases on negotiable instruments, which do not appear to me to arise in the present case. It seems to me that in this case the plaintiffs were not bound by the French law; and therefore, assuming that the defendants would be discharged by French law, this case must be determined by the law of England. With regard to the suggestion that there ought to be a stay of proceedings, the answer appears to me to be this. If the judgment given by the learned judge was right, I think there is no ground at the present stage why a stay should be granted. If the judgment were wrong, then no stay would be needed. It seems to me unnecessary to go into the question whether the judge at the trial could grant a stay when the case came on before him for trial, and equally unnecessary to go into the question whether, after judgment pronounced, he could stay proceedings generally, or could only stay execution pending an appeal. I see no ground in law on which any such stay ought to be granted. For these reasons I am of opinion that the judgment was right and should be affirmed.

LINDLEY, L.J. The first thing to be borne in mind is that the contracts sued upon are English contracts, made and to be performed in England. The defence set up is in substance, that the defendants are a French company which is being wound up in France. Where such is the case, there is no remedy by the French law against the defendants except in the winding-up proceedings. The question is whether that is a defence to an action brought here. The defendants must be considered as domiciled in France, and I will assume for a moment, though I think it doubtful, that liquidation proceedings are equivalent to bankruptcy. It is contended for the defendants that by reason of the bankruptcy law in France, in which country the defendants are domiciled, the action cannot proceed. Even if the defendants had obtained what was equivalent to a discharge in bankruptcy according to French law, I think that the proposition so contended

1890

GIBBS & SONS v. SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

Lindley, L.J.

for is wrong. There is really no authority for it. An ingenious argument was based upon what I think was a misconception of the view taken by Lord Blackburn in *Bartley* v. *Hodges*. (1) He no doubt referred to the fact that the defendant was not stated to be domiciled in Victoria; but, when his actual judgment is considered, I do not think that the inference to be drawn from that must be extended too far. I cannot read the judgment as anything but an adoption by him of what Lord Kenyon said in *Smith* v. *Buchanan*. (2) He said in substance, that the contract was an English contract, and that neither the plaintiff nor defendant was stated to be domiciled in Victoria; but I do not think it is to be inferred because he made use of the latter expression that he meant that, if they had been, the result would have been different. The expressions so used by him with reference to the domicil of the parties have been considered by Mr. Westlake and Mr. Foote, in their books on Private International Law, and they both come to the conclusion that, if he meant to imply what has been suggested, his view is erroneous. But I do not think that he meant anything of the sort. I cannot see any principle upon which it can be said that the domicil of the defendant is in any respect material. The consequences of adopting the doctrine suggested by the defendants appear to me to be so startling that I decline to adopt it.

But then it is said that the proceedings ought to have been stayed before judgment, or, if not, at any rate they ought to be stayed after it. I cannot conceive any reason why they should be stayed before judgment, or why the plaintiffs should not be allowed to ascertain their legal rights on these English contracts by this action. I should think that it would be the most convenient course for both parties that such rights should be so ascertained. As for staying execution after judgment, who ever heard of a judgment debtor asking for a stay of execution, except pending an appeal? But it is said that the liquidator might ask for a stay, and this is practically an application by the liquidator. I see no reason why such an application on behalf of the liquidator should be granted. Execution could only go against the property of the defendants, and to such execution the plaintiffs

(1) 1 B. & S. 375. (2) 1 East, 6.

have a right. If any property not belonging to the defendants is taken, it can be protected by interpleader proceedings. It seems to me doubtful upon the evidence as to the French law whether the property of the company has vested in the liquidator; but in any case no injustice can arise from allowing execution to go. On these grounds I think that the appeal fails.

LOPES, L.J. Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France. That proposition seems to me to be the result of the judgment of Lord Kenyon in *Smith* v. *Buchanan* (1) and that of Lord Blackburn in *Bartley* v. *Hodges*. (2) As I read Lord Blackburn's judgment in that case, he entirely agreed with the passage from Story which he read, and adopted the judgment of Lord Kenyon in the earlier case. The result of these cases seems to me to be that the question of the defendants' domicil is immaterial. Consequently, there is no answer to this action. With regard to the suggestion that there ought to be a stay of proceedings, all I can say is, that I fail to see any ground whatever for it. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Johnson, Budd, & Johnson.*

Solicitors for defendants: *Murray, Hutchins, & Stirling.*

(1) 1 East, 6.

(2) 1 B. & S. 375.

E. L.

HONG KONG AIRLINES LTD, RE

Business and Property Courts (Insolvency & Companies List (Ch D))

Sir Alastair Norris (sitting as a judge of the High Court): 14 December 2022

[2022] EWHC 3210 (Ch); [2023] B.C.C. 477

H1 *Restructuring plan—Application for sanction—Overseas airline—Jurisdiction dependent on sufficient connection to the English court's jurisdiction—Test for sufficiency—Whether sanctioning plan would involve breach of international convention—Class composition—Whether secured and unsecured creditors could be in same class—Whether creditors on claims arising from obligations governed by different laws could be in same class—Whether plan would be internationally effective if sanctioned—Companies Act 2006 Pt 26A.*

H2 This was an application by a company for the sanction of the court to a restructuring plan under the Companies Act 2006 (CA 2006) Pt 26A.

H3 The company, HKA Ltd, was an airline based in Hong Kong. It was registered at Companies House as an overseas company, and its centre of main interests (COMI) was Hong Kong. As a result of the global Covid-19 pandemic it faced severe financial difficulties and was the subject of a winding-up petition in Hong Kong. HKA's indebtedness fell into a number of categories: amounts due in respect of leases of aircraft, including some owned by special purpose vehicles funded by the China Development Bank (CDB); claims relating to working capital provided by banks and other financial creditors, including an issue of "senior perpetual notes" which were governed by English law; unpaid airport fees and government dues; liabilities to trade creditors; and related-party and intra-group claims. Proceedings on the petition had been adjourned in order to see whether HKA could avoid liquidation by restructuring. Accordingly, HKA presented a restructuring plan. The plan excluded a number of categories of claim. It was presented in parallel to a scheme of arrangement being put in place in Hong Kong, because of the application in Hong Kong of the rule in *Antony Gibbs*, although that scheme did not cover the English-law indebtedness. The plan comprised in broad terms an injection of new capital, the reduction of the airline's fleet, and the compromise of claims of unsecured creditors. Three class meetings were ordered by the court. (1) The first class consisted of lenders, trade creditors and the lessors of aircraft that were to be returned. These creditors would receive approximately 5 per cent of their claims, and a pro rata distribution if the company achieved certain targets. (2) The second class was composed of the financiers and lessors (the "critical lessors") of aircraft which were to be retained as part of the fleet. The members of this class had two options, namely (a) to continue the leases, in which case they were to receive 5 per cent of the difference between their existing claims and the value of their new lease rights, along with a pro rata distribution; or (b) terminate the leases, obtain a return of their aircraft and then claim as unsecured creditors. (3) The third class comprised the perpetual noteholders, who would receive a cash payment of about 2.5

per cent of their claims and a performance-related distribution. The meetings were duly held and the statutory majorities reached. The plan was now before the court for sanction.

H4 Held, granting the application and sanctioning the scheme:

H5 1. Although the application was unopposed, that did not relieve the court of its duty to scrutinise the plan. It was settled law that decisions in cases concerning schemes of arrangement provided a clear guide for the exercise of the jurisdiction in relation to restructuring plans under Pt 26A of CA 2006 and the same approach to sanctioning the plan would be adopted. Firstly it was necessary to determine whether there was jurisdiction. The court would not exercise jurisdiction over a foreign company unless there was sufficient connection with the court's jurisdiction, to be established by an intense focus on the facts; it was not necessary that an overwhelming majority of indebtedness was necessary to establish the sufficiency of the connection. In this case approximately 42 per cent of the company's indebtedness was governed by English law; the rule in *Antony Gibbs* prevented the perpetual notes being varied other than by an order of the English court; and HKA was registered as an overseas company in England. (*Smile Telecoms Holdings Ltd, Re* [2022] EWHC 740 (Ch); [2022] Bus. L.R. 591, *Gategroup Guarantee Ltd, Re* [2021] EWHC 775 (Ch); [2021] B.C.C. 722 and *Drax Holdings Ltd, Re* [2003] EWHC 2743 (Ch); [2004] 1 W.L.R. 1049 applied.)

H6 2. A further jurisdictional issue was raised by the Convention on International Interests in Mobile Equipment 2001 ("the Cape Town Convention") as applied to aircraft and aircraft equipment. Under the Convention, where the lessee had suffered an insolvency-related event then no obligations of the lessee could be modified without the consent of the creditor. This would potentially apply in relation to the critical lessors. However, sanctioning the plan would not involve the sanctioning of a breach of international obligation because the critical lessors had unanimously voted in favour of the plan, and each had the second option of terminating its lease. (*MAB Leasing Ltd, Re* [2021] EWHC 379 (Ch) followed).

H7 3. On class composition, the first class meeting had included creditors who held security for their indebtedness. The question was whether it was impossible for them to meet together with creditors whose debts were not secured at all with a view to considering their common interest. That was not impossible, because the plan did not affect security rights, but the rights of a secured creditor to recover the element of its claim that exceeded the value of its security. Neither was it the case that the class would be fractured by the fact that the claims arose from original obligations governed variously by English, Hong Kong or Chinese law: the liquidation claims were governed by the Hong Kong rules of winding up; the governing law of the original obligation was not material.

H8 4. The court was satisfied on the evidence that the outcome of the class meetings could be safely relied on. Each meeting was fairly representative of the class; the explanatory statement was full, and when certain modifications were made the meetings were rescheduled so that the creditors had sufficient time to consider the modified proposals; the meeting arrangements facilitated participation; and there was no identified special interest of a member of the majority of any class that was different from and adverse to the other members of the class, such as to suggest that they had not acted bona fide and in accordance with their interest as class members.

H9 5. Under the plan all the class members were predicted to receive a materially better return than in the event of an immediate liquidation, which was the only alternative. On that basis the court could conclude that the plan was fair, in the sense that it embodied a compromise that might reasonably be entered into by intelligent and honest class members having regard to their ordinary class interests.

H10 6. The court should consider whether the plan would be internationally effective, which meant being satisfied that it would achieve a substantial purpose in the key jurisdictions in which HKA had liabilities or assets, and required credible evidence that the scheme had a real prospect of being

recognised and given effect. On the evidence the plan would have substantial effect. (*DTEK Energy BV, Re* [2021] EWHC 1551 (Ch); [2022] 1 B.C.L.C. 260 applied).

H11 Cases referred to:

Anglo American Insurance Co Ltd, Re [2001] 1 B.C.L.C. 755 Ch D
Antony Gibbs & Sons v Societe Industrielle et Commerciale des Metaux (1890) 25 Q.B.D. 399 CA
Drax Holdings Ltd, Re [2003] EWHC 2743 (Ch); [2004] 1 W.L.R. 1049; [2004] B.C.C. 334
DTEK Energy BV, Re [2021] EWHC 1551 (Ch); [2022] 1 B.C.L.C. 260
Gategroup Guarantee Ltd, Re [2021] EWHC 775 (Ch); [2021] B.C.C. 722; [2022] 1 B.C.L.C. 141
Hawk Insurance Co Ltd [2001] EWCA Civ 241; [2002] B.C.C. 300; [2001] 2 B.C.L.C. 480
MAB Leasing Ltd, Re [2021] EWHC 152 (Ch); [2021] EWHC 379 (Ch)
Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia [2001] EWCA Civ 1696
Smile Telecoms Holdings Ltd, Re [2022] EWHC 740 (Ch); [2022] Bus. L.R. 591; [2022] B.C.C. 808
Sovereign Life Assurance Co v Dodd [1895] 2 Q.B. 573 CA
UDL Holdings Ltd, Re [2002] 1 H.K.C. 172 HKFCA
Virgin Atlantic Airways Ltd, Re [2020] EWHC 2191 (Ch); [2020] B.C.C. 997 (convening hearing)

H12 *Tom Smith KC*, *Clara Johnson* and *Georgina Peters* (instructed by Latham & Watkins LLP) for the applicant.

JUDGMENT

SIR ALASTAIR NORRIS:

1. Hong Kong Airlines Ltd ("the Company") was incorporated in Hong Kong in 2001. It remains registered there, and its centre of main interests is located in Hong Kong. It is registered at Companies House in England as an overseas company. As its name suggests it carries on the business of an airline, with a passenger and cargo business (and related services) centred on Hong Kong airport.

2. For present purposes it may be said that its ultimate shareholder is HKA Group Holdings Co Ltd, a BVI incorporated company ("HKA Holdings BVI"). The ownership of HKA Holdings BVI is divided between a number of corporate and individual shareholders, one whom ("HNA Group") became insolvent and is the subject of reorganisation proceedings in the People's Republic of China. HNA Group transferred its shareholding in the Company during its reorganisation.

3. Below HKA Holdings BVI are two intermediate shareholders:-

> (a) the Company is a sub-subsidiary of Hong Kong Airlines International Holdings Limited, a Cayman incorporated company ("HKA Holdings Cayman");
> (b) the Company is a direct subsidiary of HKA Group Company Limited, another BVI incorporated company which is also registered in Hong Kong ("HKA Group BVI").

I will refer to HKA Holdings BVI, HKA Holdings Cayman, HKA Group BVI the Company and their associated companies as "the Group".

4. The Company has obligations to six categories of creditor:-

> (a) The aircraft and their parts are held under leases. The Company operates 53 aircraft. Of these 40 are held either under finance leases (under which the Company retains the aircraft on termination of the lease) or operating leases (under which the Company returns the aircraft at the termination of the lease). The leases are conventional in form, and entitle the lessor,

should an insolvency-related event occur, to ground the aircraft, to terminate the lease, to repossess the aircraft and to claim termination payments. The 13 remaining aircraft are in the ownership of SPVs, funded by a loan from the China Development Bank ("CDB") to each SPV under security arrangements which include a direct covenant to pay by the Company. At the commencement of the present proceedings the claims in this category amounted to approximately HK$22.5 billion.

(b) Working and long-term capital is provided by banks and other financial creditors. This category includes an issue of senior perpetual notes ("the PNs") governed by English law and guaranteed by the Company, HKA Group BVI and HKA Holdings Cayman. At the time of the hearing the claims of the holders of the PN's had an aggregate value of about HK$6.5 billion.

(c) The operating of the airline has incurred unpaid airport fees (particularly to Hong Kong airport) and other government dues which, at the commencement of the present proceedings, amounted to some HK$1.7 billion. If airport fees remain unpaid the airport operator can ground any aircraft operated by the defaulting airline. If government dues are not paid critical licences may be withheld.

(d) Operating the business has inevitably incurred liabilities to trade creditors, suppliers and suppliers of services. At the commencement of the present proceedings these stood at some HK$2.5 billion.

(e) There are related party creditors (excluding intra-Group claims) amounting at the commencement of the present proceedings to some HK$6.9 billion.

(f) There are intra-Group claims amounting at the commencement of the present proceedings to some HK$548 million.

5. The Company is unable to repay this indebtedness. Its revenue has been severely hit, first, by a decline in the number of those wishing to visit Hong Kong; and then by the impact of COVID. During the year to January 2020 the Company carried 6,892,593 passengers. In the year to January 2021 it carried 217,693. The year to January 2021 also saw a decline of 52.8% in the cargo tonnage transported. No one disputes that as matters stand the Company is both cash flow and balance sheet insolvent. It is already the subject of a winding-up petition based upon a debt of HK$81.3 million (with supporting creditors in the sum of at least HK$292.2 million) before the Hong Kong Court of First Instance which (by order of Mr Justice Harris) stands adjourned until 16 January 2023: no defence to the petition is suggested and the reason for its adjournment is to see whether a restructuring can be achieved.

6. The Company has now proposed a restructuring plan in an endeavour to secure its continued existence as a going concern. It has three elements:-

(a) the injection of HK$3 billion by a new investor (which emerged as the result of a competitive "new money" solicitation process) in return for a subscription of new equity (conditionally upon completion of the other elements);

(b) the reduction of the aircraft fleet from 53 to 20 aircraft, retained aircraft being held on modified terms and liabilities in respect of the returned aircraft being compromised;

(c) the compromise of the claims the unsecured creditors.

7. The proposed plan (i) does not deal with the entirety of the Company's indebtedness; and (ii) of itself is not sufficient to achieve the desired commercial end.

8. As to the first, the following summary of the claims to be excluded (amounting to HK$17.5 billion) will suffice for the purposes of this judgment:-

> (a) The outstanding claims of those whose engagement is critical to the ongoing operation, such as employees, Hong Kong Airport (which has already detained 10 aircraft and with whom a separate consensual arrangement is to be made), other airport authorities, the Hong Kong government and a cash handling facilitator:
> (b) The claims of other governments (where a doubt exists as to whether they are capable of compromise);
> (c) The any netted-off claims of Group companies (which are to be subordinated to external claims or waived);
> (d) Claims by and against the HNA Group (which are to be the subject of a global settlement between HNA Group and the Group to be entered before any restructuring of the Company becomes effective);
> (e) Claims in respect of certain sub-leased aircraft where it is intended that the Company will procure a novation of the agreement, thereby enabling the Company to extract itself from the arrangement.
> (f) The rights of secured creditors in relation to their security, which rights have either already been the subject of agreement or are the subject of an agreed valuation process.
> (g) The claims of the Company's advisers in relation to the formulation and promulgation of the plan.

The Company is, of course, entitled to choose which claims it wishes to compromise by way of a plan or arrangement: *SEA Assets Ltd v PT Garuda Indonesia* [2001] EWCA Civ 1696.

9. As to the second, the plan cannot of itself achieve a compromise in relation to any liability governed by Hong Kong law, because Hong Kong is a jurisdiction which applies The Rule in Gibbs (*Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 Q.B.D. 399). There is therefore a parallel scheme of arrangement under the Hong Kong Companies (Winding Up and Miscellaneous Provisions) Ordinance in the same terms (save that it does not deal with the English law debt, principally the PNs) as the proposed plan. The scheme has been approved by the requisite statutory threshold in Hong Kong and the sanction hearing is listed before Mr Justice Harris on 14 December 2022. It is not anticipated that it will be opposed.

10. I must now deal with the proposed plan ("the Plan"). It deals with some HK$31.55 billion of the Company's total indebtedness of some HK$49.01 billion. On 25 October 2022 Mr Justice Fancourt ordered th e convening of three meetings of creditors whose rights were to be compromised by the Plan.

11. First, there was convened a meeting of unsecured creditors consisting of lenders, trade creditors and the lessors of aircraft that were to be returned as part of the operational restructuring ("the Unsecured Creditors"). Their claims total HK$18.276 billion. These claims are to be replaced by claims against a new entity ("AssetCo1"). AssetCo1 is to receive HK$990 million out of the injection of new money, and to have the benefit of a "contingent value right" ("CVR") in the event that the restructured Company achieves certain financial performance targets. Of these receipts AssetCo1 will immediately pay each Unsecured Creditor a sum representing about 5% of the value of its unsecured claim and will subsequently distribute a pro rata share of any payment under the CVR arrangement.

12. Second, there was convened a meeting of the financiers or lessors of aircraft which are to be retained under the operational restructuring ("the Critical Lessors"). Their claims total HK$6.7 billion.

The Critical Lessors are afforded an option under the Plan. Option 1 is to continue the leases or finance arrangements on the aircraft retained by the Company (but on amended terms and for a different duration); and to receive in addition from a new entity ("AssetCo2") (i) a payment representing 5% of the difference between its existing claim and the value of its new lease rights; and (ii) a pro rata share of any payment under a similar CVR arrangement. AssetCo2 is to receive HK$110 million out of the injection of new money to fund these payments, and to have the benefit of a CVR arrangement. Option 2 is for the lessor or financier to terminate the lease or financial arrangement, obtain a return of the aircraft, and then to claim as an Unsecured Creditor.

13. Third, there was convened a meeting of the holders of the PNs ("the Perpetual Noteholders"). Their claims total HK$6.56 billion (or US$683 million). In the events which have happened Perpetual Noteholders are to reduce that claim to US$100 million and in return will receive (i) an immediate cash payment of a sum representing 2.5% of the outstanding principal amount of the PNs and (ii) (by amendments to the PNs) a performance-linked distribution based on the CVR regime applicable to other classes. (The amended terms also contain provisions which, at the option of the issuer of the PNs, may result in further payments to the Perpetual Noteholders). The guarantees supporting the PNs are to be released.

14. At the convening hearing there were interventions from two groups of creditors: (i) an ad hoc group of Perpetual Noteholders ("the AHG") holding approximately one third of the PNs, who sought an adjournment of the convening hearing; and (ii) two aircraft lessors who formed part of the proposed class of Unsecured Creditors, sought permission to raise class issues at the sanction hearing. By his Convening Order Mr Justice Fancourt permitted any creditor to raise class or other jurisdictional issues at the sanction hearing and laid down a tight timetable for the identification of any such issues and the exchange of evidence. In the event, although on 21 November 2022 solicitors for the AHG set out a list of issues which they intended to raise, no creditor filed any evidence; and on 29 November 2022 the AHG withdrew its list of objections.

15. Only the Company appeared at the hearing. But, as has often been said, the lack of opposition does not relieve the Court of the burden of scrutiny, though (where objections have been raised) it does not place upon the applicant the burden of arguing against its own case or upon the judge the burden of advancing the objectors' arguments: see *Re Smile Telecoms Holdings* [2022] Bus. L.R. 591 per Snowden LJ at [51]–[52]. It was, no doubt, in knowledge of these views of Snowden LJ that the solicitors to AHG not only indicated an intention not to appear but also expressly withdrew their list of issues (rather than simply leaving them "on the table").

16. This is the Plan for which sanction is sought, which sanction I gave at the conclusion of the hearing on 9 December 2022 for reasons to be given in writing. I propose to state those reasons shortly, partly because the issues for decision are those which frequently arise in cases such as this and there is a substantial body of law settled at first instance, partly because the Plan creditors are for the most part financial institutions who are both sophisticated and have access to advice, and partly because the Hong Kong Court of First Instance is well versed in schemes of arrangement and in the body of common law concerning them.

17. Sanction is sought under Part 26A ("Part 26A") of the Companies Act 2006 ("the 2006 Act"), though not under that part of it which authorises "cross-class cramdown". Such applications under s.901F of Part 26A have much in common with schemes of arrangement under the 2006 Act, and it is well settled that decisions in cases concerning schemes of arrangement provide a clear guide for the exercise of the jurisdiction under this head of Part 26A: *Re Gategroup Guarantee Ltd* [2021] B.C.C. 722. Adopting that approach I have identified seven groups of issues on which decisions are required.

Questions about jurisdiction

18. Applications under Part 26A can only be made if the two threshold conditions are satisfied (Condition A and Condition B). Insofar as the satisfaction of these two Conditions was not decided at the convening hearing (i) I find that the Company has encountered financial difficulties that are affecting its ability to carry on business as a going concern; (ii) I hold that it is proposing a compromise or arrangement with classes of its creditors the object of which is to eliminate, reduce or mitigate the effect of those financial difficulties.

But I should elaborate on two issues which have been the subject of challenge by the AHG.

19. I am satisfied that the Company is "a company" for the purposes of Part 26A: it is a foreign company liable to be wound up as an unregistered company under the Insolvency Act 1986. The court will, however, as a matter of discretion only exercise jurisdiction over a foreign "company" if it has "a sufficient connection" with this jurisdiction: *Re Drax Holdings* [2004] 1 W.L.R. 1049. That is because an English court will not wind up a foreign company where it has no legitimate interest to do so, thereby exercising an exorbitant jurisdiction contrary to international comity. Although going to the discretion whether or not to sanction the Plan, the point is conveniently dealt with here.

20. I hold that in the instant case is there is "a sufficient connection". First, the Company is an overseas company registered as such in this jurisdiction. Second the PNs are governed by English law and, under The Rule in *Gibbs*, can only be varied by the order of an English court. Third, English law governed debt amounts to 42% of the Company's total indebtedness. Whilst in some cases a sufficient connection has been found because the "overwhelming majority" of a plan or scheme proponent's indebtedness is governed by English law (see e.g. *Re Smile Telecoms Holdings Limited* (*supra*) at [60]–[61]) that does not mean that "an overwhelming majority" of indebtedness is necessary to establish the sufficiency of the connection. "Sufficiency" falls to be established by an intense focus on the facts of each case and not by satisfaction of some (as yet unstated) numerosity requirement. Fourth, in the instant case there has been active participation in the Plan by a very significant portion of the holders of non-English law debt (both Hong Kong and PRC governed debt). Fifth, the Plan is proceeding (as Mr Smith KC put it) "hand-in-glove" with the Hong Kong scheme of arrangement: far from exercising an exorbitant jurisdiction the English court is simply playing its part in cross-border insolvency proceedings. Sixth, there is something to be said for having a comprehensive plan in one jurisdiction (supported by parallel schemes in others) rather than having a jigsaw of interlocking schemes. In the instant case I am satisfied that there is a sufficient connection which justifies the English court considering the Plan.

21. I further hold (which has been the subject of challenge by the AHG) that the Plan is a "compromise" or "arrangement" for the purposes of Part 26A. It seems to me obvious that the Plan creditors give up some of their existing rights and in return receive replacement rights. Their existing rights are not expropriated.

22. A further jurisdictional issue concerns the ability of this Court to deal with the leasing and financing arrangements relating to certain aircraft and their parts. The Convention on International Interests in Mobile Equipment 2001 ("the Cape Town Convention" or "CTC") as applied to aircraft and aircraft equipment by the Protocol to the Cape Town Convention on Matters Specific to Aircraft Equipment deals, amongst other things, with the effect of insolvency law upon the rights of lessors and the holders of international interests in aircraft. It has been ratified by the United Kingdom and by China (but not by the Hong Kong SAR). One of its key provisions says that where the lessee has suffered "an insolvency-related event" then no obligations of the lessee may be modified "without the consent of the creditor". This potentially applies to eight of the aircraft intended to be retained

(being therefore held by "Critical Lessors") where a Chinese company is a co-lessee with the Company. I do not need to decide the vexed question of whether a Part 26A plan is "an insolvency related event" for the purposes of the CTC. For present purposes I can assume that it does apply and enquire whether the rights of the aircraft lessor can nonetheless be modified because the modification is made with "the consent" of the creditor.

23. Whether this issue is characterised as going to jurisdiction (being a "roadblock" which would inevitably lead to a refusal of sanction) or as potentially being a "blot" on the Plan rendering it technically defective matters not: it is convenient to deal with it in this group of issues. I hold that the CTC in this case presents no jurisdictional difficulty and sanctioning the plan would not involve the sanctioning of a breach of international obligation. First, the Critical Lessors unanimously voted in favour of the Plan: each may therefore be taken to have consented to the modification of its rights which the Plan contains. The same point arose in *Re MAB Leasing Ltd* [2021] EWHC 379 at [47]–[49]. Second, each Critical Lessor has available Option 2 under which it may decline to accept the modification of its rights and instead terminate the arrangement and recover its aircraft. The modification of the lessor's rights will therefore only occur if Option 2 is declined and Option 1 chosen. By choosing option one the lessor consents to the modification of its rights. (I should here acknowledge the assistance I gained from the writings of Professor Louise Gullifer and Professor Riz Mokal).

Compliance

24. Having reviewed the evidence I am satisfied that there has been compliance with the statutory requirements and with the terms of the Convening Order of Mr Justice Fancourt: and I so find. No more need be said.

Constitution of the Plan meetings

25. Class questions would normally be settled at the convening hearing. But in the instant case the AHG and two lessors of aircraft raised the possibility that there were class questions which required examination. The court must be astute, particularly with applications under Part 26A, to see whether the conventional class composition rules are being manipulated so as to constitute a single assenting class or to dilute the votes of potential dissenting creditors. Unsurprisingly, rather than adjourn the convening hearing Mr Justice Fancourt permitted the class issues to be formulated and evidenced. The AHG prepared (and then formally withdrew) a list of issues. Nobody filed any evidence No one appears at the hearing for the purpose of raising any issues. I shall therefore simply undertake the usual scrutiny.

26. The principles for class composition under Part 26A are the same as those for schemes of arrangement under the 2006 Act: *Re Virgin Atlantic Airways* [2020] B.C.C. 997 at [44]–[48]. Those class composition rules are very well known and a further summary of them would serve no purpose. I simply highlight (i) that from the first the key consideration has been that a class must be confined to those persons whose rights are not so dissimilar as to make it *impossible* for them to consult together with a view to their common interest (see *Sovereign Life Assurance v Dodd* [1895] 2 Q.B. 273 at 283); and (ii) the valuable exposition of class composition by Lord Millett in the Hong Kong case of the *Re UDL Holdings Limited* [2002] 1 H.K.C. 172 at a 184 to 185.

27. The task in hand is to look at the existing rights of Plan creditors which it is proposed shall be varied or compromised by the Plan, and to do so in the context in which those rights fall to be exercised; and then to look at the rights received under the variation or compromise. In the present case it is

common ground that that company is a liquidation: that is the realistic alternative to the implementation of the Plan. I have already drawn attention to the existence of a winding up petition (with supporting creditors) due for hearing on 16 January 2023, to the impounding of aircraft by the Hong Kong airport authority, to the right of that authority and aircraft lessors to take possession of aircraft where there is a default in payment, and to the cash flow insolvency of the Company.

28. Unsecured creditors of the Company would be entitled to prove for their debts in a Hong Kong liquidation, and to receive a pari passu distribution. Secured creditors will either have to value their security and prove for the deficiency or surrender their security and prove for the entire debt. The Unsecured Creditors who met for the purpose of considering the Plan included creditors who held security for their indebtedness. The question is whether it was impossible for them to meet together with creditors whose debts are not secured at all with a view to considering their common interest. I consider that it was not impossible.

29. The Plan does not affect security rights. Security rights are not being compromised, released or varied. What is being compromised is the right of the secured creditor to recover the deficiency, the element of its claim that exceeds the value of its security, the amount for which it would have to prove in a Hong Kong liquidation: see the expert opinion of Tommy Cheung dated 2 December 2022. As regards this there is an identity of interest with other members of the class of Unsecured Creditors who hold no security. I am satisfied that the class of Unsecured Creditors was correctly constituted.

30. I reach that view as a matter of principle. Mr Smith KC submitted that it was in fact consistent with (i) the approach taken in *Re Hawk* [2002] B.C.C. 300 at [35]; and (ii) the scheme approved in *Re Anglo-American Insurance Co Ltd* [2001] 1 B.C.L.C. 755 at 759h and 767a. I accept that that is so; and although the point was not directly argued, class composition was the subject of argument by distinguished counsel who did not seek to suggest that secured creditors could not consult with unsecured creditors as regards the deficiency claims. I take some comfort from that.

31. One further point arises. The claims of Unsecured Creditors arise out of obligations governed by English (32%), Hong Kong (49%) and PRC (19%) law. It was at one time suggested that this consideration should fracture the class. But on the evidence the differing governing laws do not affect the nature of the claim capable of being advanced by the creditor in a Hong Kong liquidation of the Company. The claims that can be advanced in the liquidation are governed by the Hong Kong rules of winding up; the governing law of the original obligation is not material.

32. I hold that the class of Unsecured Creditors was properly constituted.

33. The Critical Lessors who met together fell into two categories; (i) 12 lessors of aircraft to be retained as part of the operational restructuring: and (ii) CBD as as lender to six SPVs whose aircraft are to be retained (and which has the benefit of a direct payment covenant from the Company). The rights to be compromised are essentially similar; a right of termination and an unsecured claim for outstanding sums due. CBD has in addition a security claim over shares in the relevant SPVs. But this security has no value. The rights given under the Plan provide each of the Critical Lessors with the same economic treatment i.e. although there are differences in the sums to which they will become ultimately entitled this is the result of the consistent application of established valuation rules to different types and vintages of aircraft. Mr Smith KC submitted (and I accept) that this is the same approach was adopted in *Re MAB Leasing Ltd* [2021] EWHC 152 (Ch) and [2021] EWHC 379 (Ch), where (although there might be differences in outcome occasioned by differences in election or differences in market value or differences in original contractual rates) the differences were not material and there was more to unite than to divide. I take comfort from that. I hold that the class of Critical Lessors was properly constituted.

34. The Perpetual Noteholders met as a class. The rights which they compromised and the rights they received in return were identical. They are a properly constituted class.

35. I am therefore satisfied that each class which section 901F of Part 26A requires should agree the compromise was properly constituted.

Statutory majorities

36. Section 901F of Part 26A requires 75% in value of the class of creditors present and voting at the class meeting to agree the compromise or arrangement. 90.83% by value of the Unsecured Creditors present and voting at their meeting approved the Plan. 100% of the Critical Lessors present and voting at that class meeting agreed to the Plan. 79.74% by value of the Perpetual Noteholders present and voting at their meeting approve the Plan.

37. It is clear that the statutory majorities were achieved.

Can the court safely rely on the outcome of the class meetings?

38. There are four sub- issues to consider under this heading. The first is whether (bearing in mind that there is no numerosity requirement under Part 26 A) the class meetings may be regarded as fairly representative of the relevant class. 60 out of 160 known Unsecured Creditors attended the class meeting. Taking into account the fact that a class of unsecured creditors will consist of creditors of a widely disparate type, some with modest claims and some not inclined to engage with the restructuring process, I regard that as fairly representative of the class. All of the Critical Lessors voted at their meeting. 66.88% of the Perpetual Noteholders voted at their meeting. I consider that to be a fair representation.

39. The second sub-issue is whether those attending (or choosing not to attend) were properly informed. This is the function of the Explanatory Statement. In the instant case that Explanatory Statement was comprehensive and comprehensible by its intended addressees. It provided sufficient information to enable the Plan creditors to decide whether to accept what was offered by the Plan in substitution for their rights in a liquidation. It was circulated on 28 October 2022 in preparation for Plan meetings intended to be held on 25 November 2022, allowing sufficient time for consideration. But it was the subject of three modifications with which I must briefly deal. These were circulated to Plan Creditors on 17 November 2022.

40. The original Plan contained in clause 9.8 a conventional provision permitting the Company to consent on behalf of all Plan Creditors at the Sanction Hearing to any modifications to the Plan or the Restructuring Documents, as the Court may approve, which would not directly or indirectly have a material adverse effect on the rights or interests of the relevant Creditors. The three proposed modifications (I will summarise their substance rather than descend to textual detail) arose out of further negotiation.

41. The first modification relates to a Company asset called "the BOCOM Structured Notes". These were thought be valueless (and the Plan was prepared on that footing). Certain creditors thought that they might have value. The Plan has been modified so as to ensure that if the BOCOM Structured Notes have value then any recoveries will be distributed to Plan Creditors.

42. The second modification arose out of a request by CDB that its own claims against HNA Group in the Chinese reorganisation should clearly not be impacted by any compromise between the Company and the HNA Group. There are 4 other Plan Creditors who might likewise be concerned. The proposed modification preserves the rights of such Plan Creditors in the HNA Group reorganisation (for they were never intended to be affected).

43. The third modification relates to an enlarged claim by Rolls Royce. The Plan was prepared on the footing that the claim of Rolls Royce against the Company stood at the US$7 million shown in the Company's books. But Rolls Royce has made demand in the total sum of US$911 million which would have an impact upon the recoveries of Plan Creditors under the Plan (and also in a liquidation). The Company is proposing the payment, on a contingent basis, of an additional sum to AssetCo1 so as to secure that the initial payment to each Unsecured Creditor does not fall below that originally proposed (of about 5% of the unsecured claim) ("the Anti-Dilution Provision"). The Anti-Dilution Provision does not apply to possible distributions by AssetCo1 in respect of the CVR, and because the CVR depends on the achievement of targets, an enlarged Rolls Royce claim may affect that achievement. This was explained in a Second Supplement to the Explanatory Statement also sent on 17 November 2022.

44. Because of the circulation of the Supplemental and Second Supplemental Statements on 17 November the Plan meetings were adjourned until 1 December 2022. I am satisfied that this gave Plan Creditors sufficient time to consider the modified proposals.

45. In my judgment the modifications do not have any material adverse effects upon the Plan Creditors. Indeed, they are designed to confer benefits, either financial or in terms of clarity. I indicated at the hearing that I would approve them. It was upon the modified Plan that the properly informed Plan Creditors voted. That concludes the second sub-issue.

46. The third sub-issue is whether the arrangements for the Plan meetings were such as to facilitate participation. I am satisfied that they were and that there is no reason to doubt that the recorded outcome of the meeting truly reflects the views of those who participated or wanted to participate.

47. The fourth sub-issue is whether the majority acted *bona fide* and in accordance with their interests as ordinary class members. The AHG suggested in its (now withdrawn) list of issues that by reason of the collateral interests of certain creditors and the effect of such collateral interests upon voting outcome, sanction ought to be refused. I have not identified any special interest of a member of the majority in any class different from and adverse to the interests of other class members. In particular, having held that the presence of secured creditors at the meeting of Unsecured Creditors did not *fracture* the class, I should confirm that I do not consider that the presence of creditors with security interests unaffected by the Plan can be taken of itself to *influence voting* on the deficiency claims that fell within the Plan. The interest of those holding unsecured claims (of whatever nature) was identical: did the implementation of the Plan offer a better prospect than proof in an inevitable liquidation? (It is, in addition, pointed out that only two secured creditors attended the meeting of the Unsecured Creditors, and that if the votes of those two secured creditors were to be discounted or set on one side, the Plan would still have been approved by over 90% of the Unsecured Creditors voting at the meeting. There was therefore a very large majority of Unsecured Creditors without the supposed special interest of unaffected security rights).

Fairness

48. It is well settled that as part of the sanction process Court must assess whether the proposed plan is for a "fair" the sense that it embodies a compromise that might reasonably be entered into by an intelligent and honest class member addressing the issues for decision having regard to his or her ordinary class interests. Clearly a very high number of the creditors of the Company consider that it is, as demonstrated by the representation at the Plan meetings and the margins by which the Plan was approved. Being properly informed, such creditors are the best judges of their own commercial interests.

49. It is easy to see, on an objective basis, why they might make that judgment. The only alternative to the Plan is an immediate liquidation. Grant Thornton have prepared (and the Plan Creditors have received) an analysis of the projected returns in a liquidation. For the Unsecured Creditors the recoveries are likely to be between 0.8% (low case) and 1.3% (high case). The projected recoveries under the Plan lie in the range 5.1% to 10.1%. For the Critical Lessors the liquidation return is likely to be between 4.1% (low case) and 5.8% (high case). The projected recoveries under the Plan lie in the range of 5.1% to 10.5%. For the Perpetual Noteholders the liquidation return is likely to be 0.9% (low case) and 1.4% (high case). The projected recoveries under the Plan lie in the range of 2% to 12.2%. (If the Rolls Royce claims were admitted in full in any liquidation then "low case" returns would be further reduced). Thus, in each case the Plan offers the prospect of materially better returns.

50. I hold that the "fairness" test is satisfied.

Is there any technical or other defect in the Plan that would affect its effectiveness?

51. No-one has suggested that there is any technical defect in the scheme which deprives it of effect or (now that the CTC issue may be laid on one side) that there is an infringement of some mandatory provision. But it is convenient to consider under this head whether the Plan will be internationally effective. In doing so I propose to adhere to the approach which I set out in *Re DTEK Energy BV* [2022] 1 B.C.L.C. 260 at [27] namely, the court needs to be satisfied that the scheme will achieve a substantial purpose in the key jurisdictions in which the Company has liabilities or assets, and for that purpose will require credible evidence that the scheme has a real prospect of being recognised and given effect.

52. As to the legal issues arising; first, according to ordinary principles of international law a compromise of English law governed debt (which amounts to 42% of the Company's total indebtedness) approved by an English court is likely to be internationally recognised as effective. Second, the Report of Mr Tommy Cheung confirms that a Hong Kong Court would be likely to give effect to the compromise of that debt. Third the Report of Collette Wilkins KC confirms that the BVI and Cayman Court's would treat as valid and effective a compromise of the English law governed debt under the Perpetual Notes and the related guarantee obligations of HKA Group BVI and of HKA Holdings Cayman.

53. As to factual matters; first, the Plan has been approved by 91.86% of the Plan Creditors: it is unlikely that they will seek to undermine the Plan in other jurisdictions available to them, and the courts in any such jurisdiction are likely to take into account the very high level of support for the Plan. Second, 99% of unsecured creditors holding PRC law-governed claims voted in favour of the Plan: it is unlikely that they will seek to undermine the Plan in China. Third, CBD (being a Critical Lessor holding a PRC law-governed claim) approved the Plan: it is unlikely that it will seek to undermine the Plan in China and a Court in the PRC is likely to acknowledge that CBD submitted to the English jurisdiction.

54. Accordingly, there is a reasonable prospect that the Plan will have a substantial effect in Hong Kong, the BVI, the Cayman Islands, and China; and that in granting sanction this Court will not have been acting in vain.

Conclusion

55. For these reasons I granted sanction to the modified Plan.

(Order accordingly)

HCMP 1474/2022
[2022] HKCFI 3792

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1474 OF 2022

IN THE MATTER OF Hong Kong Airlines Limited (香港航空有限公司)

and

IN THE MATTER OF section 670 of the Companies Ordinance, Chapter 622

Before: Hon Harris J in Court
Date of Hearing: 14 December 2022
Date of Decision: 14 December 2022
Date of Reasons for Decision: 20 December 2022

R E A S O N S F O R D E C I S I O N

Introduction

1. The Company seeks the Court's sanction under *Section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and holders of unsecured debt. After

an adjournment, the Scheme Meetings were duly convened on 1 December 2022. The resolutions of the Scheme Meetings were carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 90.04% of the Unsecured Scheme Claims and 100% of the Critical Lessors Scheme Claims voted.[1]

2. The Scheme seeks to restructure the Company's indebtedness in order to return the Company to a solvent going concern. Absent restructuring, the Company would be liquidated. A successful restructuring would give the Scheme Creditors a higher recovery:

(a) For the Unsecured Creditors, recovery under the Scheme is estimated to be 5.1%-8.7%, whereas recovery in the Company's liquidation is estimated to be 0.7%-1.3%.

(b) For the Critical Lessors, recovery under the Scheme is estimated to be 5.1%-10.1%, whereas recovery in the Company's liquidation is estimated to be 4.1%-5.8%.

3. The Company is a Hong Kong-incorporated entity and is part of a group of 51 companies ("**Group**"). The Group's key businesses consist of providing air passenger transport, air cargo transport, and other airline-related services. As its name suggests it is based in Hong Kong and operates regionally.

4. Badly hit by the pandemic, the Company is cash-flow insolvent. The Company's audited accounts for the year ended 31 December 2021 show the Company having a net current liability of

[1] Generally I shall use the definitions contained in the Explanatory Statement and Scheme. The nature of the unsecured debt will become apparent later in this decision.

approximately HK$10,748,219,000. As of 31 December 2021, the Company's total indebtedness amounted to approximately HK$49.064 billion, comprising reported liabilities of approximately HK$39.768 billion and guarantee liabilities of approximately HK$9.296 billion.

5. The Company's creditors include the following categories:

(a) bank lenders and financial creditors;

(b) financial and operating lessors of aircraft and aviation parts;

(c) airport authorities;

(d) hundreds of trade creditors;

(e) holders of the US$683,000,000 7.125% Senior Perpetual Securities ISIN XS1526108235 ("**Perpetual Notes**") issued by Blue Skyview Company Limited and guaranteed by, among others, the Company; and

(f) other creditors, excluding the Perpetual Noteholders, with guarantee claims against the Company.

6. The bulk of the Company's debts are governed by Hong Kong law, while the remaining debts are governed by Mainland law and English law (such as the Perpetual Notes). The Company is very likely to go into liquidation, unless its current indebtedness can be restructured.

7. To return the Company to being a solvent going concern, the Company is pursuing a Group-wide debt restructuring consisting of the following:

(a) raising HK$3 billion from Hong Kong Air Limited ("**New Investor**") through the issuance of new shares to the New Investor;

(b) the Scheme;

(c) a restructuring plan under Part 26A of the UK Companies Act 2006 ("**UK Plan**"), which will compromise the same debts as the Scheme Claims and, in addition, the indebtedness in respect of the Perpetual Notes and the associated guarantees; and

(d) consensual restructurings to resolve certain secured liabilities and other liabilities excluded from the scope of the Scheme and the UK Plan.

8. The Scheme covers most of the Company's unsecured creditors, other than the Perpetual Notes Creditors to be covered by the UK Plan. The Scheme seeks to discharge the Company's unsecured indebtedness within the concept of Scheme Claims, which would also entail releasing the Related Debtor and the Related Guarantor (Clause 15 of the Scheme). In return, the Scheme Creditors will be given the following Restructuring Consideration depending on which class the Scheme Creditors fall into:

(a) One class of the Scheme Creditors are the Critical Lessors which are in essence the owner or secured financier of aircraft which the Company plans to retain after completion of the Restructuring ("**Retained Aircraft**"). Each Critical Lessor will receive (Clause 13 of the Scheme):

(i) In respect of its Reduction Portion, the Cash Option or the Equity Option as selected by the Critical Lessor prior to the Voting Record Time, and a Replacement Claim against AssetCo2;

(ii) In respect of the Reduced CL Debt Amount, fixed monthly instalments, the amount of which depends on the model of the Retained Aircraft. As this is in effect an extension of the Retained Aircraft leases or loan, the Critical Lessor must consent to this treatment of the Reduced CL Debt Amount.

(b) The other class of the Scheme Creditors are the Unsecured Creditors. Each Unsecured Creditor will receive a Replacement Claim against AssetCo1 (Clause 12 of the Scheme).

9. The Scheme Creditors' recovery analysis is as follows:

(a) For the Unsecured Creditors, recovery under the Scheme is estimated to be 5.1%-8.7%, whereas recovery in the Company's liquidation is estimated to be 0.7%-1.3%.

(b) For the Critical Lessors, recovery under the Scheme is estimated to be 5.1%-10.1%, whereas recovery in the Company's liquidation is estimated to be 4.1%-5.8%.

10. The Scheme and the UK Plan are in essence inter-conditional because the approval of both are conditions precedent to the New Investor's investment. On 9 December 2022, the English court sanctioned

the UK Plan, which was unopposed. Sir Alastair Norris handed down his reasons on 14 December 2022.

Criteria which guide the Court in determining whether to sanction a scheme

11. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently summarised in *Re China Singyes Solar Technologies Holdings Ltd* [2]. The Court considers in particular the following:

(a) whether the scheme is for a permissible purpose;

(b) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;

(c) whether the meeting was duly convened in accordance with the Court's directions;

(d) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;

(e) whether the necessary statutory majorities have been obtained;

(f) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class

[2] [2020] HKCFI 467; [2020] HKCLC 379 at [7]

within which he voted might reasonably approve the scheme; and

(g) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

Permissible purpose

12. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. As part of the debt restructuring, it is a permissible purpose for a scheme to release obligations of third parties, such as the scheme company's guarantors and joint obligors. Where the scheme company is a guarantor, the scheme may release the principal obligors. See *Re Unity Group Holdings International Ltd* [3] .

13. The Scheme seeks to discharge Related Guarantors and Related Debtors. The Related Debtors are primary obligors where the Company is a guarantor. In order to permit the Scheme to discharge debts owed by the principal obligors (i.e. the Related Debtors), the Company has entered into a number of deeds of contribution, whereby it agreed to be liable to each of such Group Companies (as primary debtors / obligors) to make, on demand, a contribution in respect of any amounts that are paid by that Group Company towards the discharge of its primary liabilities. Accordingly, those Group Companies will have rights of contribution against the Company in respect of their primary liabilities. The use of a deed of contribution to permit a guarantor's scheme to discharge debts owed by the principal obligors is a well-established technique in England,

[3] [2022] HKCFI 3419 (Harris J).

although the technique is not needed in Hong Kong (*Re Unity Group Holdings International Ltd*[4]). As there is a parallel UK Plan, the Company consistent with UK practice entered into deeds of contribution.

Class considerations

14. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised thus:

(a) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.

(b) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.

(c) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, such that the test for classes becomes an instrument of oppression by a minority.

[4] [2022] HKCFI 3419 at [17]

(d) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

(e) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

See *Re China Oil Gangran Energy Group Holdings Ltd* [5].

15. In my view the Scheme properly placed the Scheme Creditors in two classes, namely the class of the Unsecured Creditors and the class of the Critical Lessors. The classification is consistent with the above principles for the following reasons. **First**, the Unsecured Creditors are properly placed in one class. They hold Unsecured Scheme Claims which are the ordinary unsecured debts of the Company and they are given the same Restructuring Consideration. Although certain Unsecured Creditors have Claims against the Company which are in part secured, the Scheme will only apply to the Unsecured Portion of their Claims. This an established practice in Hong Kong: see *Re I-China Holdings Ltd* [6]; *Re*

[5] [2021] HKCFI 1592; [2021] HKCLC 911 at [15]-[16]
[6] Unrep., HCMP 580/2004, 26 April 2004 at [13] (Kwan J)

Dickson Group Holdings Ltd[7]; *Re Century Sun International Ltd*[8]. **Secondly**, the Unsecured Creditors and the Critical Lessors need to be in different classes because they are given different Restructuring Consideration. **Thirdly**, the Critical Lessors are properly placed in one class because there are 13 Critical Lessors, namely: China Development Bank ("**CDB**") who is a financier and holds security in respect of six Retained Aircraft owned by six of the SPV Borrowers and leased to the Company; and twelve lessors ("**Lessors**") in respect of the remaining 14 Retained Aircraft leased to the Company. CDB and the Lessors' pre-scheme rights are essentially identical because in the event of the Company's liquidation. The Lessors will have unsecured claims against the Company in respect of payments due under the leases**.** CDB will have claims against the Company in respect of payments due under the loans taken out by the SPV Borrowers ("**SPV Loans**") and in respect of which the Company had assumed liability pursuant to a covenant to pay. Although CDB holds security over the Company's shares in the SPV Borrowers, the security is valueless. Therefore, CDB's claims against the Company are in reality unsecured. The technical existence of worthless security would not render CDB a secured creditor for classification purposes: *Re Metinvest BV.*[9] Upon the Company's default, CDB and the Lessors can terminate the leases and recover the aircraft.

16. The Restructuring Consideration given to the Critical Lessors is similar in principle, but is different in terms of the length of the lease or loan extension at the Critical Lessors' option. The difference is necessitated by the different models of the Retained Aircraft held by each Critical Lessor. Such necessary differences would not fracture the class. Zacaroli J

---

[7] Unrep., HCCW 333/2006, 30 May 2008 at [17] (Kwan J)
[8] [2021] HKCFI 2928; [2021] HKCLC 1477 at [1], [7] and [9]
[9] [2017] EWHC 178 (Ch) at [14] and [16]-[18] (Mann J)

considered class classification in a scheme also restructuring the debt of an airline group in *Re MAB Leasing Ltd*[10]. His analysis of the classes in that case is instructive:

> "Turning to the rights conferred by the scheme, all creditors are given the same four options. One option is to terminate the lease, recover the aircraft and receive a one-off termination payment. That payment will be calculated as 115% of what the creditors would have received from the company in its liquidation, assuming that a dividend would be paid at the upper-end of the range of estimated outcomes.
>
> Alternatively, creditors can opt to continue the lease, in which case they will be entitled to receive a substantially reduced rent for 2021, calculated by reference to how much the aircraft has used, subject to both a floor and a cap. This is called a 'power by the hour basis', which differs for each of the three types of aircraft under lease, together with one of the following three options –
>
> 1. After 2021, the lease rentals will be reset to market rates. The market rates have been arrived at through negotiation, but have been confirmed by expert valuation evidence, which indicates that the rates to be offered are within the range of market rates for each aircraft.
>
> 2. After 2021, the lease rentals will be reset to an amount slightly uplifted from market rates, but with the company having the option to defer payment and with the option to extend the agreement for a further defined period, both depending on certain conditions being satisfied.
>
> 3. The third of these options is that after 2021, the lease rentals will be reset to market rent plus an uplift by reference to the higher of the multiple of 1.25 or the company's EBITDA, again, with an option for the company to defer payment.
>
> Since in each scenario the rent is to be set by reference to market rates, it will differ for each aircraft, depending on its type and vintage.
>
> The first point to note is that the mere fact the scheme creditors may end up with different rights under each of the four options does not fracture the class. The difference in rights is as a result of the election they make. As far as rights conferred by the scheme are concerned, they are all given precisely the same right to choose between the four options."

[10] [2021] EWHC 152 (Ch) at [24]-[27] (Zacaroli J)

17. The fact that Critical Lessor's new rights differ by virtue of the commercial characteristics of the underlying commercial transaction does not in my view make it impossible for the Critical Lessors to consult together with a view to a common interest.

18. **Fourthly**, although the class of the Unsecured Creditors will include members of the Class of the Critical Lessors because the latter also hold some Unsecured Scheme Claims, such cross-holdings would not fracture the class: *Re Steinhoff International Holdings NV*[11].

Meeting

19. I am satisfied that the Convening Order has been complied with. During the Scheme Meetings held on 1 December 2022, the Scheme Creditors in each class duly voted in favour of the Scheme: see the Chairperson's Report. The requirements under *section 674(1)(b)* of the Ordinance that the Scheme be approved by a majority in number representing at least 75% in value of the Creditors present and voting in person or by proxy have been satisfied.

Explanatory Statement

20. After the Scheme and Explanatory Statement were circulated to the Scheme Creditors in accordance with the Convening Order, the Company provided two supplements to the Scheme Creditors. On 17 November 2022, the Company circulated to the Scheme Creditors the first supplement to the Explanatory Statement ("**First Supplement to the Explanatory Statement**"). The First Supplement to the Explanatory Statement arose out of discussions between the Company and some

[11] [2020] EWHC 3455 (Ch) at [19] (Sir Alastair Norris)

creditors concerning, inter alia, some additional consideration to be provided to the Scheme Creditors, a proposed amendment to the definition of "Excluded Claim" requested by CDB, a significant claim made by a creditor which exceeded the claim recorded in the Company's books (but which adverse effect on Scheme Creditors is mitigated by an anti-dilution mechanism introduced by the Company in the Restructuring Documents), and some timetabling changes. On 25 November 2022, the Company circulated to the Scheme Creditors the second supplement to the Explanatory Statement ("**Second Supplement to the Explanatory Statement**"). The Second Supplement to the Explanatory Statement explained some clarificatory amendments to be made to the Scheme.

21. It is well-established that there is nothing objectionable for a scheme document to be amended after its circulation, as long as those who would be called upon to vote on it are giving adequate notice of the changes: *Re Hidili Industry International Development Ltd*[12]. Here the Scheme Creditors were given sufficient notice of the amendments to the Scheme because the Scheme Meetings were adjourned to 1 December 2022.

22. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

> "A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes,

[12] [2022] HKCFI 1833; [2022] HKCLC 755 at [33]

> and I would normally expect it to have its views independently verified by an insolvency practitioner or other suitable professionals"[13].

23. In my view the Explanatory Statement clearly satisfies the requirements of *section 671(3)*.

Court's Discretion

24. Even if the requirements that I have addressed above are met, the Court has a discretion to decline to sanction a Scheme if it is not satisfied that it is one an intelligent and honest man would approve. Formulating the criteria in less technical language: is it broadly fair? However, the Court should be slow to differ from the majority views, as the Court normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd* [14].

25. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Claims will be discharged and in return the Scheme Creditors will be entitled to the relevant Scheme consideration. The evidence supports the view that the Scheme consideration provides the Scheme Creditors with a better return than in an insolvent liquidation of the Company. The Scheme is thus the one that an intelligent and honest creditor can sensibly be expected to approve.

26. The Scheme's effectiveness is subject to Restructuring Conditions, namely:

---

[13] *Re Century Sun International Ltd* [2021] HKCFI 2928; [2021] HKCLC 1477 at [23] (footnotes omitted)
[14] [2020] HKCA 973; [2020] HKCLC 1549 at [37].

(a) the Scheme Effective Date having occurred;

(b) all necessary consents, approvals or authorisations for the effectuation of the Scheme and the Restructuring having been obtained, including, without limitation, all necessary consents, approvals or authorisations from any and all relevant governmental bodies;

(c) the New Investor having paid, in cleared funds, an amount of HK$3,000,000,000 to the Company, in exchange for the issuance of the New Investor Shares;

(d) each of the Restructuring Documents having been executed by or on behalf of each of the parties thereto;

(e) at least two Critical Lessors having given their consent, whether actual or deemed, to the Proposed Modifications in accordance with Clause 13.21 of the Scheme; and

(f) the Company having paid, or caused to be paid, all outstanding fees, costs and expenses of the Company Advisers reasonably incurred in connection with the Restructuring, and duly invoiced to the Company at least five Business Days before the Restructuring Effective Date or such later date as may be agreed by the Company with the relevant Company Adviser, provided that the Restructuring Effective Date shall not be delayed solely by reason of any non-payment of professional fees (in the nature of success fees or otherwise) to the extent the quantum can only be calculated, or will only become due and payable, at a later date, in accordance with the relevant engagement letter.

27. This is not uncommon and the Court may sanction a scheme which is subject to conditions. The principles are well established:

> "[The authorities] discuss and confirm three important principles which are of more general application.
>
> The first is that the court will always wish to ensure that it does not act in vain.
>
> That is not to say that the court requires certainty that a condition will be satisfied, a principle which is illustrated by Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) in which the court was prepared to sanction a business transfer scheme even though David Richards J was, as he put it at paragraph 26 of his judgment 'less than convinced' that the scheme once sanctioned will definitely be effective. The degree of assurance the court requires will depend on all the circumstances of the case. Thus, it is relevant that in Sompo the scheme was in any event going to be effective in part, because the question that arose related to its recognition in another jurisdiction, not whether it might be ineffective more generally.
>
> The second principle is that the court will be unlikely to sanction a scheme if the condition is one which gives a discretion to a third party as to whether or not they will take some step necessary to render the scheme effective. Henderson J made this clear in the passage from Lombard Medical that I have already cited. In my view what he said was consistent with sound principle. If the satisfaction of a condition to the effectiveness of the scheme as a whole is left to the ultimate discretion of a third party, it is capable of cutting across the requirements of creditor approval, court sanction (in which the court not any other person is required to exercise a discretion) and registration, which are the three steps for plan effectiveness for which the statute provides.
>
> The third important principle of more general application is one of clarity and certainty. Provided that clarity and certainty are present on the face of the scheme or plan and no further decision-making process is required, in other words it is self-executing without the further intervention of an interested third party, there is much less likely to be a problem"[15].

[15] *Re Smile Telecoms Holdings Limited* [2021] EWHC 685 (Ch) at [51] – [54] and [57] (Trower)

28. Having regard to these principles it does not seem to me that the conditions represent any impediment to the Court sanctioning the Scheme:

(a) a number of the conditions are within the Company's control, such as the occurrence of the Scheme Effective Date;

(b) all relevant parties are committed to the successful implementation of the Scheme; and

(c) the Company does not expect any insuperable difficulties in terms of authorisations from the relevant governmental bodies.

29. Therefore, in sanctioning the Scheme, the Court would not be acting in vain. It will be facilitating the restructuring, which given its complexity unsurprisingly contains components which have a degree of uncertainty attached to them; but not in my view sufficient to constitute a reason for the court to withhold sanction.

International effectiveness

30. In an international case, the Court will consider whether the scheme is effective in other foreign jurisdictions of practical importance. It would not be a proper exercise of discretion to sanction a scheme that serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(a) Is a material amount of debt to be compromised by the scheme governed by the law of a jurisdiction other than Hong Kong?

(b) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

(c) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued. See *China Oil* at [21]-[23].

31. As mentioned above, most of the Company's debts are governed by Hong Kong law, while the remaining debts are governed by Mainland law and English law (such as the Perpetual Notes). As regards debts governed by English law, they are subject to the UK Plan. As regards debts governed by Mainland law, the Scheme is expected to be internationally effective because no holder of any Mainland law debt has come forward to oppose the Scheme or the UK Plan. Further, the Company has no meaningful assets in the Mainland. The risk of adverse enforcement by any hold of the Mainland Law debt is remote. A remote risk of adverse

enforcement by creditors would not hamper the effectiveness of the Scheme : See *Re Century Sun International Ltd*[16].

Conclusion

32. For the reasons I have explained I will make an order sanctioning the Scheme.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

[16] [2021] HKCFI 2928; [2021] HKCLC 1477

[2021 (1) CILR 426]

IN THE MATTER OF FREEMAN FINTECH CORPORATION LIMITED

GRAND CT. (Segal, J.) February 4th, 2021

Companies — arrangements and reconstructions — confirmation by court — court sanctioned scheme of arrangement between company and unsecured creditors pursuant to Companies Act (2021 Revision), s.86(2) even though one unsecured creditor not bound by scheme because his claim governed by Macau law not Cayman law — scheme likely to be substantially effective — no indication Macau creditor intended to take action to enforce his claim and claim small

The court was asked to sanction a scheme of arrangement.

The company sought the court's sanction of a proposed scheme of arrangement between the company and its unsecured creditors, pursuant to s.86 of the Companies Act (2021 Revision). The company was an investment holding company incorporated in the Cayman Islands. It was part of a group of companies engaged in the provision of financial services to customers in Hong Kong and the People's Republic of China. The company was registered in Hong Kong as a non-Hong Kong company and its shares had been listed on the Hong Kong Stock Exchange. In 2019, a winding up petition was presented against the company in Hong Kong on the grounds *inter alia* that the company was insolvent. Joint provisional liquidators were appointed by the Hong Kong court in 2020. The company, acting though the JPLs, introduced a scheme of arrangement in Hong Kong and the Cayman Islands. The majority of the company's debts were governed by Hong Kong law. Under the proposed scheme of arrangement, unsecured creditors would likely receive a return of 8.7%–11.4%, whereas if the company were to go into insolvent liquidation the return would be 2.7%.

At the Cayman scheme meeting, five scheme creditors attended the meeting by proxy and voted unanimously in favour of the scheme. No scheme creditor abstained or voted against the scheme. The total value of the claims of the creditors voting at the meeting was some HK$3bn. It appeared that the amount owed to those creditors was approximately 96% of the company's total estimated unsecured debt.

The JPLs were aware of one creditor whose claim against the company of some HK$48m. (amounting to approximately 1%–2% of the company's total debt) was governed by Macau law. The Macau creditor had been

given notice of the Cayman scheme meeting and copies of the scheme documents but had not contacted the JPLs nor sought to participate in or attend the Cayman scheme meeting. The company accepted that although the Macau creditor was to be treated in this jurisdiction as bound by the Cayman scheme, as he had not submitted to the jurisdiction of this court and as the debt owed to him was not governed by Cayman law, there was a serious risk that the Cayman scheme and the sanction order could not be made effective and enforced against him in China or other jurisdictions. The same issue arose with respect to the Hong Kong scheme. The company submitted that although there was a risk that the Macau creditor could take action to obtain judgment in a third jurisdiction which did not recognize the Cayman and Hong Kong schemes, there was no evidence that the Macau creditor intended to do so and the company might be able to take steps to prevent execution of such a judgment. Given the possibility that no action might be taken by the Macau creditor, the relatively small amount owed to the Macau creditor compared to the amounts owed to scheme creditors, the overwhelming support of scheme creditors and the fact that any action taken by the Macau creditor would not adversely or materially affect the implementation of the Cayman scheme, the court should exercise its discretion and sanction the scheme.

The Hong Kong scheme was sanctioned by Harris, J.

Held, ordering as follows:

(1) The function of the court at a sanction hearing of a scheme of arrangement under the Companies Act was well known. The court must be satisfied that the provisions of the Act (and the order convening the scheme meeting of creditors) had been complied with. The court must be satisfied that the class of creditors the subject of the court meeting was fairly represented by those who attended the meeting, and that the statutory majority were acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purported to represent. The court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme. There must be no "blot" on (*i.e.* defect in) the scheme. There must be no other reason which would preclude the court from exercising its discretion to sanction the scheme. One such reason was the principle that the court must be satisfied that the scheme would achieve a substantial effect and that it was not acting in vain (paras. 16–17).

(2) The Cayman scheme clearly fell within s.86 of the Companies Act. It was an arrangement between the company and a class of its creditors. The requirements of the convening order had been complied with and the scheme meeting appeared to have been properly conducted. The statutory majorities were also achieved. In relation to minority protection, it appeared that the class of scheme creditors who were the subject of the Cayman scheme meeting was fairly represented by those who attended the meeting and there was no evidence to suggest that the statutory majority

was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class. The scheme was obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The evidence indicated that there were no defects which could constitute a blot on the scheme (paras. 18–21).

(3) With regard to the Macau creditor, the court adopted the following approach. (a) The court needed to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme. (b) The court needed to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. There should be evidence as to the nature and extent of the risks associated with having a creditor, who was owed a not insubstantial sum, left outside and not bound by the Cayman scheme. The court required credible evidence to the effect that it would not be acting in vain. (c) The court needed to consider whether on the evidence it was appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who were not bound and were likely to be able to take action in other jurisdictions. This assessment would be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that might impact the recovery and rights of creditors and others under the scheme). In appropriate cases, the fact that significant claims might not be bound by the scheme might not prevent the court sanctioning the scheme where there were clear and real benefits to be derived from the scheme and which were unlikely to be disturbed by hostile action following sanction. If the scheme was likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the court would be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the court would wish carefully to consider the risks in each case. It would be relevant that the creditor(s) in question had indicated support for the scheme and an intention not to take action, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme. (d) The court needed to consider the issue of fairness in this context. If those who were bound by the scheme had accepted a haircut or other variation or discharge of their rights and claims, it might be unfair to sanction the scheme and hold them to the terms of the scheme if there was a serious risk that other creditors would be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by scheme creditors under the scheme). It might be relevant to consider the extent to which creditors were made aware of the risks in the explanatory statement before voting (para. 31).

(4) In the present case, it was appropriate to sanction the Cayman scheme. The court accepted the company's submissions. This was not a case in which the creditor concerned had indicated a willingness to support the Cayman scheme or given an indication that he would take no action to enforce his claim, nor was there evidence as to the extent to which the company could prevent such enforcement or the likely impact of a successful enforcement action on the company. However, the court accepted that in view of the Macau creditor's silence and the absence of any indication that he intended to take any action, there was a real possibility that no action would be taken; that even if action was taken, the company might be able to take some steps with a view at least to delaying or avoiding enforcement action and that even if enforcement action were successful, the amounts involved were sufficiently small to avoid interfering with the implementation of and to undermine the benefits obtained by scheme creditors under the Cayman scheme. It was also right to give considerable weight to the judgment of Harris, J. and to follow the decision he had made in relation to the Hong Kong scheme (para. 32).

Cases cited:

(1) *Anthony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1890), 25 Q.B.D. 399, considered.
(2) *China Lumena New Materials Corp.*, *In re*, [2020] HKCFI 338, considered.
(3) *Lehman Brothers Intl. (Europe) (No. 10)*, *In re*, [2018] EWHC 1980 (Ch); [2019] BCC 115; [2019] Bus. L.R. 1012, considered.
(4) *New Zealand Loan & Mercantile Agency Co. Ltd.* v. *Morrison*, [1898] A.C. 349, referred to.
(5) *PT Garuda Indonesia*, *In re*, 2001 WL 1171948; on appeal, [2001] EWCA Civ 1969, considered.
(6) *Sompo Japan Ins. Inc.*, *Re*, [2007] EWHC 146 (Ch), considered.
(7) *TDG plc*, *In re*, [2008] EWHC 2334 (Ch); [2009] 1 BCLC 445, considered.
(8) *Van Gansewinkel Groep BV*, *Re*, [2015] EWHC 2151 (Ch); [2015] Bus. L.R. 1046, considered.
(9) *Winsway Enterprises Holdings Ltd.*, *Re*, [2017] 1 HKLRD 1, considered.

Legislation construed:

Companies Act (2021 Revision), s.86(2):

> "If a majority in number representing seventy-five per cent in value of the creditors or class of creditors … present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors … and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company."

G. Manning for the company.

1 **SEGAL, J.:**

Introduction

This is my judgment dealing with the petition presented by Freeman FinTech Corp. Ltd. ("the company") with respect to, and the company's application for sanction of, a scheme of arrangement ("the Cayman scheme") between the company and its unsecured creditors, pursuant to s.86 of the Companies Act (2021 Revision) ("the Act"). The sanction application was heard today (February 3rd, 2021).

2 The company is acting by and through its joint provisional liquidators (Ho Kwok Leung Glen ("Mr. Ho") and Lai Kar Yan) ("the JPLs") who were appointed by the Hong Kong court and whose powers to promote a scheme of arrangement in this jurisdiction on behalf of the company were recognized by this court in an order made by me and dated November 4th, 2020.

3 The company has also promoted a parallel scheme of arrangement under the laws of Hong Kong ("the Hong Kong scheme"). The Cayman scheme and the Hong Kong scheme are each conditional upon the other receiving sanction from the court in their respective jurisdictions. They each contain the same terms. The majority of the company's debts are governed by Hong Kong law. Prior to the hearing of the sanction application, I was told that the sanction hearing in respect of the Hong Kong scheme had taken place yesterday before Harris, J. and an order sanctioning the Hong Kong scheme had been made (and a copy of Harris, J.'s judgment in draft was very helpfully provided to me at the beginning of the sanction hearing, for which I am most grateful to Harris, J.).

The background

4 The background to the company is set out in the petition dated December 16th, 2020 and Mr. Ho's first affirmation affirmed on December 16th, 2020. In summary:

(a) The company is an exempted limited liability company, incorporated in the Cayman Islands on August 14th, 1992.

(b) The company has been registered in Hong Kong as a non-Hong Kong company since November 25th, 1992 and its shares have been listed on the Hong Kong Stock Exchange ("SEHK") since May 11th, 1998.

(c) The company is an investment holding company and is part of a group of companies ("the group") whose subsidiaries are principally engaged in the provision of financial services to customers in Hong Kong and the People's Republic of China ("the PRC").

(d) The group booked losses during calendar years 2018 and 2019 of over HK$2bn., causing significant cash flow problems.

(e) On May 10th, 2019, a winding-up petition was presented against the company in the Hong Kong court on the grounds that, *inter alia*, the company was insolvent.

(f) The JPLs were appointed on February 28th, 2020 and, pursuant to an order extending their powers on March 26th, 2020, are empowered to enter into discussions on behalf of the company for the purpose of a restructuring. Subsequently, following a concern I had raised, the Hong Kong court made a direction permitting the JPLs to commence proceedings to introduce a scheme of arrangement in both this jurisdiction and Hong Kong.

(g) Trading of the company's shares was suspended on February 28th, 2020. The SEHK has mandated certain requirements and conditions the company is required to meet prior to the trading of its shares being permitted to resume.

(h) Should the company fail to comply with these requirements and conditions by August 27th, 2021, the SEHK will cancel the company's listing.

(i) In addition to the suspension of trading in the company's shares, both the SEHK and Securities and Futures Commission of Hong Kong have imposed various trading restrictions and limitations on the company's key operating subsidiaries, which have had a significant impact on the ability of those subsidiaries to operate and, in turn, has significantly impacted the financial performance of their businesses.

(j) The JPLs are of the opinion that an immediate winding up of the company (and the group) would not be in the creditors' best interests as it would not maximize the value of the company's assets and would therefore diminish creditor returns and that the interests of creditors will be better served through the Cayman scheme and the proposed restructuring of which it is a part.

The Cayman scheme

5 The Cayman scheme proposes a compromise and arrangement between the company and scheme creditors. The scheme creditors comprise all of the company's creditors with unsecured claims (to include both the claims of its unsecured creditors and those of its secured creditors in respect of the portion of their claims which are not secured).

6 The purpose of the Cayman scheme (and the Hong Kong scheme) is to compromise the company's existing unsecured indebtedness and return it, and the group, to a position of solvency. The Cayman scheme will principally involve a cash injection from an investor (to reduce the company's secured

debt and provide cash consideration for the benefit of the scheme creditors) and a debt for equity swap (which will necessitate a restructuring of the share capital of the company). Following the Cayman scheme becoming effective, the company will continue as a going concern, trading of the company's shares on the SEHK can resume and all outstanding debts owed by the company will be discharged.

7 In essence, the Cayman scheme provides for the full and final release of creditor claims in exchange for:

(a) Dividends pursuant to the Cayman scheme, which will include a share in the cash consideration of HK$80m. and other retained assets to be realised.

(b) A share in 1,868,176,188 of the company's shares, representing approximately 10% of the enlarged issued share capital of the company.

8 No secured claim will be admitted into the Cayman scheme and therefore no secured creditor (in its capacity as such) will be entitled to any distribution under the terms of the Cayman scheme unless it has either (i) agreed the appraised value of its security with the scheme administrators and participated in the Cayman scheme as a scheme creditor for the unsecured portion of its admitted claim; or (ii) released its security and participated in the Cayman scheme as a scheme creditor for its entire admitted claim which will be treated as unsecured.

9 The JPLs have conducted a detailed analysis of the return that the creditors would likely receive pursuant to the Cayman scheme (8.7%–11.4%) compared with the return that they would likely receive in the alternative of an insolvent liquidation (2.7%). This enables, on an indicative basis, a comparison of the outcome for scheme creditors under the Cayman scheme with that in liquidation. If the Cayman scheme is not approved and implemented, the JPLs consider it to be inevitable that the company (and the group) will be placed into insolvent liquidation (presumably in Hong Kong and possibly in this jurisdiction).

The convening order

10 On December 16th, 2020, the company filed the petition and a summons seeking an order that the company be given leave to convene a meeting of scheme creditors for the purpose of considering and, if thought fit, approving the Cayman scheme.

11 On December 31st, 2020, I issued an order ("the convening order") granting leave on the following terms:

(a) That there be a single class of unsecured creditors, *i.e.* the scheme creditors.

(b) That there be a meeting of scheme creditors ("the Cayman scheme meeting") at 10 a.m. (Hong Kong time) on January 22nd, 2021 in Hong Kong with a connection via video link to the offices of the JPLs' attorneys in Cayman (to allow those in Cayman to hear and participate in the proceedings in Hong Kong). The convening order stated that it was permissible for the Cayman scheme meeting to take place at the same time and location as the meeting to consider the Hong Kong scheme. Creditors were permitted to attend in person, in proxy, by a Zoom remote link or telephone in the manner described and in accordance with the procedures set out in the explanatory statement (which were needed to comply with Hong Kong's COVID regulations). Documents filed were to be treated as filed for the purpose of both schemes and only one vote was required and was to be treated as a vote cast at both scheme meetings and for the purpose of both schemes.

(c) That scheme creditors were to be sent a notice of the Cayman scheme meeting and the documents listed in para. 5 of the convening order ("the scheme documents") by email or courier.

(d) Notice was also to be given by various methods of advertisement and publication.

(e) Within seven days of the Cayman scheme meeting, the chairman was to report the proceedings and result to the court.

The Cayman scheme meeting

12 As was confirmed in Mr. Ho's fourth affirmation, all creditors were sent the scheme documents by email and/or courier on December 30th, 2020. Notice was also given in accordance with the convening order by (i) an announcement to the SEHK; (ii) an advertisement in *The Standard*; (iii) an advertisement in *Sing Tao Daily*; and (iv) notice in the Cayman Islands *Gazette*.

13 The Cayman scheme meeting was held at the Hong Kong Management Association venue in accordance with the convening order with a connection via video-link to the offices of Campbells in the Cayman Islands at 9 p.m. (Cayman time) on January 21st, 2021 (which was 10 a.m. Hong Kong time on January 22nd, 2021). Mr. Ho acted as the chairman of both scheme meetings.

14 Prior to the Cayman scheme meeting, the JPLs received a total of eight notices of claim for voting purposes and seven proxies. Ultimately only five scheme creditors participated in the Cayman scheme meeting (Prosper Talent Ltd., Pure Virtue Enterprises Ltd., China Huarong Macau (HK) Investments Holdings Ltd., Robertsons and Crowe (HK) CPA Ltd.). The other three scheme creditors which had filed notices either chose not to attend the Cayman scheme meeting or their notice was rejected in full by

the chairman on the basis that their claim was secured and the estimated value of the security held exceeded the value of the claim. The notices filed by Prosper Talent Ltd. and Pure Virtue Enterprises Ltd., two secured creditors, were allowed in part by the chairman, to the extent that the estimated value of relevant security interests held by these secured creditors was insufficient to satisfy their claims. The notice filed by China Huarong Macau (HK) Investments Holdings Ltd. was allowed in full by the chairman because he accepted that the value of security interest held by this secured creditor will be nil.

15 Accordingly, five scheme creditors attended the Cayman scheme meeting by proxy (and gave their proxies to different individuals so that five persons were in attendance at the Cayman scheme meeting). They voted unanimously in favour of the Cayman scheme. No scheme creditor abstained or voted against the Cayman scheme. The total value of the claims of the five creditors voting at the Cayman scheme meeting was HK$2,992,628,293.18. The Cayman scheme was therefore approved by a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy at the meeting, as required by s.86(2) of the Act. It appears that the amount owed to the creditors voting at the Cayman scheme meeting represented approximately 96% of the total estimated unsecured debt of the company.

The law

16 The function of the court at the sanction hearing of a scheme of arrangement under the Act is well-known. It is set out in a frequently cited passage from *Buckley on the Companies Act*, and was neatly summarized by Morgan, J. in the Business and Property Courts in London in *In re TDG plc* (7) ([2009] 1 BCLC 445, at para. 29) as follows:

(a) The court must be satisfied that the provisions of the statute (and the order convening the scheme meeting of creditors) have been complied with.

(b) The court must be satisfied that the class of creditors the subject of the court meeting was fairly represented by those who attended the meeting, and that the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they purport to represent.

(c) The court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

(d) There must be no "blot" on (*i.e.* a defect in) the scheme.

17 I would add a fifth matter for consideration at the sanction hearing, which may only be an amplification of the others mentioned above but

which I consider helpful to identify separately, namely that there must be no other reason which would preclude the court from exercising its discretion to sanction the scheme. One such reason which is frequently referred to in the authorities and which arises for consideration in this case is the principle that the court must be satisfied that the scheme will achieve a substantial effect and that it is not acting in vain.

The statutory requirements and the convening order

18 The Cayman scheme clearly falls within s.86 of the Act: it is an arrangement between the company and a class of its creditors. The requirements of the convening order were also clearly complied with. The Cayman scheme meeting appears to have been properly conducted. The statutory majorities were also achieved. 100% of those present by proxy voted in favour of the Cayman scheme.

Minority protection

19 On the evidence before me, it appears that the class of scheme creditors who were the subject of the Cayman scheme meeting was fairly represented by those who attended the meeting, and there is no evidence to suggest that the statutory majority was acting other than *bona fide*, or to suggest that they were coercing the minority in order to promote interests adverse to those of the class.

Rationality

20 The Cayman scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. In particular, the commercial purpose of the Cayman scheme was clearly explained in the explanatory statement and the scheme documents and it appears that the Cayman scheme offered material benefits to scheme creditors (the return which the scheme creditors would likely receive pursuant to the Cayman scheme of 8.7%–11.4%, while not representing a substantial recovery, was considerably greater than the return of only 2.7% which they were expected to receive in the event that the Cayman scheme was not approved or sanctioned and if an insolvent liquidation resulted). Furthermore, the Cayman scheme was unanimously supported by the scheme creditors at the Cayman scheme meeting and it appears that, as noted above, the value of the claims of the five creditors voting at the Cayman scheme meeting represents a very substantial proportion of the total unsecured liabilities of the company (as estimated by the JPLs, recognizing that there is some uncertainty as to the quantification of unsecured claims since this depended on the value and proceeds realised in respect of collateral held by the secured creditors). In

such a case the court will not readily differ from the commercial assessment of the creditors as to their own interests.

Blot on the scheme

21 The evidence indicates that there were no defects which could constitute a blot on the Cayman scheme.

Discretion—impact of a scheme creditor's claim being governed by a law other than Cayman or Hong Kong law

22 There is some debt which the Cayman scheme purports to compromise that is not governed by Cayman Islands law. It is also not governed by Hong Kong law. The issue was identified at the convening hearing when the company submitted, and I accepted, that the matter would fall to be considered at the sanction hearing in light of the action taken by the creditor concerned.

23 The JPLs are aware of one creditor, whose claim against the company in the sum of approximately HK$48m. (approximately US$6.2m.) is governed by Macau law ("the Macau creditor"). The Macau creditor's claim amounts to approximately 1%–2% of the total debt of the company.

24 The Macau creditor was given notice of the Cayman scheme meeting and copies of the scheme documents were sent to him by email and courier. However, he did not make contact with the JPLs, did not return the forms, and did not seek to participate in or attend the Cayman scheme meeting.

25 The company accepted that while the Macau creditor was to be treated in this jurisdiction as bound by the Cayman scheme (the discharge effected by the Cayman scheme and the order sanctioning it will be effective as a matter of Cayman Islands law irrespective of the governing law of the debt—see the judgment of the Privy Council, on appeal from the Supreme Court of Victoria, in *New Zealand Loan & Mercantile Agency Co. Ltd.* v. *Morrison* (4)), since the Macau creditor had not submitted to the jurisdiction of this court and since the debt owed to him was not governed by Cayman law, there was a serious risk that the Cayman scheme and the sanction order could not be made effective and enforced against him in the PRC or other jurisdictions. This was the case in jurisdictions which refused to recognize foreign schemes or restructuring proceedings and those common law jurisdictions which followed the English Court of Appeal's decision in *Anthony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1), to the effect that a discharge of a debt pursuant to a foreign bankruptcy or restructuring proceeding would only be recognized if the proceeding took place in the jurisdiction of the governing law of the debt or possibly in a place that would be recognized in the jurisdiction of the governing law of the debt. The same issue arose

with respect to the Hong Kong scheme, since the Macau creditor had not submitted to the jurisdiction of the Hong Kong court and the debt owed to him was not governed by Hong Kong law.

26 The company submitted that nonetheless the court could and should sanction the Cayman scheme provided that it was satisfied that the Cayman scheme would achieve a substantial effect and that the court would not be acting in vain or making an order which had no substantive effect or would not achieve its purpose. The court needed to determine, in the exercise of its discretion, whether to sanction the Cayman scheme on this basis.

27 As regards authorities dealing with the approach that the court should adopt in a case such as this, the company referred me to a decision of Harris, J. in Hong Kong in another case, *In re China Lumena New Materials Corp.* (2) ("*China Lumena*") (the company originally only provided me with a copy of the judgment in *China Lumena* but I directed that the authorities referred to by Harris, J. also be filed and provided to me). In that case, the Hong Kong scheme purported to compromise debt governed by PRC law. 42% of the debt covered by the scheme was owed to a PRC creditor and was governed by PRC law. The PRC creditor did not vote at the scheme meeting although a letter had been sent by its Zhejiang branch to say that it supported the scheme but that its representatives had encountered difficulties in obtaining approval to leave the PRC to attend the scheme meeting and its Hong Kong branch which was also a creditor had voted in favour of the scheme. Harris, J. noted that that there was no mechanism for enforcing or obtaining recognition of the scheme in the PRC. He considered that the key issue was whether in these circumstances the court should exercise its discretion to sanction the scheme having regard to the court's unwillingness to sanction a scheme which had no or only a limited utility, as he had explained in another decision of his, *Re Winsway Enterprises Holdings Ltd.* (9) ("*Winsway*"). There he had noted ([2020] HKCFI 338, at para. 12) that the utility of a scheme could be called into question—

> "if in a transnational context there is a serious question over the extent to which a scheme will be enforcible [*sic*] against foreign creditors. However, it is well-established that in assessing whether or not this is the case the court takes a robust and practical approach. For example, in *re Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [[2001] EWCA Civ 1696 at [27]], an English scheme in respect of an Indonesian company was sanctioned despite the existence of dissenting creditors and despite the fact that there was no parallel scheme in Indonesia or formal recognition of the English scheme in Indonesia."

He concluded (*ibid.* at paras. 13–14) that:

> "13. Ultimately, the guiding principle is that the court should not act in vain or make an order which has no substantive effect or will not achieve its purpose. The principle does not require either worldwide effectiveness or worldwide certainty. Thus it does not require that the court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets or in which creditors might make claims, it is especially important that the scheme be effective. The court will sanction the scheme provided it is satisfied that the scheme would achieve a substantial effect: *Re Lehman Brothers International (Europe) (No 10)* [[2018] EWHC 1980 (Ch)].
>
> 14. As there would appear to be no reason to think that there is a [PRC] creditor who is likely to try to enforce its claim in Hong Kong against the Company arguing that it is not bound by the Scheme because [PRC] law governs its debt, it seems to me that this is a proper case for the court to proceed on the basis that the scheme will probably serve its purpose, has utility and should be sanctioned."

28 In *In re Lehman Brothers Intl. (Europe) (No. 10)* (3), Hildyard, J. had said as follows ([2018] EWHC 1980 (Ch), at paras. 187–190):

> "187. Having regard to the general principle that the English court will not act in vain or make an order which has no substantive effect or will not achieve its purpose, and echoing Sompo Japan Insurance Inc v Transfercom Ltd [2007] EWHC 146 (Ch) at [18]–[20] and Rodenstock at paras. 73 to 77, in Re Magyar at [16], David Richards J said:
>
> > 'The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose.'
>
> 188. However, the principle does not require either worldwide effectiveness, or certainty. Thus, it does not require that the Court must be satisfied that the scheme will be effective in every jurisdiction worldwide: its focus is on jurisdictions in which, by reason of the presence there of substantial assets to or because of which creditors might make claims, it is especially important that the scheme be effective. Further, and as Snowden J explained in Re Gansewinkel at [71],
>
> > 'The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.'

189. Thus, in Sompo, when sanctioning an insurance transfer scheme under the Financial and Market Act 2000 (which is analogous in the context), David Richards J said this:

> '[17] My principal concern, when the application was first before me on 14th December 2006, was to understand the true impact, if any, of the proposed transfer on the business … What, if any, effect will the transfer have if proceedings against Sompo were brought in those jurisdictions where it did have substantial assets? Would the transfer be recognised in those jurisdictions? If not, what purpose would be served by the transfer?
>
> [18] It was relevant, therefore, to have some evidence as to the proportion of the transferred policies which were governed by English law or other UK law and, particularly if the proportion were small, to have some evidence as to the effect of the transfer in Japan and perhaps other jurisdictions where Sompo has substantial assets.
>
> [19] If it appeared that the transfer would have little or no significant effect, it raised an issue as to whether in its discretion the Court should sanction the transfer. It is established that, on comparable applications under the Companies Act 1985, the Court will not act in vain …
>
> [26] Overall this evidence leaves me less than convinced that the scheme once sanctioned will definitely be effective as regards proceedings in foreign jurisdictions to enforce claims under policies which are governed by foreign law, although I acknowledge that it provides a proper basis for concluding that it may well be so effective in Japan and the United States. More importantly, as I have mentioned, the evidence establishes that over 27% of the policies in number and by reference to reserves are governed by English law, and it is reasonable to suppose that the transfer will be effective in any relevant jurisdictions as regards those policies. The proposed scheme will therefore achieve a substantial purpose. The fact that the scheme also extends to a larger class of business not governed by English law is not, in my judgment, a good ground for refusing to sanction the scheme. Whether the scheme is recognised as effective in Japan or the United States or elsewhere will, if necessary, be tested in due course in proceedings in those jurisdictions.'

190. The Administrators submitted, and I agree, that the present case is stronger than Sompo: it is difficult to see how creditors could enforce their statutory interest entitlements in the English administration of an English company under English law in any

jurisdiction other than England, and only a small proportion of the Surplus is situated outside of England."

29 The company noted that the evidence demonstrated that the company's assets were located in the Cayman Islands or Hong Kong, save for one asset, namely an inter-company receivable owed to the company by a BVI subsidiary in the group. The assets in the Cayman Islands would be protected as a result of the Cayman scheme and the sanction order to be made by this court which in this jurisdiction would be regarded as being effective against and binding the Macau creditor. The assets in Hong Kong would similarly be protected by the Hong Kong scheme and sanction order. The company argued that while there was a risk that action could be taken by the Macau creditor to obtain a judgment in a third jurisdiction which did not recognize either of the schemes, for example Macau (and the company was unable to explain whether there was a choice of courts and submission to jurisdiction clause in the Macau creditor's contract with the company) and to enforce that judgment in the BVI against the receivable, there was no evidence or indication from the Macau creditor that he intended to do so (he had made no contact with or threats against the company) and the company might be able to take steps to prevent execution of such a judgment in view of the Cayman scheme and the Hong Kong scheme (although the company at this stage had not determined what action was available or would be taken). The company submitted that in view of the possibility that no action might be taken by the Macau creditor, the relatively small amount owed to the Macau creditor compared to the amounts owed to scheme creditors, the overwhelming support of scheme creditors and the fact that any action taken by the Macau creditor would not adversely or materially affect the implementation of the Cayman scheme, the court should exercise its discretion and sanction the Cayman scheme.

30 The company also relied on the decision and reasoning of Harris, J. in his draft judgment in this case. He concluded, after citing passages from his earlier judgments in *China Lumena* (2) and *Winsway* (9) that:

"The Scheme if sanctioned in Hong Kong will prevent [the Macau creditor] taking enforcement proceedings in Hong Kong. Accordingly, [the Macau creditor's] debt does not impact adversely on the utility of the Scheme. I will, therefore, make the order which has been handed to me sanctioning the Scheme."

31 In my view, the following points summarize the approach which the court should adopt in the present and similar cases:

(a) The court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.

(b) The court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the

creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the company had considered whether the Macau creditor could obtain a judgment in a jurisdiction in which the Cayman scheme was not recognized and enforce that judgment or otherwise obtain execution in a jurisdiction in which the company had assets and which would also not recognize the Cayman scheme. I indicated that there should be evidence as to the nature and extent of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman scheme. In this connection, I note the following comments of Snowden, J. in *Re Van Gansewinkel Groep BV* (8) ([2015] EWHC 2151 (Ch), at para. 71), after referring to *Re Sompo Japan Insurance Inc.* (6):

> "In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. *The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain.*" [Emphasis added.]

(c) The court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The court will consider, as Lloyd, J. put it in his judgment at first instance in *In re PT Garuda Indonesia* (5) (which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In *Sompo Japan* (6), a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the court will be likely to sanction the scheme despite some

creditors not being bound and the risk of enforcement action by them. But the court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in *China Lumena* (2), or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in *Garuda*.

(d) It also seems to me that the court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by scheme creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in *Garuda*.

32 I have concluded that in the present case, it is appropriate to exercise my discretion to sanction the Cayman scheme. I accept the company's submissions, as summarized in para. 29 above. This is not a case in which the creditor concerned has indicated a willingness to support the Cayman scheme or given an indication that he will take no action to enforce his claim, nor is there evidence as to the extent to which the company could prevent such enforcement or the likely impact of a successful enforcement action on the company. However, I accept that in view of the Macau creditor's complete radio silence and the absence of any indication from him that he intends to take any action, there is a real possibility that no action will be taken; that even if action is taken, the company may be able to take some steps with a view at least to delaying or avoiding enforcement action and that even if enforcement action were successful in the BVI, the amounts involved are sufficiently small to avoid interfering with the implementation of and to undermine the benefits obtained by scheme creditors under the Cayman scheme (I note that the risks were not mentioned in the explanatory statement but the issue was mentioned to me at the convening hearing and on the facts of this case I do not consider that this prevents me from or materially weakens the case for sanctioning the Cayman scheme). I also consider that in this case it is right to give considerable weight to the judgment of Harris, J. and to follow the decision he has reached in relation to the Hong Kong scheme.

Order accordingly.

Attorneys: *Campbells* for the company.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2022 (NSJ)

IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF E-HOUSE (CHINA) ENTERPRISE HOLDINGS LIMITED

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Nick Herrod, Mr Ryan Hallett and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Company**
Convening hearing:	**15 September 2022**
Sanction hearing:	**9 November 2022**
Draft judgment distributed:	**10 November 2022**
Judgment Delivered:	**17 November 2022**

HEADNOTE

Creditors' scheme of arrangement pursuant to section 86 of the Companies Act (2022 Revision) – decision at convening hearing and sanction hearing – voting by creditors who are affected by sanctions on Russia – scheme discharging New York law governed debt – availability and effect of relief under chapter 15 of the US Bankruptcy Code and under New York private international law – effect of the scheme under Hong Kong and BVI law

JUDGMENT

Introduction

1. In July 2022 E-House (China) Enterprise Holdings Limited (the ***Company***) applied for an order (the ***Convening Order***) giving it permission to convene a single meeting (the ***Scheme Meeting)*** of certain of its creditors (all of whom are holders of notes issued by the Company) who were to be parties to a scheme of arrangement under section 86 of the Companies Act (2022 Revision) (the ***Companies Act***) for the purpose of considering and if thought fit approving the scheme.

2. On 28 July 2022, the Company filed a petition seeking the sanction of the proposed scheme and a summons (the ***Convening Order Summons***) pursuant to which it applied for the Convening Order. On 7 September 2022 the Company filed a further summons seeking permission to amend the petition in the manner set out in the amended petition attached to the further summons (the ***Amended Petition***).

3. The Convening Order Summons was heard on 15 September 2022. I was satisfied that it was appropriate to permit the Company to convene a meeting of the creditors to be parties to the scheme, although, as I explain below, I declined to permit the Company to exclude from voting certain creditors affected by sanctions against The Russian Federation (***Russia***). The Convening Order was made on 20 September 2022. The meeting was to be held on 12 October 2022. I explain below the issues that arose at the convening hearing and my reasons for making the Convening Order.

4. On 4 October 2022 the Company filed a summons (the ***Scheme Meeting Summons***) seeking an urgent order that the date of the meeting be changed to 2 November 2022. The Company, in its evidence in support of the Scheme Meeting Summons, explained that scheme documents had been sent to creditors but the Company had recently found that creditors were taking longer than expected to submit their voting instructions. As a result, the Company considered that creditors should be given more time to submit voting instructions so that as many creditors as

possible had the opportunity to vote and participate in the meeting. The Company also sought an order that the record date for the meeting be amended and that certain other consequential orders be made (including a direction that it give notice to creditors of the change to the date of the meeting and the other orders made). The Company also filed a Re-Amended Petition (the ***Re-Amended Petition***) which included various minor updating amendments to the Amended Petition. The Company requested that I deal with the Scheme Meeting Summons on the papers without the need for a further hearing. In view of the urgency and subject matter of the Scheme Meeting Summons, I was prepared to do so. On 5 October 2022, I ordered (the ***Further Convening Order***) that the Company had permission to amend and reschedule the date of the meeting to 2 November 2022 and made the necessary consequential orders. I also gave the Company permission to amend the scheme document in the form appended to the Fourth Affirmation of Zhou Liang (***Mr Zhou***).

5. On 6 October 2022 the Company sent to scheme creditors and published the notice of the date of the reschedule meeting and an update letter explaining the reasons for the change to the date of the meeting, explaining the further proposed amendments to the scheme and providing an update on progress in the restructuring and certain further information which I directed be provided to scheme creditors.

6. The meeting of scheme creditors was held in the Cayman Islands on 2 November 2022 at the offices of the Company's Cayman Islands attorneys (Maples and Calder). Creditors were able to attend in person or via a Zoom link. Over 93% in value of the notes subject to the scheme attended in person or by proxy and creditors representing 99.96% by value and 99.87% by number voted in favour of the scheme. The scheme therefore achieved the support of a very substantial proportion of affected scheme creditors.

7. On 9 November 2022, the Company's application for an order sanctioning the scheme was heard. At the end of the hearing I confirmed that I would grant the order sought and that I would subsequently set out in writing, in addition to my reasons for making the Convening Order, my reasons for making the order sanctioning the scheme. This judgment now sets out those reasons.

The evidence

8. The main evidence filed in support of the Convening Order Summons was as follows. The First Affirmation (***Zhou 1***) of Mr Zhou (who is the Company's CFO), the Second Affirmation of Mr Zhou (***Zhou 2***), the Third Affirmation of Mr Zhou (***Zhou 3***), the First Affidavit of Yeung King Shan Fanny (***Ms Yeung***) (who is an associate director of D.F. King Limited, the Company's information agent (the ***Information Agent***)), the Second Affidavit of Ms Yeung, the Affidavit of Edward Lam (***Mr Lam***) (who is a partner in Skadden, Arps, Slate, Meagher & Flom, the Company's onshore legal advisers) and the Affidavit of Allan Gropper (***Judge Gropper***) (who is a well-known and highly respected retired Bankruptcy Judge for the Southern District of New York). Zhou 1 exhibited a copy of the form of explanatory statement (the ***Explanatory Statement***) that the Company proposed to send to the creditors who were to be parties to the proposed scheme. The formal terms of the proposed scheme were set out at Appendix 4 of the Explanatory Statement (the ***Scheme***).

9. The following further evidence was filed in support of the Company's application for an order sanctioning the scheme. The Fifth Affirmation of Mr Zhou (***Zhou 5***); the Third Affidavit if Ms Yeung; the First Affidavit of Mr Alexander Lawson (the chairperson at the meeting of scheme creditors); the First Affirmation of Zhang Xing (***Zhang 1***) (Mr Zhang is an officer of China International Capital Corporation Hong Kong Securities Limited (***CICC***), the Company's financial adviser) and the Third Affidavit of Ms Rachel Catherine Baxendale of Maples and Calder. Shortly before the sanction hearing, the Company also filed the Sixth Affirmation of Mr Zhou (***Zhou 6***).

The Company, its financial position, and the notes which are to be subject to the scheme

10. The Company is a holding company. Its shares and notes have been listed on the Hong Kong Stock Exchange (***HKSE***). Its principal assets are the shares that it holds in its subsidiaries, in

particular Fangyou Information Technology Holdings Limited (***Fangyou***), a company incorporated in the BVI (through which it indirectly owns a number of operating entities including Hong Kong Fangyou Software Technology Company Limited (***Hong Kong Fangyou***) a company incorporated in Hong Kong), and TM Home Limited (of which the Company owns 70.23%, and which is incorporated in the Cayman Islands and ultimately controls a number of other operating entities). The Company is in the business of real estate agency services, real estate data and consulting services and real estate brokerage network services in the People's Republic of China (***PRC***), through its indirect operating subsidiaries there (I refer to the Company, its subsidiaries and its indirect subsidiaries as the ***Group***).

11. There are two note issues which are to be subject to the scheme (together the ***Old Notes***). The notes are all governed by New York law:

    (a). senior notes with an aggregate principal amount of US$298,200,000, a coupon of 7.625% per annum and a maturity date of 18 April 2022 (the ***2022 Notes***).

    (b). senior notes with an aggregate principal amount of US$300,000,000, a coupon of 7.60% per annum and a maturity date of 10 December 2023 (the ***2023 Notes***).

12. The 2022 Notes were listed on the HKSE but were delisted following maturity. The 2023 Notes remain listed on the HKSE but trading was suspended on 19 April 2022. I refer to the holders of the 2022 Notes and the 2023 Notes together as the ***Noteholders***.

13. The Old Notes are held in global form through the Hongkong and Shanghai Banking Corporation Limited (***HSBC***) acting through its nominee HSBC Nominees (Hong Kong) Limited as common depositary (the ***Depositary***) for the clearing systems (who are identified below). HSBC is the trustee of the Old Notes (the ***Old Notes Trustee***).

14. The Old Notes are guaranteed by certain direct and indirect subsidiaries of the Company (the ***Subsidiary Guarantors***), namely Fangyou , CRIC Holdings Limited (***CRIC***) (incorporated in the British Virgin Islands), Hong Kong Fangyou and CRIC Holdings (HK) Limited (***CRIC Hong Kong***) (incorporated in Hong Kong).

15. The Company has liabilities in addition to those arising under the Old Notes. These include sums owing under a convertible note (the ***Convertible Note***) issued on 4 November 2020 to Alibaba.com Hong Kong Limited (***Alibaba***) in the principal amount of HK$1,031,900,000 (US$135,000,000). In addition, there are liabilities owed to other members of the Group of RMB 1,423,300,000 (US$223,347,000) and other payables of RMB 12,200,000 (US$1,914,000).

16. The Company's financial position deteriorated in the second half of 2021 and the first half of 2022 as a result of various factors described in Zhou 1, including the downturn in the PRC property market. The Company was unable to repay the principal due on 18 April 2022 in respect of certain of the Old Notes. This default caused a cross-default under the Convertible Note but Alibaba agreed to waive this default subject to certain conditions which included a term that if the Company's proposed restructuring had not become effective by 31 October 2022 (which was later extended to 15 December 2022), then the waiver would be automatically and immediately revoked and Alibaba would become entitled to enforce the Convertible Note. Despite this waiver, sums remain due and owing under both the 2022 Notes and the 2023 Notes which the Company cannot pay. The Company's position is that it was therefore cashflow insolvent at the time of the filing of the petition and remains so and that absent the approval of the scheme by Noteholders and the sanction of the scheme by the Court, it was likely to go into insolvent liquidation.

17. According to Mr Zhou, the Company's financial position as at 31 March 2022 can be summarised as follows:

(a). it had assets with a net book value of approximately RMB 8,967,000,000 (approximately US$1,407,118,000). It had total liabilities of approximately RMB 5,981,189,000 (approximately US$938,579,000).

(b). the value of its assets (valued at book value) exceeded its liabilities. However, a majority of the Company's assets were not readily realisable and were unlikely to be recoverable in full or, in some instances, at all.

(c). the Company held cash and cash equivalents of approximately RMB13,380,000 (approximately US$2,100,000).

(d). the Company was, as noted above, unable to repay the principal sum of US$298,200,000 due on the maturity of the 2022 Notes on 18 April 2022. The failure to pay the amounts due under the 2022 Notes constituted an event of default under the relevant indenture, and as already noted, a cross-default (but without giving rise to an automatic acceleration) under the terms of the Convertible Note, which in turn constituted a cross-default under the 2023 Notes. The default under the Convertible Note has been, as I have also already noted, waived by Alibaba in exchange for the Company entering into various undertakings and agreements. However, the amounts due under the 2022 Notes and the 2023 Notes remain payable and outstanding.

18. As at the date of the Explanatory Statement, the Company's most recent audited accounts were those for the period ending 31 December 2020, as the audited accounts for 31 December 2021 were still in preparation (see the Explanatory Statement at [2.14(b)]). A copy of the unaudited consolidated financial statements of the Group for the year ended 31 December 2021 and the interim unaudited consolidated financial statements of the Group as at 30 June 2021 were attached in Appendix 8 to the Explanatory Statement and Mr Zhou provided further financial information in Zhou 1 based on and extracted from the Group's unaudited management accounts as at 31 December 2021. Mr Zhou stated that there had been some significant movements in relation to certain assets and liabilities during the period from 1 January 2022 to 31 March 2022 and confirmed that these had been taken into account in the information provided and statements made regarding the Company's financial position in Zhou 1 and that the updated information had been provided to Kroll (HK) Limited (***Kroll***) for the purpose of its liquidation analysis (which was attached as appendix 3 to the Explanatory Statement).

19. The Explanatory Statement (at [2.14(a)]) also noted that the figures for 31 March 2022 provided in it were based on the Group's unaudited management accounts as at 31 December 2021 with the necessary amendments to reflect the updated information provided to Kroll. Mr

Zhou further confirmed in Zhou 1 that there had been no significant changes to the Company's financial position since these updated figures. He also explained why the Company had been unable to finalise its 2021 and interim 2022 financial statements in time for inclusion in the Explanatory Statement. This, he said, had been primarily due to the fact that the progress in preparing the financial statements of the Group had been negatively affected by the strict COVID-19 prevention and control measures in the PRC, as well as staff turnover within the Group and a change in the Company's auditor. The Company had made announcements in July 2022 and August 2022 on the HKSE regarding the delays in finalising its financial statements and the reasons for the delays.

The restructuring negotiations and communications with Noteholders regarding the scheme process in advance of the hearing of the Convening Order Summons

20. The Company has been in discussions for some time regarding how to deal with its financial problems and the terms of a restructuring of the Old Notes.

21. In March 2022, the Company appointed a financial adviser (CICC) to evaluate the capital structure and liquidity position of the Company and its subsidiaries, and to explore options for the restructuring of the Old Notes.

22. On 31 March 2022, the Company announced on the HKSE website the commencement of an offer to exchange the outstanding principal amount of the Old Notes and a solicitation of consents from the Noteholders (the ***Exchange Offer***) which exchange was subject to certain conditions being met, including acceptance of the Exchange Offer by holders of at least 90 per cent of the outstanding principal amount of the Old Notes (the ***Minimum Acceptance Amount***).

23. Given the conditions attached to the Exchange Offer, concurrent with announcement of the Exchange Offer, the Company also invited the Noteholders (through an announcement on the HKSE website) to accede to a restructuring support agreement (the ***RSA***) by 4.00 p.m. London time on 11 April 2022 (the ***Exchange Expiration Deadline***). The Company's announcement also stated that the restructuring may be implemented through a scheme of arrangement if the Exchange Offer was not successfully completed, and provided a copy of the RSA, which

appended a term sheet setting out the terms of the proposed restructuring (the ***RSA Term Sheet***).

24. On 11 April 2022, the Exchange Expiration Deadline was extended to 4.00pm London time on 13 April 2022 and the Company announced this on the HKSE's website.

25. On 14 April 2022, the Company announced on that website that it had terminated the Exchange Offer due to the Minimum Acceptance Amount condition not having been satisfied and that it was preparing to implement the restructuring by way of a scheme of arrangement and that therefore it was extending the deadline for accession to the RSA, in accordance with the terms of the RSA, to 4.00 pm London time on 22 April 2022 (the ***Instruction Fee Deadline***).

26. On 5 August 2022, the Company sent a letter to Noteholders (as creditors who would be subject to the scheme). This letter is referred to as the ***PSL*** (an abbreviation of practice statement letter). The purpose of the PSL was (as contemplated by [3.1] of the Practice Direction No 2 of 2010 (the ***Practice Direction***)) to give notice to Noteholders of the terms of the proposed Scheme and of the restructuring, of the relevant background, that the Company intended to apply to the Court for an order permitting it to convene a meeting of Noteholders and to give notice of the issues that the Court would need to consider at the hearing of the Convening Order Summons. The PSL stated that the hearing of the Convening Order Summons had been listed for 5 September. It also explained that the commencement of the Scheme proceedings had been delayed for various reasons including (as discussed in more detail below) difficulties resulting from the effect of sanctions on Russia and the need for negotiations with Alibaba. The PSL noted that the terms of the scheme provided that the date on which the scheme became effective (the ***Restructuring Effective Date***) must occur by a certain date (the ***Longstop Date***) which had initially been 13 October 2022 but which the Company wished to amend to 31 October 2022. The PSL was notified to Noteholders via various different methods. These were posting the PSL on the website established by the Company to upload relevant information and documents relating to the scheme; circulating the PSL electronically through the clearing systems (Euroclear Bank S.A./N.V. and Clearstream Banking, S.A.) and sending the PSL via email

directly to each Noteholder who had registered with the Information Agent or had otherwise notified the Company or the Information Agent of its email address.

27. As noted above, the petition and the Convening Order Summons were then filed on 28 July 2022. The hearing of that summons was originally listed for 5 September 2022. However it subsequently became necessary to delay the hearing until 15 September 2022. Noteholders were notified of this change by letter dated 2 September 2022 (the ***2 September 2022 Letter***) which was distributed using the same methods of communication that had been used for giving notice of and circulating the PSL.

28. The Company had planned to circulate on 2 September 2022 or shortly thereafter an update to Noteholders to inform them of the changes that had been made since the PSL to the terms and structure of, and the process for voting on, the scheme. The 2 September 2022 Letter stated that "*Further details on the Scheme will follow early next week*." But unfortunately, because of further delays in finalising aspects of the restructuring, in particular delays in obtaining confirmation from the Old Notes Trustee that it would be prepared to act as a trustee of the new notes to be issued under the scheme (the ***New Notes***) and that it would assume other roles in connection with the New Notes, the update was further delayed. On 12 September 2022, three days before the hearing of the Convening Order Summons, the Company eventually sent out the update (the ***Additional PSL***) once again using the same methods of communication as had been used for the PSL. The Additional PSL explained the revisions to the scheme and the restructuring that had been made since the PSL and attached copies of the amendments to the scheme documents required to give effect to those changes.

The terms of the RSA and the high level of Noteholder support for the Scheme

29. A detailed overview of the RSA is set out at [5.10] of the Explanatory Statement. Its terms can be summarised as follows. Under the RSA, any Noteholder who accedes to the RSA by the Instruction Fee Deadline, votes in favour of the Scheme at the Scheme meeting and does not exercise its rights to terminate the RSA or breach any provision of it in any material respect, will be a ***Consenting Creditor***, and will receive a cash fee on the Restructuring Effective Date

in an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline (the ***Instruction Fee***). Mr Zhou confirmed in Zhou 1 (at [49]) that as at the date of his affirmation (9 September 2022) approximately 89.07% by value of Noteholders had signed or acceded to the RSA and therefore had undertaken to vote in favour of the Scheme at the Scheme meeting.

The terms of the Scheme

30. The terms of the Scheme were summarised in Zhou 1 at [61] to [87] and in further detail in section 7 of the Explanatory Statement and, as I have noted, set out in Appendix 4 to the Explanatory Statement. The Scheme will only affect the rights of the Company, the Subsidiary Guarantors and the "*Scheme Creditors*."

31. Scheme Creditors are defined as "*without double counting, the Noteholders, the Old Notes Trustee and the Depositary*." As regards voting, however, the Old Notes Trustee and the Depositary have agreed not to vote at the scheme meeting. The Noteholders are defined as "*those Persons with an economic or beneficial interest as principal in the Old Notes held in global form or global restricted form through the Clearing Systems at the Record Date, each of whom has a right upon the satisfaction of certain conditions, to be issued with definitive registered notes in accordance with the terms of the Old Notes*." A Released Claim is defined as "*any Scheme Claim, Ancillary Claim, or any past, present and/or future Claim arising out of, relating to or in respect of: (a) the Old Notes Documents; (b) the preparation, negotiation, sanction and implementation of [the] Scheme and/or the RSA; and/or (c) the execution of the Restructuring Documents and the carrying out of the steps and transactions contemplated in [the] Scheme …"* An Ancillary Claim is a claim against a Released Person. The following are defined as a Released person: the Company; the Subsidiary Guarantors, the Group, their Affiliates, Personnel and Advisers; the Old Notes Trustee and its connected parties and advisers; the New Notes Trustee and its connected parties and advisers; the Holding Period Trustee (whose role I discuss below); the Scheme Supervisor (who is Mr Lawson, who is appointed by the Board to act in such capacity); the Information Agent and the Cayman Islands Information Agent (which is Alvarez & Marsal Cayman Islands Limited).

32. Under the Scheme, on the Restructuring Effective Date:

(a). Scheme Creditors will release in full the Released Claims, in exchange for the New Notes and the Cash Consideration (which means 6% of the outstanding principal amount of the Old Notes held by the relevant Noteholder together with interest on the Old Notes accrued up to but excluding 18 April 2022).

(b). the Old Notes will be released, cancelled, fully compromised and forever discharged, and the respective rights and obligations of the Scheme Creditors, the Company, the Subsidiary Guarantors and the Old Notes Trustee towards one another under the Old Notes Documents will terminate and be of no further effect.

(c). Noteholders who are Consenting Creditors will be paid the Instruction Fee.

(d). the New Notes will be issued to Scheme Creditors in tranches which mature on the first anniversary and then in six-month increments from the date of the issue of the New Notes. The interest rate on the New Notes will be 8% per annum. The first principal payment of 10% of the aggregate principal amount of the New Notes will be due one year after the Restructuring Effective Date. The New Notes will mature on the third anniversary of the date that they are issued.

(e). the liability of the Subsidiary Guarantors will be released.

The Kroll liquidation analysis

33. An estimated outcome for Scheme Creditors of a liquidation of the Company was prepared by Kroll. They prepared a written liquidation analysis (dated 29 July 2022) which was discussed in Zhou 1 at [93] to [97] and set out, as I have said, at appendix 3 to the Explanatory Statement. In summary, the return to Scheme Creditors in an insolvent liquidation was estimated by Kroll to be in a range from 25.8% (low case) to 36.1% (high case). The liquidation analysis assumed

that all entities in the Group are put into liquidation. It assessed the likely realisable value of each of the companies in the Group on what is described as a segmented based approach. Kroll explained what this means in [3.2] of their analysis:

> *"E-House has over 300 major subsidiary entities within the Group. Given the significant number of subsidiaries and the complexity of the Group's corporate structure, we have sought to conduct our analysis on a consolidated basis for each Segment level. Based on the information provided by Management, we have aggregated the assets and liabilities of each Segment. For this Liquidation Analysis, we have assumed that upon the liquidation of each Segment, the proceeds from the aggregated realisation of assets for any specific Segment will be used to repay the aggregated debts recognised in the same Segment."*

34. The six segments identified by Kroll were as follows: the Company; 125 subsidiary entities that are principally engaged in real estate agency and consultancy; 17 subsidiary entities that are principally engaged in the provision of real estate related education services; 7 subsidiary entities that are engaged in offshore financing and marketing activities; 54 subsidiary entities that are principally engaged in digital marketing and brokerage; and 104 entities controlled by Leju Holdings Limited, a NYSE-listed entity that is principally engaged in the provision of online-to-offline real estate services. The liquidation analysis assumed that each company in the Group will cease operations upon liquidation and as a result that its assets will be sold at discounted prices rather than at prices that might be achieved if they were sold on a going concern basis.

The impact of Russian sanctions

35. The UK Government, the US Government and the European Union have imposed sanctions on Russia including sanctions in response to Russia's invasion of Ukraine. The UK's sanctions have been extended to and apply in the Cayman Islands. The Company was required to consider the effects, and to modify the terms of the scheme to deal with issues arising because, of these sanctions. The Company had to consider whether any Noteholders were subject to these sanctions regimes (in particular the asset freezes imposed thereby) in order to decide whether sanctions prohibited the discharge of the Old Notes, the issue of the New Notes and the payment of fees to Noteholders. Furthermore, as the Company discovered, it was also necessary

to consider whether any Russian banks or custodians through whom Noteholders hold their Old Notes (which banks and custodians are participants in and hold accounts with the clearing systems) were subject to sanctions and the impact of sanctions on the operation of the clearing systems. Sanctions may have an impact on the means by which the clearing systems communicate with and distribute documents to their participants and account holders. This could extend to the process by which the Explanatory Statement and related documents are to be distributed to Noteholders, the blocking by the clearing systems of transfers of and dealings in the Old Notes and the process for obtaining voting instructions from Noteholders.

36. Where notes are held through a clearing system the identity of the beneficial holders of the notes will generally not be known to the issuer of the notes and may be impossible to ascertain otherwise than with the assistance of the clearing system. The issuer relies on the clearing systems to facilitate communications with (both to and from) noteholders. The issuer sends a notice or other communication to the clearing system who transmits it to its account holders, who in turn submit it to those who hold accounts with them. The clearing system will also transmit voting instructions back from the ultimate beneficial owner to the issuer. The issuer also depends on the clearing system to ensure the integrity of the voting process by blocking trading in and transfers of the notes during the period in which noteholders are voting. The issuer also depends on account holders in the clearing system to provide confirmation and verification that a person claiming to be a scheme creditor is a holder of notes and the amount of notes they hold. The position role of the clearing systems and their involvement in communications with Noteholders and the voting process is explained in Ms Yeung's First Affidavit.

37. The sanctions regimes I have identified are relevant to the Company's scheme for the following reasons:

(a). the Cayman Islands sanctions regime is engaged because the Company is a Cayman Islands exempted company. As a British Overseas Territory the UK's sanction regulations (The Russia (Sanctions) (EU Exit) Regulations 2019) are applied to and

in the Cayman Islands by The Russia (Sanctions) (Overseas Territories) Order 2020 (as amended).

(b). the United States sanctions regime is potentially engaged because the Old Notes are governed by New York law and denominated in US$.

(c). the European Union sanctions regime is engaged because the clearing systems through which the Old Notes are held are subject to certain sanctions imposed by the European Union. This includes, since March 2022, the blocking and suspension of settlement services provided by the clearing systems in respect of accounts held by certain Russian banks and financial intermediaries, including the National Settlement Depository (***NSD***) which is the central securities depository for the Russian Federation.

38. Consequently, the Company considered and took advice on the impact on the scheme process and the nature and scope of these sanction regimes. Mr Zhou dealt with this in his evidence. He summarised the position in Zhou 2 as follows (see also Zhou 1 at [86]):

> *"6. Various financial sanctions have been imposed in response to Russia's invasion of Ukraine. As a result of such sanctions, the Clearing Systems (through which the Old Notes are settled) have blocked all transfers with accounts held by certain Russian banks and financial intermediaries. These restrictions have affected approximately 6.65% of the Noteholders (by value) who acceded to the RSA.*
>
> *7. The Company has been advised that the Scheme does not constitute a breach of the applicable financial sanctions regimes of the United States, the United Kingdom, the Cayman Islands and the European Union.*
>
> *8. Nevertheless, it is a matter for all stakeholders in the Scheme …to take their own commercial position on sanctions."*

39. A summary of the steps taken and advice received by the Company was set out by Mr Lam in his Affidavit. He noted that the Company had made various inquiries, with the assistance of the Information Agent, to ascertain whether any Noteholders were subject to or affected by the sanctions regimes. The Company deduced, based on information provided by the clearing

systems and obtained from the process for obtaining Noteholders' agreement to accede to the RSA, that approximately 6.65% of those Noteholders who acceded to the RSA hold their Old Notes through the NSD. The clearing systems have blocked transfers from the accounts of NSD's held by them. Mr Lam explained (at [22]) that:

> *"I have been informed by D.F. King, the information agent engaged by the Company, that Euroclear and Clearstream, through which the 2022 Notes and the 2023 Notes are settled, have blocked all transfers with accounts held by certain Russian banks and financial intermediaries, including Russia's National Settlement Depositary (the **"NSD")** from March 2022 (prior to the time the RSA was entered into in April 2022). I have also been informed by D. F. King that approximately 6.65 per cent of the holders of the 2022 Notes and the 2023 Notes who acceded to the RSA did not submit instructions through Euroclear or Clearstream. The Company was provided with a lock-up report containing the identity those holders that had acceded to the RSA, including those who did not submit instructions through Euroclear or Clearstream (the **"Lock-up Report").** So far as the Company can determine, the Lock-up Report contains the identity of all the holders of the 2022 Notes and 2023 Notes that did not submit instructions through Euroclear or Clearstream (the **"Blocked Noteholders")**. The Company has informed us that it believes, after due inquiry with D.F. King, that all of its Blocked Noteholders hold their 2022 Notes and/or 2023 Notes through the account of the NSD. As a result of the transfer block imposed by Euroclear and Clearstream, the Company believes there has been no change to the list of Blocked Noteholders since the time the RSA was entered into."*

40. Accordingly, some Noteholders are unable to receive documents or give instructions via the clearing systems (I refer to all such Noteholders as the ***Blocked Noteholders***). It appears that the Blocked Noteholders are Noteholders who hold their Old Notes through accounts with NSD or with other custodians who themselves have accounts with NSD. Some of the Blocked Noteholders have, despite these difficulties, been contacted by the Company and acceded to and agreed to be by bound the RSA. I refer to these Noteholders as the ***RSA Blocked Noteholders***. There may be other Blocked Noteholders but the Company currently does not know whether any exist or if they do exist who they are.

41. 89.07% by value of all Noteholders have acceded to the RSA and, as I have said, the RSA Blocked Noteholders constitute approximately 6.65% of all such acceding Noteholders. The alternative method for contacting the RSA Blocked Noteholders was discussed in Zhou 1 at [53]. The PSL and other documents and notices were posted on the scheme website so that any

Blocked Noteholder could access them and were sent by email to each Blocked Noteholder whose email address was known to the Company or the Information Agent (see Zhou 1 at [102]).

42. Therefore, so far as the Company was able to ascertain, all the RSA Blocked Noteholders held their Old Notes through NSD and none of the Noteholders were themselves subject to the asset freezes or other provisions of the sanctions regimes. The Company had also, as Mr Lam confirmed, verified that none of the RSA Blocked Noteholders were listed or treated as designated or blocked persons under the regulations governing the relevant sanctions.

43. As a further precaution to ensure that no Noteholder who is prevented by sanctions from voting on, from having the Old Notes discharged by or from receiving the scheme consideration under the scheme, from doing so, the Company will require Scheme Creditors to execute a distribution confirmation deed. This contains various sanctions related confirmations to be made by and on behalf of each Scheme Creditor to confirm that they are not subject to sanctions. If any Scheme Creditor fails to give the required affirmative confirmations then Company will check that Scheme Creditor's details against the lists of designated sanctioned persons in the Cayman Islands, the United Kingdom, the European Union and the United States to ensure that the Scheme Creditor is not on a sanctioned person.

44. In these circumstances, the Company is satisfied that, based on and following what it considers to be reasonable inquiries, the promotion and implementation of the scheme will not give rise to a breach of any applicable sanctions regime.

The Company's approach before the hearing of the Convening Order Summons to voting by Blocked Noteholders

45. Thus the clearing systems' decision to suspend settlement services and communications through accounts held by NSD has had an impact on the process for obtaining the approval of and implementing the scheme. As a result, the Company has been unable to give notices to or obtain voting instructions from the Blocked Noteholders via the clearing systems in the usual way (or make payments or transfer the scheme consideration to Blocked Noteholders). In

addition, the Company's bank has advised that it cannot make direct payments to the Blocked Noteholders (see Zhou 1 at [58]) and the Information Agent has indicated (in light of comments made by the clearing systems) that it is unable to collect information and voting instructions from the Blocked Noteholders outside the clearing systems.

46. The difficulties associated with sanctions were not addressed prior to the RSA being signed because the Company was not aware of them at the time. The need to investigate and resolve these difficulties and to prepare amendments to the scheme documents caused delays in finalising the terms and structure of the scheme and were mainly responsible for the need to delay the hearing of the Convening Order Summons. The amendments that the Company decided were needed to address the problems caused by sanctions were summarised in the Additional PSL as follows (underlining added):

> *"5. Since the [PSL], the Scheme Company has been working through the mechanics of the Restructuring and, following discussions with Euroclear and Clearstream, it has been agreed that the new notes to be issued pursuant to the Restructuring (the **"New Notes")** can take a global form and will be on the same terms as the Term Sheet to the RSA, subject to the amendments shown in Appendix B to this PSL. The trustee of the New Notes will be an independent and professional provider of note trustee services that will be confirmed by the Scheme Company as soon as possible. The Scheme and Restructuring are also subject to the amendments set out below.*
>
> *6. First, the Scheme Consideration due to those persons or entities who hold the Old Notes through accounts held by certain Russian banks and financial intermediaries, including the [NSD], whose settlement services have been suspended and blocked by Euroclear and Clearstream, (the **"Blocked Scheme Creditors")** will need to be first held by a trustee in accordance with the terms of the Holding Period Trust Deed (the **"Holding Period Trustee")** on trust for the Blocked Scheme Creditors until the maturity date of the New Notes or the lifting of the applicable sanctions, whichever is earlier. If applicable sanctions are still in place upon the expiry of the Holding Period Trust, the Scheme Company will undertake in the Scheme to create a successor trust (the **"Successor Trust")** for Blocked Scheme Creditors' Scheme Consideration to be held until the earlier of (i) the expiry of the perpetuity period of the Successor Trust or (ii) the lifting of applicable sanctions, with the Blocked Scheme Creditors being given a reasonable period thereafter to recover their entitlement to the Scheme Consideration in accordance with the terms of the Successor Trust. The same will apply to the Instruction Fee, which is to be paid to those Blocked Scheme Creditors who*

are also Consenting Creditors. The Holding Period Trustee will be Ultrex Holdings (HK) Limited, a Hong Kong incorporated subsidiary of the Scheme Company.

7. *Further and on account of the same sanctions regulations of the European Union, the Information Agent is not able to collect information, including voting instructions, from the Blocked Scheme Creditors. As a result, the Blocked Scheme Creditors will not be permitted to attend or vote at the Scheme Meeting. However, Blocked Scheme Creditors who are also Consenting Creditors will still be eligible to receive the Instruction Fee, on the terms set out in paragraph 6 above.*

8. *Finally, as anticipated in the [PSL], the Scheme Company proposes an amendment to the RSA to extend the Longstop Date until 31 October 2022. The Scheme Company now also proposes a further amendment to the RSA to provide the Scheme Company with the right (at its sole discretion) to extend the Longstop Date to 30 November 2022 (together with the initial extension until 31 October 2022, the **"Longstop Date Extension")** should additional time be required to complete the Restructuring. Consenting Creditors who vote in favour of the Scheme will be treated as having voted in favour of the Longstop Date Extension."*

47. As this extract makes clear, the Company decided, in order to deal with the impact of sanctions, that the New Notes could be issued in global form; that the New Notes could not be issued to Blocked Noteholders but would need to be held on their behalf by a trustee and Blocked Noteholders could not and would not be allowed to vote at the scheme meeting.

48. The arrangements for voting at the scheme meeting were set out in the Explanatory Statement and the documents attached to it, including the solicitation package. These explained what steps needed to be taken by a Scheme Creditor in order to be entitled to attend and vote at the scheme meeting. In the case of intermediated securities such as the Old Notes held through clearing systems, as I have noted, the clearing systems play a critical role since they pass on documents to their account holders (who then forward the documents to sub-custodians and thereby to Noteholders), block dealings in the Old Notes while voting is taking place and transmit back voting instructions executed by such account holders on behalf of Noteholders.

49. The Company prepared a form of document to be used by account holders for the purpose of recording and evidencing the Old Notes held and the voting instructions given by Noteholders.

This is the Account Holder Letter which must be signed by an Account Holder, who is defined in the Scheme as a person who has an account with the clearing systems and is recorded in the books of the clearing systems as holding in that account a book-entry interest in the Old Notes. The Account Holder in the Account Holder Letter identifies and provides the name of the person who is the to be treated as the Scheme Creditor in respect of a specified amount of the Old Notes and on whose behalf the Account Holder is acting. This ensures that the ultimate beneficial owner of the relevant Old Notes can attend and vote at the Scheme Meeting in accordance with the "Looking through the Register" approach set out in the Practice Direction (see [4]). The Account Holder in the Account Holder Letter gives various confirmations (representations) and voting instructions on behalf of the Scheme Creditor and provision is made in the Account Holder Letter for the appointment of a proxy by the Scheme Creditor. Appendix 2 to the Account Holder Letter attaches a distribution confirmation deed (to which I made reference above) which all Scheme Creditors must execute in order to be entitled to receive and before receiving their share of the New Notes. Annex B to the distribution confirmation deed sets out various securities law and sanctions confirmations and undertakings to be given by the relevant Scheme Creditor. The sanctions confirmations, in summary, confirm that the Scheme Creditor and its affiliates and associates are not subject to sanctions or acting for Russia and will not use the proceeds of the New Notes to fund or facilitate the business of any sanctioned person or of Russia.

50. The Explanatory Statement and the solicitation package confirmed and expanded on what was said in the Additional PSL regarding the position of the Blocked Noteholders. Blocked Noteholders (including the RSA Blocked Noteholders) would be excluded from voting. The Company considered that this was necessary because the Blocked Noteholders could not receive documents or give voting instructions via the clearing systems and because the Information Agent was also unable to send documents to or receive voting instructions from them. However, to ensure that the RSA Blocked Noteholders (who had acceded to the RSA and thereby agreed to submit an Account Holder Letter and vote in favour of the Scheme at the scheme meeting, and who were only entitled to the Instruction Fee if they did so) would be financially no worse off by being unable to vote, the Company agreed to waive the RSA Blocked Noteholders' obligation to submit an Account Holder Letter and agreed that the RSA

Blocked Noteholders should nonetheless still be paid their Instruction Fee if the Scheme was approved and sanctioned. This would be paid to the Holding Period Trustee.

Third Parties

51. The Scheme also provides that by no later than the date of the sanction hearing, various non-parties to the Scheme will give undertakings to the Company and the Court to be bound by the terms of the Scheme. These include the Subsidiary Guarantors, the subsidiaries who will guarantee the New Notes, the Old Notes Trustee, the Depositary, the Old Notes Paying and Transfer Agent, the New Notes Trustee,, the New Notes Paying and Transfer Agent, the Holding Period Trustee, the person appointed to act as the supervisor of the Scheme and the Information Agent.

The issues arising on the convening hearing

52. It is now well settled that the function of the Court at a scheme convening hearing is not to consider the merits or fairness of the proposed scheme. These issues arise for consideration at the sanction hearing if the scheme is approved by the requisite majority of creditors. At the convening hearing the Court is concerned with a narrower range of issues when determining whether to give directions for the convening of the scheme meeting and if so what those directions should be. The issues for consideration are referred to in the Practice Direction (at [3]). They are now frequently summarised as covering three main areas, namely first, any issues which may arise as to the constitution of the meeting or meetings of creditors; secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme and thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it (which will usually include a review of the extent to which the scheme will be effective abroad in other relevant jurisdictions).

53. In addition, the Court will consider whether adequate notice has been given to creditors of the purpose and effect of the proposed scheme and of the convening hearing. The Practice Direction (at [3.1]), as noted above, states that:

> *"....practitioners should consider giving notice to persons affected by the scheme in cases where class or other issues referred to in paragraph 3.3 below arise and where it is practical to do so. Such notice should include a statement of the intention to promote the scheme and of its purpose, and also of the proposed composition of classes and of the intention to raise any issue as referred to in paragraph 3.3 below."*

54. Paragraph 3.3 of the Practice Direction states that:

> *"At the first hearing, the Court will also consider any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme."*

55. In this case, there is no issue as to jurisdiction. The Company is a Cayman Islands incorporated company and is therefore liable to be wound up under the Companies Act. Accordingly, pursuant to section 86(5) of the Companies Act the Court clearly has jurisdiction to convene a scheme meeting (and sanction a scheme) in respect of the Company (I discuss below the relevance of the connections to the jurisdiction for the purpose of the Court's exercise of its discretion to sanction the Scheme). The Scheme is also clearly an arrangement within the meaning of section 86 of the Companies Act.

56. Issues do however arise in relation to the following matters: the notice of the convening hearing; class composition; the extent to which there are doubts as to the international effectiveness of the Scheme; the adequacy of the disclosure in the Explanatory Statement and the directions to be given for the convening and conduct of the Scheme meeting. I deal with each of these issues in turn.

Notice of the convening hearing and amendments to the Scheme

57. As I have noted above, Scheme Creditors were first given notice of the proposed scheme on 5 August 2022 in the PSL. The PSL said that the convening hearing was listed on 5 September 2022. They were notified on 2 September 2022 that the date of the convening hearing had been put back to 15 September 2022. They were then notified shortly before the convening hearing,

on 12 September 2022, that certain amendments to the Scheme were to be made with respect to the treatment of the Blocked Noteholders and that the Company would seek to be granted the power to extend the Longstop Date to 30 November 2022.

58. The question of the timing and adequacy of notice to Scheme Creditors has been considered by a number of authorities. As Mr Justice Zacaroli noted in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) (***Lecta***) at [10] "*The essential question, as posed by Norris J in Re NN2 Newco Ltd [2019] EWHC 1917 (Ch), at [22]-[23] is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns*." As Mr Justice Meade said in *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) (***Nostrum***) at [25] "*the appropriate period of notice is a fact-sensitive matter*."

59. In this case, leaving to one side the position of the Blocked Noteholders, I am satisfied that adequate notice has been given. The basic terms of the Scheme were notified on and have not materially changed since 5 August 2022. The PSL in early August gave notice that the convening hearing would be in early September and the subsequent notice dated 2 September gave just under two weeks' notice of the revised hearing date (of 15 September). Furthermore, a substantial proportion of the Noteholders have been involved in the restructuring negotiations and have become parties to the RSA. The precise dates on which Noteholders acceded to the RSA have not been disclosed but it is clear that they did so some time in advance of the PSL. In the PSL the Company confirmed (at [39]) that Noteholders holding approximately 90% of the Old Notes had already by 5 August 2022 entered into or acceded to the RSA.

60. But what about the position of the Blocked Noteholders? Some of the Blocked Noteholders acceded to the RSA. They will have been fully informed of the terms of the Scheme. But there may be others who have not come forward. They cannot receive notices through the clearing systems and so must rely on making their own searches of the Company's website and the HKSE website. This may result in some delays in their picking up and finding out about developments. However, the PSL was uploaded to the Company's and the HKSE's website in

early August 2022 and therefore it is reasonable to expect that even these other Blocked Noteholders will have been aware of the restructuring proposals, the terms of the Scheme and the timetable for implementing it, including there being a convening hearing in early September. I had a concern that they will only have found out that the Company was proposing that they would not have the right to vote at the Scheme meeting a matter of days before the convening hearing. It is possible that some of the Blocked Noteholders may have wished to object to the Company's proposal and to have made representations at the convening hearing but were unable to do so in view of the very short notice given of the amendments. However, in this case I do not consider that there is a need to find or justification finding that the Company failed to give adequate notice to the Blocked Noteholders of important amendments to the Scheme so that the convening hearing should be adjourned. First, as I shall explain shortly, I directed at, and the Company has agreed following the convening hearing that Blocked Noteholders be permitted to vote at the Scheme meeting and that arrangements be made that will give them an opportunity to do so outside the clearing systems. Therefore, the main cause of concern that the Blocked Noteholders would have had has been dealt with. Secondly, and most importantly, the Blocked Noteholders will have an opportunity to raise any concerns and objections to sanction of the Scheme at the sanction hearing. In view of the very short notice they were given of the amendments to the Scheme affecting them, they will be given greater leeway than creditors would usually have to raise at the sanction hearing issues that could and should have been brought forward at the convening hearing. Thirdly, the Company is clearly under serious time pressure in view of the Alibaba deadline and an adjournment of the convening hearing would potentially have serious and damaging consequences for the restructuring and the interests of Noteholders.

Class composition

61. The Court's approach to considering the question of class composition was neatly summed up recently by Meade J in *Nostrum* as follows:

> *"The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC*

> *342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority."*

62. In this jurisdiction the test to be applied is also summarised in the Practice Direction (at [3.2]).

63. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members have if the scheme is implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

64. The Company submitted that in the present case, the Scheme Creditors should vote in a single class:

(a). the Court needed to consider the rights of Scheme Creditors under the Scheme and under the alternative to the Scheme. The Company submitted that the Scheme Creditors have the same rights and are treated equally under the Scheme and would have the same rights under the alternative to the Scheme.

(b). the Scheme Creditors will, subject to the two differences discussed below, be given identical legal rights under the Scheme. Once the restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of Scheme consideration pro rata to their existing claims. There is no relevant difference of treatment and therefore no difference in the rights acquired by Scheme Creditors under the Scheme.

(c). the Company also submitted that the evidence indicated that the alternative to the Scheme (the comparator) was an insolvent liquidation. If the Scheme is not approved the Company is very likely to enter into insolvent liquidation. In that situation, all Scheme Creditors would have the same legal rights against the Company. They would have unsecured claims ranking *pari passu*, and would receive (based on the Kroll liquidation analysis) the same estimated pro rata return of approximately 25.8% to 36.1%. The Company submitted that the Kroll liquidation analysis had been properly prepared and set out a realistic and reasonable estimate of the recoveries that Scheme Creditors would make if the Company and other members of the Group were forced in liquidation upon the failure of the Scheme.

65. The Company accepted that there were some differences of treatment between Scheme Creditors but that these differences were said to be immaterial and did not fracture the class:

(a). some, but not all, Scheme Creditors have signed the RSA and will receive the Instruction Fee although all Noteholders were offered the opportunity to accede to the RSA and receive the Instruction Fee.

(b). the Blocked Noteholders will not be able to receive the Scheme consideration on the Restructuring Effective Date, but instead the Scheme consideration to which the Blocked Noteholders would otherwise be entitled will be held on trust by the Holding Period Trustee, and subsequently the trustee of the Successor Trust until the applicable sanctions are lifted or for the duration of the two trusts. Furthermore, the Company's position at the convening hearing was that the Blocked Noteholders would not be entitled to attend or vote at the Scheme meeting.

66. As regards the fees, the Company argued that the fact that creditors had entered into a lock-up agreement did not give rise to a class issue. Rather, it was relevant to the exercise of the discretion of the Court when deciding whether to sanction a scheme (citing *Telewest Communications* [2004] BCC 342 at [53]). The Company argued that it was well-established that fees paid in connection with lock-up agreements of a type similar to the RSA (commonly

referred to as consent fees) did not fracture a class merely because some members of the class will not receive the fee (*In Re DX Holdings Ltd and other Companies* [2010] EWHC 1513 (Ch) at [7]). Two factors were important: first, whether or not the consent fee was offered to all scheme creditors and secondly, whether the consent fee was likely to exert any material influence on creditors' voting decisions (*Re Magyar Telecom* [2014] BCC 448 at [12]; *Re PrimaCom Holdings GmbH (No.1)* [2013] BCC 201 at [55]-[57] and *Re Privatbank* [2015] EWHC 3186 (Ch) at [30]). In this case, as already noted, the Instruction Fee had been offered to all Noteholders who acceded to the RSA by the Instruction Fee Deadline and all Noteholders were given the opportunity and sufficient time to accede to the RSA after the announcement of the RSA on 31 March 2022; the Instruction Fee was small, being only 1% of the outstanding principal amount of the Old Notes held by Noteholders who are Consenting Creditors; under the Scheme, the Noteholders were expected to receive 100% of the sums due under the Old Notes (albeit at a later date) but in a liquidation, the return was expected to be between 25.8% (low) and 36.1% (high) so that in these circumstances it was highly unlikely that a Noteholder who would otherwise have intended or planned to vote against the Scheme would have been persuaded and incentivised to vote in favour in order to obtain the Instruction Fee and a small additional 1% return.

67. As regards the treatment of the Blocked Noteholders:

(a). the Company noted that the Blocked Noteholders were receiving the same benefits under the Scheme as other Scheme Creditors (including, where they had acceded to the RSA, the Instruction Fee) but at a later date. The Company submitted that the delay in the Blocked Noteholders having access to their Scheme consideration was not unusual where parties to a scheme were subject to regulatory or other requirements that made it unlawful for them to receive the scheme consideration immediately. The Company relied on the following recent statement of the applicable principle by Mr Justice Marcus Smith in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch) (***Haya***) at [72(3)]:

> "*Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify their ability to*

> *receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J.*"

(b). as regards the prohibition on the Blocked Noteholders from attending or voting at the Scheme Meeting, the Company noted that the issue had arisen in *Nostrum*, another sanctions case, but had not affected Meade J's decision that it was appropriate to convene a scheme meeting of a single class of scheme creditors. Meade J had noted at [42] of his judgment, the Company said, that the scheme creditors affected by sanctions had signed a lock-up agreement prior to their being sanctioned, and this strongly indicated that they did not object to the scheme. The Company submitted that the restrictions on the Blocked Noteholders' right to attend and vote at the Scheme meeting, if relevant at all, related only to the fairness of the Scheme, which was not a question to be decided at the convening hearing. If the Blocked Noteholders had any objections to the Scheme, related to the effect of sanctions or the mechanisms put in place to deal with them, then they would be able to raise these objections at the sanction hearing.

68. I accept that the entitlement of Consenting Creditors to be paid the Instruction Fee does not require that they be put in a separate class. But in my view the proper approach to be followed by the Court was that set out by Marcus Smith J in *Haya*. He said this (at [72(4)] (underlining added):

*"Consent payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:*

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment."

69. The Court is required, when addressing the question of whether the class of Scheme Creditors has been fractured, to have regard to the rights given to Scheme Creditors pursuant to or in connection with the Scheme and consider whether there are material differences in those rights that prevent the Scheme Creditors from being able to consult together with a view to their common interest. It seems to me that rights have to be assessed at the date of the Scheme Meeting and include rights granted under documents that are entered into in connection with and for the purpose of obtaining creditor support for the Scheme. Accordingly, Consenting Creditors are to be treated as having different rights from other Scheme Creditors. But where all Scheme Creditors have been given an equal opportunity to obtain the consent fee (by acceding to a lockup agreement such as the RSA) and all Scheme Creditors are otherwise treated equally, the difference in rights is self-induced, in the sense that it arises from a choice made by those Scheme Creditors who have decided not to accede to the lockup agreement. Furthermore, the difference in rights is not of a kind that can reasonably be expected materially to affect Scheme Creditors' decision making at the Scheme Meeting, if the amount of the consent fee is so small that no reasonable and properly informed Scheme Creditor would be likely to change his/her vote (to vote in favour of the scheme) because of the entitlement to be paid the consent fee or be likely to regard that entitlement as having a substantial effect on his voting decision.

70. In the present case, all Scheme Creditors were invited to become parties to the RSA. This included the Blocked Noteholders, a significant number of whom acceded to the RSA. The Instruction Fee is an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline. The fee is not calculated by reference to the scheme consideration, as was the case in *Haya*, but that is not unusual or determinative. The amount of the Instruction Fee is not *de minimis* or trivial but it is not of such an amount that Scheme Creditors who are entitled to it can reasonably be expected to have a materially different view of the benefits of the Scheme over the alternative (an insolvent liquidation). There is no evidence to indicate, nor is the amount of the Instruction Fee inherently and of itself so large as to indicate, that a reasonable and properly informed Scheme Creditor would be likely to change his/her vote because of the entitlement to be paid the Instruction Fee or be likely to regard that entitlement as having a substantial effect on his voting decision. The Instruction Fee is being paid as an incentive for an early commitment to support the Scheme,

and represents reasonable compensation for a commitment to support the Scheme in advance of the Scheme meeting.

71. It is also worth noting that the payment of a consent fee may also be relevant to a different issue at the sanction stage. If fees are paid to secure the support of Scheme Creditors and have the effect of manipulating the vote at the Scheme Meeting, such fees can affect and undermine the integrity of the vote and be a ground for refusing to sanction the scheme. But no issue on this ground arises in this case.

72. I accept the Company's submissions with respect to the effect of the arrangements made in relation to the Blocked Noteholders' Scheme consideration. As pointed out by Marcus Smith J in *Haya* there is a fundamental distinction between a scheme conferring different rights on different groups of creditors and a scheme conferring the same rights on all creditors but with some creditors being unable to enjoy those rights (immediately) by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

Preventing Blocked Noteholders from attending or voting at the Scheme meeting

73. However, I do not accept that it would be permissible to deprive the Blocked Noteholders of the right to attend and vote at the Scheme meeting. While it might be said that by establishing arrangements and obtaining directions for the conduct of the Scheme meeting that prevented Blocked Noteholders (who were nonetheless Scheme Creditors whose rights were discharged and varied by the Scheme) from attending and voting, the Blocked Noteholders were being granted different rights from other Scheme Creditors under or in connection with the Scheme (so that they should be in a different class), it seems to me that this issue does not go to class composition. It goes to an even more fundamental point, namely the rights given by the Companies Act to parties to a scheme and to the fairness of the Scheme (leaving aside the

impact of the Bill of Rights). It therefore raises an issue which might lead the Court to refuse to sanction the Scheme at the sanction stage.

74. Blocked Noteholders are unable to receive documents and give voting instructions via the clearing systems. There is no evidence that attendance of any Blocked Noteholder or voting by a Blocked Noteholder at the Scheme meeting would be unlawful and a breach of relevant sanctions. If that were the case, the position would be different. It is just that the usual method of communicating with and obtaining instructions from the ultimate and unidentified holders of the Old Notes is not available because of the effect of sanctions and the action taken by the clearing systems in response to such sanctions.

75. Parties to a scheme of arrangement whose rights are to be varied or discharged thereby are entitled to attend and vote at the Scheme meeting. In my view, that is what is envisaged and required by the relevant provisions of the Companies Act.

76. Section 86 of the Companies Act states that:

> *"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them ... the Court may ... order a meeting of the creditors or class of creditors .... to be summoned in such manner as the Court directs.*
>
> *(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.*

77. The Court is to summon a meeting of all those creditors who are made parties to the scheme and such creditors are entitled to vote. The Blocked Noteholders are to be made parties to the Scheme. They must be summoned to the Scheme meeting and allowed to vote.

78. As I pointed out to the Company at the convening hearing, parties to a scheme must be given the right to vote on it and if there are practical problems which make it difficult for them or limit their ability to exercise that right and vote then the company must do (and must show that it has done) everything which it can reasonably be expected to do to give the scheme creditors concerned the opportunity to exercise the right to vote. In this case, it seemed to me that Blocked Noteholders could be given the opportunity to vote. They had already been notified of the Scheme and arrangements for the Scheme Meeting and could access the Scheme documents via the Company's scheme website and it seemed to me that it must also be possible for the Company to make arrangements, as had been done with the RSA, for Blocked Noteholders to submit voting instructions and evidence of their status as Noteholders outside the clearing systems to suitable persons identified and appointed by the Company for the purpose. After the convening hearing, and following consultations with its advisers and the clearing systems, the Company confirmed that indeed this was possible and the Scheme documents and the arrangements for attendance and voting at the Scheme meeting were amended to allow Blocked Noteholders to attend and vote at the meeting.

79. The Company relied on the judgment of Meade J in *Nostrum* and it is worth noting precisely what the learned judge had said on this topic in his judgment (underlining added):

> *"13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes. Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.*
>
> *14. The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring.*
>
> ....

> *42. Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.*
>
> *43. In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway."*

80. It therefore appears that in *Nostrum* the Sanctions Disqualified Persons were prohibited by sanctions from dealing with their notes. That appears to have meant that it would have been unlawful for them to vote at the scheme meeting. That is not the position in this case. In addition, it appears that all the Sanctions Disqualified Persons had agreed to support and be bound by the scheme, so that their assent did not need to be established or confirmed by a vote at the scheme meeting. I do not need in this case to decide whether the Court would be willing to sanction a scheme where creditors who are made parties to the scheme cannot vote. I would say however that I am not currently satisfied that this is an issue which only goes to fairness.

International effectiveness of the Scheme

81. At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose.

82. In this case the Old Notes are governed by New York law. While as a matter of Cayman law, the Scheme will be effective to discharge the Old Notes and Noteholders will be bound by the Scheme if sanctioned, the question arises as to whether the Scheme will be effective as a matter of New York law and whether Noteholders will be bound so that they cannot bring proceedings to enforce the Old Notes or to wind up the Company in another jurisdiction in which the Company has valuable assets or could be wound up (and whether there is a real risk that dissenting creditors would take such action). As I have noted, the Company is a holding company and its principal assets are the shares it holds in its subsidiaries, in particular Fangyou (a BVI incorporated company) and TM Home Limited (a Cayman incorporated company).

83. In order to ensure that the Scheme is binding and given effect as a matter of New York law, the Company intends to apply, if the Scheme is sanctioned, for relief under chapter 15 of the US Bankruptcy Code. As regards the prospects of obtaining and the effect of chapter 15 relief the Company relied on Judge Gropper's evidence. Judge Gropper, as I have noted, is a hugely experienced and highly respected former US Bankruptcy Judge for the Southern District of New York. He summarised his evidence at [9] and [10] of his Affidavit as follows:

> *"9. I have been asked to state whether in my opinion (i) a United States Bankruptcy Court with appropriate jurisdiction, including the United States Bankruptcy Court for the Southern District of New York, would recognize the Cayman Islands' judicial process of obtaining approval of the Scheme (the "**Proceeding**") as a foreign main proceeding under chapter 15; (ii) relief could be obtained to ensure that the Scheme would be enforced in the United States, given the Indentures are governed by New York law, and in accordance with such principles, a creditor would or could be prevented from bringing legal proceedings in the United States against the Company in contravention of the terms of the Scheme; (iii) the grant of appropriate relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes affected by the Scheme for the purposes of U.S federal and state law; and (iv) the third-party waivers and releases and exculpation provisions set out in substantially the same form as the draft Scheme would be enforceable in the United States. I have also been asked to address whether the Cayman Islands would be recognized as the center of main interests ("**COMI**") of the Company such that the Proceeding would be*

recognized as a "foreign main" proceeding under chapter 15 of the Bankruptcy Code.

10. Based on the facts provided in the documents identified below and the analysis set forth herein, and subject to the qualifications stated, it is my opinion that (i) the Cayman Proceeding would be recognized as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code; (ii) the Scheme will be effective in the United States in practice to bind Scheme Creditors in relation to the variation of their rights; (iii) relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes and related guarantees for the purposes of U.S. Federal and State law; and (iv) the third-party waivers, releases and exculpation provisions set out in substantially the same form as the draft Scheme will be enforceable in the United States. I can also confirm that principles of international comity remain important considerations for courts in the United States when considering applications to give effect in the United States to foreign proceedings."

84. Judge Gropper's Affidavit sets out a fully reasoned analysis with reference to relevant authorities to support his conclusions. He dealt in depth with the test under the chapter 15 jurisprudence for determining COMI and said this at [24]:

"Based on the statute as construed by the cases discussed above, it is my opinion that the Proceeding in the Cayman Islands would be recognized by a U.S. bankruptcy court as a foreign main proceeding. As stated above, section 1516(c) of chapter 15 provides that the place of registration is presumed to be the debtor's COMI, and in the instant case we must start with the presumption that the Cayman Islands is the COMI. This presumption may be rebutted, but here there would be insufficient grounds to do so. The Cayman Islands is undoubtedly the "center of the Company's interests", taking into account the words of the statute as written. Indeed, the Company's future as an entity depends on its efforts to restructure debt that is in default. These efforts are all centered in the Cayman Islands - in the petition to this Court to convene a Scheme Meeting, in that the Scheme Meeting will take place in the Cayman Islands, and in this Court sanctioning the Scheme. I am informed that noteholders who wish to contact the Company in relation to the restructuring and/or the Scheme will be informed through a practice statement letter that they may do so by contacting A&M, a service provider located in the Cayman Islands by: (i) writing to a Cayman Islands address; (ii) sending an email to a Cayman Islands email address; or (iii) by telephoning A&M on a Cayman Islands telephone number. In any event, by the date of the filing of the chapter 15 petition, which is the critical date for chapter 15 purposes, the Company's very existence will depend on activities centered in the Cayman Islands."

85. Judge Gropper relied in particular on the decision of the Second Circuit Court of Appeals in *Morning Mist Holdings Ltd v Kris* 714 F.3d 127 (2d Cir. 2013) (***Morning Mist***) and noted that his conclusions were strongly supported by the recent decision of Judge Glenn, the Chief Judge of the Bankruptcy Court for the Southern District of New York, in *In re Modern Land (China) Co., Ltd* 2022 WL 2794014 (Bankr. S.D.N.Y, July 22, 2022) ("***Modern Land***"). He said this about that decision:

> *"My conclusions as set forth above are strongly supported by the Modern Land decision of Judge Glenn discussed above. In a case involving a company with many relevant similarities to the Company here, the Court held that recognition as a foreign main proceeding would be consistent with the goals of chapter 15, with creditors' expectations and with choice of law principles, among other things. The Court also stressed that the judicial role in that proceeding, like the instant proceeding, was prevalent and that it would not imply the requirement that provisional liquidators or their equivalent would be required in order to meet the standards for recognition. 2022 WL 27940 at *13-14.*

86. In Judge Gropper's opinion, the third party releases in the Scheme would not preclude the US Bankruptcy Court from granting relief under chapter 15 and that the relief which would be granted would include both recognition and enforcement of the discharge effected by the Scheme. The US Bankruptcy Court would "*give full force and effect*" to the provisions of the Scheme.

87. Judge Gropper also referred to the judgment of Mr Justice Harris in Hong Kong in *In re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 16896 (***Rare Earth***). *Rare Earth* was a case involving a Hong Kong scheme in respect of a company incorporated in Bermuda which sought to discharge debt governed by Hong Kong law. But the learned judge made some comments regarding the approach of the Hong Kong courts to the effect and recognition in Hong Kong of chapter 15 relief granted by US Bankruptcy Courts in respect of schemes sanctioned in "*offshore jurisdictions*" which discharged New York law debt. Mr Justice Harris said as follows:

> *"31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under Chapter 15 and granting by the relevant Bankruptcy Court of ancillary relief which prohibited*

enforcement in the United States. As the offshore jurisdictions apply the Rule in Gibbs, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of China Oil.

32. *A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in Gibbs requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law. In the insolvency context in the United States this is I understand is achieved under Chapter 11 of United States Bankruptcy Code. This is explained by Glenn J (who dealt with the Chapter 15 application in Winsway) in his judgment in In re Agrokor d.d. In pages 184 to 185 Glenn J explains the position as follows:*

> *"The Supreme Court concluded in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an in rem proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an in rem proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"*

33. *As a matter of United States law a confirmed Chapter 11 plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under Chapter 15 does not operate as a discharge and that Glenn J acknowledges this.*

34. *On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to*

recognise was governed by English law and the arrangement arose under Croatia's Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia.

> *"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the Gibbs rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law. That would be unfortunate, indeed."*

35. *The material distinction between Chapter 11 and Chapter 15 proceedings is explained on page 187:*

> *"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property that is located within the territorial jurisdiction of the United States. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. See, e.g., Atlas Shipping, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. Id."* *(emphasis added)*

36. *It is clear from this passage that recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under Chapter 11 which purports to have*

> *worldwide effect, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.*
>
> *37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which Gibbs is concerned) and a court within its jurisdiction recognising, pursuant to a process such as Chapter 15, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and Chapter 15 recognition will not protect them.*

88. Judge Gropper noted that Judge Glenn in *Modern Land* had considered that Mr Justice Harris' summary of applicable US law had not been correct. Judge Gropper made the following comments in his Affidavit (at [19]) (underlining added):

> *"In regard to these issues, mention should be made of the recent decision of a Hong Kong Court in a case captioned In the Matter of Rare Earth Magnesium Technology Group Holdings Limited, [2022] HKCFI 1686. There, the Court, taking it upon itself to construe United States law and quoting from the decision in the Agrokor case cited above, stated in dictum that it did not believe that an order under chapter 15 recognizing and enforcing a foreign proceeding discharges the underlying debt. With respect, I believe the Court's discussion of chapter 15 and its effect erred, and Judge Glenn, the author of the decision in Agrokor, stated his disagreement with the Hong Kong decision in his recent decision in Modern Land. Judge Glenn said that the Hong Kong Court had misinterpreted his Agrokor decision and, in the plainest terms, said:*

> *"To be clear in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes [in Modern land's Cayman scheme] is "binding and effective." 2022 WL 2794014 at *5 (footnote omitted)."*
>
> *Therefore, as stated above, it is my opinion that an order of a court in a foreign insolvency proceeding under chapter 15 that meets the requirements of chapter 15 will be enforced in the United States and the relief granted will have the effect of discharging the debt and releasing guarantee claims against the Old Notes Subsidiary Guarantors for U.S. purposes, regardless of whether the debt is governed by U.S. law. If a court in Hong Kong or elsewhere refuses, for whatever reason, to give similar effect to a foreign scheme or liquidation, it will do so for its own reasons, not because of any issue arising under chapter 15 or other provision of U.S. law."*

89. The Company also relied on an opinion on Hong Kong law provided by Mr Ian De Witt, a partner in Tanner De Witt and a solicitor qualified in Hong Kong. His opinion dated 19 August 2022 was exhibited to Zhou 1. Mr De Witt opined (as I understood it) that if the Old Notes were treated as discharged in accordance with New York law, they would be treated as discharged as a matter of Hong Kong law. He relied on Judge Gropper's evidence for the proposition that the relief to be granted on the Company's application under chapter 15 would discharge the debts under the Old Notes and the obligations of the Subsidiary Guarantors and that therefore that such discharge would also be given effect under the law of Hong Kong as a result of the well-known rule in *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (***Gibbs***). As regards *Rare Earth*, Mr De Witt noted that Mr Justice Harris' "*analysis [did] not accord with the opinion given by [Judge] Gropper*" and that:

> *"In any event, the potential impact of Harris J's decision in respect of the effect of a Chapter 15 recognition is minimal as his statements are obiter and non-binding. This is because:*
>
> *(a). The debts compromised by the scheme of arrangement in [Rare Earth] did not concern any United States governed law debts….. It is unclear [how the effect of chapter 15 relief in a case involving the discharge of New York law debts by a foreign scheme] arose in the written decision.*
>
> *(b). It is not apparent from the written decision that his Lordship considered any expert opinion on New York law.*

> *(c). The sanction of the scheme of arrangement in [Rare Earth] was unopposed, thus any expert opinion adduced by the scheme company would not have been challenged."*

90. At the convening hearing I asked where the restructuring negotiations had taken place and Mr Herrod confirmed that they had largely taken place in the PRC including Hong Kong. I then asked whether this was a fact that Judge Gropper had considered and whether this might be relevant to his assessment of the location of the Company's COMI. Mr Herrod said that this was a matter that the Company would raise with Judge Gropper in advance of the sanction hearing.

91. Further, the Company also relied on the advice it had received from Maples' BVI attorneys as to applicable BVI law. In an email dated 5 August 2022, Mr Matthew Freeman, a partner of Maples in the BVI, noted that two of the Subsidiary Guarantors were incorporated in the BVI and that their guarantees were governed by New York law. He confirmed that in his opinion if sums due under the Old Notes and liability under the guarantees were discharged in accordance with New York law, then such discharge would be given effect in the BVI.

92. In view of these opinions and advice, I was satisfied that there were good grounds for concluding (and that it was reasonably likely) that the discharge effected by the Scheme would be given effect and be binding on Scheme Creditors under and as matter of New York law. It appeared that the Company would be seeking, following and in the event of the sanction of the Scheme, an order from the Bankruptcy Court for the Southern District of New York under chapter 15 (or pursuant to New York private international law applying comity) to the effect that the Released Claims would be treated as discharged under and as a matter of New York law and that there were good grounds for concluding (and that it was reasonably likely), based on Judge Gropper's evidence and recent authority (*Modern Land*), that the New York court would grant such relief.

93. It also appeared that there were good grounds for concluding (and that it was reasonably likely) that, applying the chapter 15 jurisprudence to the facts of the present case, the Company's COMI is to be treated in the Cayman Islands at the date of the filing of its chapter 15 petition.

94. I was also satisfied that in these circumstances, and applying *Gibbs*, the discharge under and resulting from the Scheme should be given effect and recognised as a matter of Hong Kong and BVI law. However, I recognise and respect the fact that Mr Justice Harris has taken a different view of the effect of relief under chapter 15 and do not disregard the importance of the *dicta* in his judgment in *Rare Earth*. It seemed to me that Mr De Witt had rather too heavily discounted the significance of those *dicta*. Nonetheless, in view of the clear decision of Judge Glenn in *Modern Land* and the strong opinion of Judge Gropper in his evidence in this case, I concluded that there were good grounds for concluding that a properly drafted order (which confirmed that the relevant debt was treated as discharged by the Scheme) did mean that under and as a matter of the law of New York the Released Claims would for all purposes be regarded as discharged and extinguished by the Scheme so that for the purpose of the rule in *Gibbs* the Released Claims would treated as having been discharged and extinguished in accordance with, as a matter of and under their proper law. I also concluded that Mr Justice Harris may wish (of course recognising that this is a matter entirely for him and the Hong Kong court) at least to review and revisit his analysis of the effect of relief under chapter 15 (with the benefit of Judge Glenn's opinion and in light of the terms of the orders made by the US court) and that, while the issue was likely to come before and require further consideration by the Hong Kong courts, the evidence before me was that the discharge of the Old Notes and the liabilities of the Subsidiary Guarantors under the Scheme would be effective in and under New York law and therefore should be given effect in Hong Kong law (once again recognising that it is for the Hong Kong court to determine questions of Hong Kong law and not for this court to do so). I can see that it might be the case that the Hong Kong court would wish to form its own view and be entitled to make its own decision as to the location of the Company's COMI when deciding whether itself to give common law assistance to Cayman appointed provisional liquidators or liquidators but it was not argued nor does it seem to me to be right to say that when the *Gibbs* rule is being applied the Hong Kong court can or should go behind and mount a collateral attack on the New York court's finding with respect to COMI and its order granting chapter 15 relief.

95. The position is the same as a matter of BVI law, which is clearly of considerable practical significance in this case since the Company has assets (shares in a major subsidiary) and two of the Subsidiary Guarantors are incorporated there.

Adequacy of the Explanatory Statement

96. I was generally satisfied that the Explanatory Statement provided adequate disclosure to Scheme Creditors. However, there were three issues which arose.

97. First, I noted that the Explanatory Statement did not provide Scheme Creditors with any details of the costs of the restructuring and Scheme process. It seemed to me that Scheme Creditors should have this information and I directed that it be provided.

98. Second, there was an issue whether the financial information contained or referred to in the Explanatory Statement was sufficiently up to date or could be considered to be stale, and whether audited financial statements should have been included. I have explained above the financial information which the Company included and referred to and the Company's explanation as to why it had not been possible or practicable to include audited financial statements or more recent financial information. I was satisfied that in the circumstances the financial information was sufficiently up to date to allow Scheme Creditors to make a properly informed decision as to how to vote on the Scheme and that the Company's explanations as to why audited financial statements were not available was reasonable.

99. Thirdly, there was an issue as to whether Kroll's liquidation analysis had been properly prepared and was sufficiently reliable. As I have noted, Kroll's liquidation analysis was not based on a company by company analysis of the likely outcome of a liquidation of each company. Instead Kroll adopted what they described as a segmented based approach under which Kroll put the Group's over three hundred companies into six sub-groups (segments) and aggregated the assets and liabilities of each sub-group (segment) for the purpose of estimating their estimate of the return to creditors of each company in the sub-group in the event of a liquidation of all the companies concerned. Kroll assumed that it was sufficient to give Scheme Creditors an analysis that based estimated returns for creditors of each company in a sub-group

on the *pro rata* amount that all creditors of all companies in the sub-group would receive if the proceeds from realisation of all assets of all such companies were aggregated and distributed among all such creditors to discharge the aggregate of all liabilities of all such companies. It appears that membership of the sub-groups was based on the companies concerned being part of the same business sector. I did have some concerns about this methodology which did not appear to be based on the impact of intercompany indebtedness between particular companies (a company in one segment might owe or be owed large sums by a company in another segment so that value would flow from or to such companies otherwise than through the segment) but concluded that it was not wholly unreasonable to assess the impact of the liquidation of a company by reference to and with the effect of a liquidation of other companies operating in the same business sector and that Kroll's approach was reasonable having regard to the number of companies concerned and the need to establish a workable and cost-effective methodology for the liquidation analysis.

Directions for the convening and conduct of the Scheme meeting

100. I was satisfied that the arrangements for convening and conducting the Scheme meeting were satisfactory. The Scheme meeting was to take place in the Cayman Islands at a time and in a manner that would allow Scheme Creditors from across the world, in particular from Asia, the UK and the US east coast to participate. Scheme Creditors were able to attend and vote at the Scheme Meeting by video conference using dial-in details which could be obtained on request from the Information Agent. Scheme Creditors who attended via video conference would be able to see and hear and be seen and heard by other Scheme Creditors attending the Scheme meeting so as so ensure that there would be an adequate "*coming together*" of Scheme Creditors and an ability for them to consult among themselves (see Trower J's judgment in *Re Castle Trust Direct PLC* [2021] BCC 1 at [42]). At the convening hearing I indicated that it would be necessary for the chairperson at the Scheme meeting to confirm in his report to the Court on the outcome of the Scheme meeting for the purpose of the sanction hearing that the technology had worked properly and that Scheme Creditors were in fact able to see and hear each other and consult in this way.

101. As I have noted, following the convening hearing the Convening Order was amended to allow the Blocked Noteholders to attend and vote at the Scheme meeting. A form of voting form (the ***Blocked Scheme Creditor Voting Form***) was prepared for use by the Blocked Noteholders and the Convening Order provided that votes cast by Blocked Noteholders using the Blocked Scheme Creditor Voting Form were to be counted by the chairperson at the Scheme meeting.

The outcome of the Scheme meeting

102. The Scheme meeting was duly held on 2 November 2022 in accordance with the terms of the Convening Order and the Scheme Creditors in attendance at the Scheme Meeting overwhelmingly approved the Scheme. Of those Scheme Creditors present and voting at the Scheme Meeting, 99.96% by value and 99.87% by number voted in favour of the Scheme. In particular, of those Blocked Noteholders present and voting at the Scheme meeting, all Blocked Noteholders voted in favour of the Scheme and none voted against. All of the Blocked Noteholders who voted in favour of the Scheme were Consenting Creditors.

Further amendment to the Scheme

103. Shortly before the sanction hearing, the Company filed Zhou 6. In that affirmation, Mr Zhou explained that Deutsche Bank AG, Hong Kong, who has been engaged to act as the New Depository, had recently informed the Company that it would not sign the deed of undertaking on the basis that it had no direct contact with the Company. Its role and relationship was only with the clearing systems. Mr Zhou said that Deutsche Bank AG had no obligations under the Scheme and so did not need to be party to the deed of undertaking. Nonetheless, it had been necessary to amend the form of deed of undertaking to remove Deutsche Bank AG as a party and to make minor amendments to the Scheme to reflect the fact that Deutsche Bank AG would not be a party. The Company indicated that it would be seeking the sanction of the Scheme with this amendment and submitted, and I accept, that it had the power to make this minor change pursuant to clause 17 of the Scheme.

Longstop Date

104. At the sanction hearing, the Company confirmed that it would be exercising the power under clause 10.1(a) of the Scheme of extending the Longstop Date to 14 December 2022 and would, if the Scheme was sanctioned, give notice to this effect to Scheme Creditors in the Scheme Effective Notice.

The issues arising at the sanction hearing

105. In my judgment in *Re Freeman FinTech Corporation Ltd* (unreported, 4 February 2021) (***Freeman FinTech***) I set out and summarised the law regarding the function of, and the approach to be adopted by, the Court at the sanction hearing (see [16] – [17]). I also set out the approach to be taken where there were issues as to the international effectiveness of the scheme (see [31]). I also note that the approach to be adopted and issues to be considered by the Court at the sanction hearing were well summarised even more recently by Mellor J when sanctioning the scheme in *Re Nostrum* [2022] EWHC 2249 (Ch) at [15] – [18].

106. The issues to be considered can be summarised as follows:

(a). first, that the Company has complied with the terms of the Convening Order and the Further Convening Order in convening the Scheme meeting and that the requisite statutory majorities under section 86(2) of the Companies Act were achieved at the Scheme meeting (***Issue One***).

(b). secondly, that the class of Scheme Creditors was fairly and adequately represented by those who attended the Scheme meeting and that the statutory majorities were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent (***Issue Two***).

(c). thirdly, that the Scheme is a scheme of arrangement that is fair, in the sense that an intelligent and honest person, being a member of the class concerned and acting in

respect of his/her interest, might reasonably approve of it and that, as a matter of its residual discretion, the Court should sanction the Scheme (***Issue Three***).

(d). fourthly, that there is no other blot or defect in the Scheme which would warrant the Court refusing to sanction the Scheme (***Issue Four***).

(e). fifthly, in the case of a scheme with an international element, that the Court will not be acting in vain if it sanctions the Scheme. This requires consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions. This was, as I have noted above, addressed in a preliminary way without the benefit of the results of the Scheme Meeting, at the convening hearing but needs to be reviewed again at the sanction stage (***Issue Five***).

Issue One

107. As regards Issue 1, I am satisfied that the additional evidence filed by the Company in advance of the sanction hearing demonstrates that the Scheme meeting was convened and conducted in accordance with the Convening Order and the Further Convening Order (and was quorate). I note in particular the evidence in Zhang 1 regarding the effectiveness of the video conference facilities. All Scheme Creditors who could not, or did not, wish to attend at the Scheme meeting venue including the Blocked Noteholders who were invited to vote by lodging duly completed Blocked Scheme Creditor Voting Forms and to attend the Scheme meeting, provided that they were able to have their identity/authority, status as Noteholder, and the size of their note holding verified by the Company prior to the Scheme Meeting. CICC provided and hosted the video conference facilities for the Scheme meeting using Zoom. One Scheme Creditor attended the Scheme meeting by video conference and no Blocked Noteholders indicated they would like to attend or attended the Scheme meeting. The person who joined via video conference could see and hear the proceedings at the Scheme Meeting venue, they could see each other and be seen by those at the Scheme Meeting venue and had the opportunity to ask questions or express opinions by using the chat function.

Issue Two

108. The Court is bound to assess whether the vote at the Scheme meeting was representative of the class of Scheme Creditors. In *Re BTR plc* [2000] 1 BCLC 740 at 747 Chadwick LJ stated that:

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged."*

109. Similarly, in *Re The Scottish Lion Insurance Co Ltd* [2010] SCLR 107 at [37] Lord Glennie stated that:

> *"[T]he grounds upon which an opposing creditor may seek to oppose the scheme are clearly wider than perversity, dishonesty and irrationality. The opposing creditor is entitled to seek to prove that the voting was unfair, unrepresentative or affected by special interests."*

110. I accept the Company's submission that in this case there is no reason to believe, and no evidence, that the views of those Scheme Creditors who voted at the Scheme meeting do not fairly represent the views of the Scheme Creditors as a whole. Neither is there any reason to believe or evidence that they were not acting *bona fide* or that they were being coerced.

Issue Three

111. The Court must also be satisfied that the proposed Scheme is fair such that as a matter of discretion it is appropriate to sanction the Scheme. Putting the same point another way, the

Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

112. In *Re SPhinX Group of Companies*, [2014] (2) CILR 152 at [3] Chief Justice Smellie summarised the role of the Court at the sanction hearing as follows:

> *"At the third stage of the process, it is apparent that the role of the court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the "fairness" of the proposed scheme, the task of the court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the court."*

113. In applying this test, the Court is required to consider the relevant comparator to the Scheme. In the present case, the evidence shows that the Scheme is likely to produce or at least facilitate a considerably better recovery for Scheme Creditors than a liquidation.

114. It seems to me that the Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The commercial purpose of the Scheme was clearly explained in the Explanatory Statement and it appears that the Scheme offers material benefits to Scheme Creditors. Furthermore, Scheme Creditors have, both as regards the terms of and the procedure of voting on the Scheme, as a result of the directions given to permit Blocked Noteholders to attend and vote at the Scheme meeting, been treated fairly and I see nothing unfair in the Company agreeing to pay the Instruction Fee only to Consenting Creditors.

115. I also accept the Company's submission that the arrangements relating to the Holding Period Trust and, potentially, the Successor Trust for Blocked Noteholders are necessary, reasonable and fair in the circumstances. As the Company pointed out, the structure it adopted mirrors and responds to the block currently imposed by the clearing systems. The position of the Blocked Noteholders under the Scheme is no different from their position as holders of the Old Notes in that they are unable to receive consideration until that block is lifted. Furthermore, the Company has not arbitrarily imposed this structure on the Blocked Noteholders but explored,

under considerable time pressure, a number of alternatives. The Company will be able to review the status of sanctions and the position of Blocked Noteholders after three years at the end of the Holding Period Trust and before setting up and if required transferring the Blocked Noteholders' Scheme consideration to the Successor Trust. I also note that none of the Blocked Noteholders have objected to these arrangements.

Issue Four

116. The Court must also be satisfied that there is no blot on or defect in the Scheme that would warrant refusal to sanction the Scheme. I accept the Company's submission that no question of a blot or other defect arises in this case.

Issue Five

117. In *Freeman FinTech* I explained at [31] the Court's approach when considering the international effectiveness issue:

> "31. *In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:*
>
> *(a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.*
>
> *(b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent*

of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to Sompo Japan (underlining added):

"In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain."

(c). the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in Garuda (2001 and WL 1171948, which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In Sompo Japan, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in China

> *Lumena, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in Garuda.*
>
> *(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in Garuda."*

118. I have already discussed at some length the approach I took to this issue at the convening hearing. But something further briefly needs to be said on the point since the Company filed further evidence from Judge Gropper after the convening hearing, the outcome of the Scheme meeting is now known and the issue falls to be reconsidered and assessed in the context of the exercise of the Court's discretion to sanction the Scheme.

119. On 28 September 2022 Judge Gropper wrote a letter to the Company, which was adduced into evidence by being exhibited to Zhou 5. In that letter Judge Gropper confirmed that he had been told that the restructuring negotiations leading to the proposed Scheme had taken place in the PRC including Hong Kong and that his opinions and conclusions set out in his Affidavit were unaffected. He noted, *inter alia*, that in *Morning Mist* the critical factor confirming that BVI was the COMI of the company was the fact that the scheme was considered and sanctioned there. Judge Gropper also noted the criticisms of the decision by Professor Jay Westbrook, a well–respected academic and bankruptcy law specialist from the University of Texas, but confirmed his view that *Modern Land* was correctly decided and that in his view Professor Westbrook's views were unpersuasive.

120. Accordingly, Judge Gropper has strongly reiterated his opinion and the analysis of the applicable law that I applied for the purpose of the convening hearing remains unaffected. Furthermore, the very substantial vote in favour of the Scheme by Noteholders and the

complete absence of any opposition to the Scheme means that, applying the test I set out in *Freeman FinTech*, it must be right to conclude that the risk of a successful challenge to the effectiveness is very low. There is a risk that the very small percentage of Noteholders who did not vote in favour of the Scheme could, even assuming that the New York Bankruptcy Judge grants the relief sought under chapter 15, seek to take action in Hong Kong but it is far from clear that they would be entitled to do so as a matter of law or that any action would prevent the Scheme being implemented. In any event, there is no evidence that any such Noteholders are considering or would wish to do so.

121. There is of course the risk that New York Bankruptcy Judge will decline to grant the relief sought by the Company. It is a condition to the effectiveness of the Scheme that such relief is granted. I was told at the sanction hearing that the Company's chapter 15 petition is due to be heard by The Honorable John P. Mastando III on Monday (14 November). It will, obviously, be a matter for Judge Mastando. The Company pointed out at the sanction hearing that this condition is one that it is permitted to waive and that should the relief it seeks not be granted it will need to consider its position and whether to waive the condition. This would be a possibility in this case in view of the very high level of support that the Scheme has obtained. Of course, in this event, the Company has the ability under the Scheme to apply for directions from this Court (see clause 19 of the Scheme). As I noted in *Re China Agrotech* [2019 2 CILR 356] at [35] the Court has the power to sanction a scheme subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date (following the reasoning of Henderson, J. in *Lombard Medical* [2014] EWHC 2457 (Ch)) and will do so where those conditions can reasonably be expected to be satisfied within a reasonably short time. I was satisfied in the present case that it was reasonably likely that the chapter 15 petition would be granted and in any event that since it was due to be heard very shortly after the sanction hearing any difficulties would emerge and could be dealt with promptly; that the conditions that needed to be satisfied in order to allow the Restructuring Effective Date to occur were administrative or otherwise likely to occur and that the amended Longstop Date was in the near future and reasonable in the circumstances.

122. I have also considered, in the context of the exercise of my discretion to sanction the Scheme, whether there are any grounds for concluding that the use of a Cayman scheme in the present case represents an abuse of process or improper forum shopping, having regard in particular to the fact that the debt subject to the Scheme is governed by New York law and the Company's strong connections with Hong Kong and the PRC. I note that no Scheme Creditor has raised any objection to a Scheme being promoted in this jurisdiction; in fact the position is the reverse. Virtually all the Noteholders have supported and voted in favour of the Scheme. In those circumstances, and generally in the circumstances of this case, it seems to me that the application for a scheme in this jurisdiction was proper and justifiable. I must say that I sometimes have a concern that when courts seek to be overly prescriptive as to when and whether it is legitimate for foreign courts to exercise jurisdiction in respect of cross-border restructuring or insolvency proceedings they do so without regard to whether creditors have objections. It seems to me that we need to adopt a flexible approach that gives companies the opportunity properly to make use of procedures in jurisdictions with which they have a sufficient and appropriate connection, where that is done in the interests of and with the support of creditors and adopt a case by case and fact sensitive basis that involves the rejection of attempts by companies to use foreign proceedings which harm or are objected to by creditors but not to intervene where they do not.

The Hon. Mr Justice Segal

Judge of the Grand Court, Cayman Islands

17 November 2022

THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NUMBER: FSD 51 OF 2021 (NSJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF MIDWAY RESOURCES INTERNATIONAL

ON THE PAPERS

Before:	The Hon. Justice Segal
Further evidence/submissions:	17, 23 and 24 March, 2021
Draft Judgment Circulated:	25 March, 2021
Judgment Delivered:	30 March, 2021

HEADNOTE

Application for the appointment of provisional liquidators under section 104(3) of the Companies Act (2021 Revision) on a light touch basis – the evidence that the Company needs to file concerning the proposed compromise or arrangement – the need to provide evidence of the views of creditors – 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.

JUDGMENT

Introduction

1. This is my judgment on the application (the ***Application***) of Midway Resources International (the ***Company***), a Cayman Islands company, for the appointment of provisional liquidators (***JPLs***). The principal evidence in support of the Application was given by Mr Peter Worthington, a director and CEO of the Company.

2. The application was initially heard on 15 March 2021 (the ***Hearing***). Ms Shelley White of Walkers appeared on behalf of the Company. For the reasons given below, the hearing was adjourned to enable the Company to provide further evidence and to give further notices to creditors. Those notices were given on 15 March and that further evidence was filed on 17 March.

3. One creditor, Sakson Drilling & Oil Services DMCC (***Sakson***), whose claims were disputed by the Company but who is potentially owed a substantial sum, in response to the notice that I directed be given, indicated that it wished to make representations to and may wish to appear before the Court on any further hearing and another creditor, in a similar position, indicated that it was considering making representations to the Court. I therefore directed that a further hearing of the Application be listed for 25 March at 9am and that any notice of an intention to appear and any written submissions or representations to the Court (together with any evidence) must be filed with the Court and served on Walkers (by email) by 4pm Cayman time on 23 March. I also said that in the event that no such notices and submissions or representations were filed, I would be prepared to deal with the Application on the papers (unless there were issues that required discussion at the hearing with respect to the form of the order) and in that event the new hearing date would be vacated.

4. On 23 March 2021, Sakson sent to Walkers a document headed "*Written Submissions of [Sakson]*" (the ***Sakson Written Submissions***) which was signed by a director of Sakson (which appears to be a corporation incorporated in Dubai), Chaher Sakkal (who I assume to be Mr Sakkal). On 24 March, Walkers filed a further letter setting out the Company's response and submissions in reply to the Sakson Written Submissions and containing an update on recent developments in Kenya and in relation to the Mauritian insolvency proceedings relating to the Company's principal (sub) subsidiary, Zarara Oil & Gas Limited (***Zarara***). On 24 March, shortly after having received that letter and late that evening, I informed (via an email sent by my PA) Walkers and Sakson (and the Cayman attorneys for the other possible creditor mentioned in paragraph 2 above), that I had concluded that the Application could be dealt with without the need for a further hearing, that the hearing listed for 25 March was vacated and that I would circulate an email the following morning explaining my decision on the Application. On the morning of 25 March (today), my PA circulated the following email to Walkers and Sakson:

> *"Following receipt yesterday pm of Walkers' reply submissions, I indicated that I had concluded that the Company's application could be dealt with without the need for a further hearing and had vacated today's hearing. I said that I would circulate an email this morning explaining my decision on the application. This is that email.*

Having reviewed and carefully considered the submissions made by Sakson in its letter dated 23 March in opposition to the Company's application together with the submissions in reply made and the update on further recent developments provided by the Company in its letter dated 24 March, I have concluded as follows:

1. *I am satisfied that the requirements of section 104(3)(a) and (b) are met in this case so that Court has jurisdiction to appoint JPLs.*

2. *I am also satisfied that it is appropriate to exercise my discretion to appoint the JPLs in the present circumstances. I shall therefore grant the application.*

3. *The draft order filed after the hearing by Walkers is approved subject to the amendments made in the attached draft (which is marked-up to show the changes from Walkers' post-hearing draft). I believe that the amendments are self-explanatory. If Walkers wish to raise any issues on the amendments, they may do so in writing.*

4. *I shall hand down later today or tomorrow a written judgment setting out the reasons for my decision. At this stage I shall just note that the recent developments in the Mauritian administration and the order made by the High Court of Kenya give rise to serious concerns as to whether it will be possible to proceed with the proposed restructuring of Zarara at all or within the period previously envisaged (and therefore as to whether Emerald's funding will be sufficient and remain available to fund the actions required to facilitate such a restructuring). I am satisfied that these developments do not provide a sufficient reason for dismissing the Company's application (and accept that, as the Company submitted, the appointment of the JPLs may well be helpful by allowing them to use their experience and expertise in restructurings to encourage and facilitate further negotiations and the avoidance of damaging hostile action by creditors) but consider that, in view of their significance, it is important that the JPLs provide an initial report to the Court immediately after the expiry of the 31 March deadline (the revised order provides for the initial report to be filed on 1 April). I would also add that I do not wish any order made by this Court to be considered as interfering with or cutting across the orders made or the exercise of their proper jurisdiction by the courts of Mauritius or Kenya and that, if appropriate, I would be prepared to consider suitable court to court communications with those courts, to the extent that the JPLs consider that this would be helpful and appropriate."*

5. This is my judgment setting out the reasons for my decision and explaining the procedural history of the Application.

The Application

6. At a meeting of the Company's board on 1 March, 2021, the board reviewed a draft creditor proposal (the ***Restructuring Proposals***) to be presented to the creditors of its principal operating subsidiary, Zarara. Zarara is a company incorporated in Mauritius. Zarara had been placed into voluntary administration in Mauritius on 2 November 2020 pursuant to a

resolution of its board. The shares in Zarara are held by another Cayman company, MRI Kenya Limited (***MRI Kenya***) which is a wholly owned subsidiary of the Company. At the meeting, the board confirmed that in its view the Company was or was likely to become unable to pay its debts within the meaning of section 93 of the Companies Act (2021 Revision) (the ***Act***), and that it intended that a compromise or arrangement be presented to the Company's creditors and the creditors of Zarara. The board also resolved to issue a unanimous recommendation to its shareholders that they should pass a resolution approving the filing of an application in this Court for appointment of provisional liquidators (***PLs***) and authorising the directors to make the application and take such other steps as may be necessary to appoint PLs for the purpose of seeking to implement a restructuring of the Company and Zarara by way of compromise or arrangement with all of the Company's creditors and those of Zarara (and take all steps necessary to achieve a restructuring of the Company consistent with the Restructuring Proposals).

7. On 3 March 2021, shareholders holding 85.424% of the Company's shares signed written resolutions in the following terms:

> *"Resolution 1*
>
> *IT WAS RESOLVED that the members of the Company hereby require the Company to be wound up by the Grand Court of the Cayman Islands (the Court) under section 92(a) of the Companies Law (2020 Revision) …. (the Law) and authorise [the] board of directors of the Company to present a winding up petition (the Petition) to the Court seeking a winding up order in respect of the Company under section 94(1) of the Law.*
>
> *Resolution 2*
>
> *IT WAS RESOLVED that concurrently with the presentation of the Petition, the board of directors of the Company be directed to issue an application with the Court for the appointment of joint provisional liquidators (the Provisional Liquidators) in respect of the Company under section 104(3) of the Law for the purpose of seeking to implement a restructuring of the Company by way of compromise or arrangement with its creditors*
>
> *Resolution 3*
>
> *IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition."*

8. On 4 March, 2021 the Company presented a winding up petition seeking a winding up order on three grounds: that the Company had passed a special resolution requiring the Company to be wound up by the Court, in reliance on section 92(a) of the Companies Act (2021 Revision) (the ***Act***); that the Company is unable to pay its debts, in reliance on section 92(d) of the Act and that it is just and equitable that the Company should be wound up, in reliance on section 92(e) of the Act. On the same day, the Company issued an *ex parte* summons (the ***Summons***) seeking the appointment of PLs pursuant to section 104(3) of the Act on the basis that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and intended to present a compromise or arrangements to its creditors. In its evidence in support of the Application filed before the Hearing, the Company referred to the Restructuring Proposals which had been prepared by the Company's board and were shortly, it was hoped, to be presented to the creditors of Zarara by Zarara's Mauritian administrator Mr Thacoor (the ***Administrator***). While the Restructuring Proposals only related to the creditors of Zarara, the Company submitted that they would significantly impact on the Company and its creditors both because it was hoped that they would result in the guarantees given by the Company to certain creditors of Zarara (the ***Guarantee Creditors***) being released and because the economic interest in the shares in Zarara was held by the Company (since MRI Kenya, the registered member of Zarara, had no external creditors and was a substantial debtor of the Company) so that the preservation of the value of Zarara would also benefit the Company. Furthermore, the Company anticipated that if the restructuring of Zarara was successful, and the Restructuring Proposals were accepted and implemented, it would also be possible to effect a restructuring of the balance of the Company's debt.

9. Even though the application for the appointment of PLs was made *ex parte*, the Company nonetheless on 5 March gave notice of the Application (but not the hearing date which had at that time not been fixed) to the Guarantee Creditors. Then on Friday 12 March, one working day before the hearing of the Application, the Company notified all its creditors (including the Guarantee Creditors) of the date and time of the hearing of the Application.

The Company's business, subsidiaries, operations and shareholders

10. The Company is the parent company of a group of companies (the ***Group***). As I have explained, the Company holds the shares in MRI Kenya, which holds the shares in Zarara. Zarara has a branch office in Kenya. The Company also owns the shares in (a) MRI Nigeria Limited, another Cayman Islands company, which holds shares in another Nigerian company, and (b) MRI Exploration (SL) Limited, a company incorporated in Sierra Leone. However, Mr Worthington stated in his evidence that the Company currently had no assets or property

and conducted no material activities in either Nigeria or Sierra Leone. In addition, management services are provided to the Company by its management contractor, MRI Management Company LLP (***MRI Management***).

11. The directors of the Company, in addition to Mr Worthington, are Dr Bristow (Chairman), Dr Nyanteki-Owusu (Deputy Chairman), Willem Jacobs, Mukesh Valabhji and John Barr. Mr Worthington and Dr Bristow and Dr Nyanteki-Owusu are also directors of Zarara.

12. The Company's majority shareholders are Golden Phoenix Investments Limited (holding around 29.4% of the Company issued shares), Emerald Holdings Limited (holding around 28.5% of the Company issued shares) (***Emerald***), and Logistics Tradecorp Limited (holding around 12.8% of the Company issued shares) while minority shareholders hold the other 29.3%.

13. The principal activity of the Group is the evaluation, exploration and development of opportunities in the oil and gas sector. The Company is a pan-Africa focused upstream oil and gas venture with an existing project in Kenya (including onshore/transition zone gas discoveries) (together Mr Worthington said with some business development in pursuit of opportunities in Nigeria). The Kenyan project had been the Company's principal focus and area of Group expenditure and commitments for the past few years. The Company's strategy was to create value through the development of upstream exploration and production opportunities in Africa with a focus on discovered oil and gas resources with early cash-flow and upside potential.

14. In Kenya, Zarara holds a 75% working interest and operatorship in two production sharing contracts (the ***PSCs***). The PSCs are dated 3 September 2008 but only became effective as of 3 December 2008. The PSCs relate to two sizeable exploration blocks, Blocks L4 and L13, which are located onshore in the Lamu basin in Kenya. The PSCs provide for the exploration, development and production of hydrocarbons in the area specified in each PSC. Originally, 90% of the rights and obligations of the contractor in and under the PSCs was held by SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (collectively ***SGD***) while 10% was held by the Kenyan Government. On 4 April 2011, SGD entered into two Farmout Agreements (the ***Farmout Agreements***) with Zarara, which were given effect by deeds of assignment (approved by the Kenyan Government). Under the terms of the Farmout Agreements, SGD assigned and transferred a 75% participating interest in the PSCs for each of Block L13 and Block L4 to Zarara. SGD retained a 15% interest. Thereafter, all subsequent exploration was

to be carried out solely at the cost of Zarara, up until a final investment decision was made to develop any appraised and commercial discovery of oil or gas.

The Group's financial difficulties and the Company's financial position

15. The Company's total subscribed capital is approximately US$79 million. It has invested substantial sums in the Kenya project, amounting to approximately US$60 million since 2012. The funding by the Company of the Kenya project was injected by making loans to MRI Kenya which on-lent the funds to Zarara. MRI Kenya has advanced to Zarara by way of loan all of the funds it required for drilling at the exploration blocks. The loan was interest free and repayable on demand.

16. The Company's financial position came under stress during the third quarter of 2018 and has continued to deteriorate since then. The financial stress was caused by the cost and schedule overruns experienced in the drilling of a technically and operationally challenging deep well on Pate Island, Kenya within Block L4. The drilling ran catastrophically over time and budget. During 2018 – 2020 the Company and Zarara entered into various creditor agreements with creditors of Zarara (which had been referred to as the phase 1 and phase 2 creditor agreements) in order to manage and deal with Zarara's financial difficulties. During this period, Emerald made significant loans to the Company and Zarara and injected further capital into the Company on an interest free basis.

17. However, the discussions with creditors and efforts to find a financial solution were ultimately unsuccessful. There were disputes with some creditors which resulted in proceedings in Kenya and these difficulties ultimately resulted in a decision by the board of Zarara to place Zarara into voluntary administration in Mauritius on 2 November 2020 and the appointment of the Administrator on 3 November 2020.

18. On 25 February 2021 the Company received a demand letter from Emerald demanding the immediate repayment of US$2,556,201 previously advanced by Emerald and on 2 March 2021, the Company received a demand letter from MRI Management demanding the immediate repayment of US$433,922 and £78,542. Mr Worthington says that the Company has no funds and is unable to repay these amounts.

19. It appears that the Company has three categories of creditor. First, trade and other unrelated creditors totalling US$1,257,401 of which at least US$466,130 is due and payable (including sums owed to MRI Management). Secondly, loans totalling US$3,218,305 made by Emerald

and other connected parties. Thirdly, the Guarantee Creditors. There are three Guarantee Creditors. They are each parties to contracts with and involved in the drilling activities of Zarara. They are Sakson, the drilling contractor; Baker Hughes EHO Ltd. (***Baker Hughes***) the principal cement and logging contractor, and Zarara's drilling project management company, North Sea Well Engineering Ltd. (***Norwell***). The Guarantee Creditors have claims totalling US$12.6 million, consisting of claims by Norwell of approximately US$1.1 million; by Sakson of approximately US$6.4 million and by Baker Hughes of approximately US$5.1 million. Each of the Guarantee Creditors has made demand for payment under the guarantees on the Company but the Company denies that any payment is due and owing and that, in the case of Baker Hughes and Norwell, that the guarantees are valid or enforceable. On 28 January 2021, Baker Hughes issued a request for a LCIA arbitration in London in respect of the sums which it claims under the Company's guarantee.

20. As regards the Company's assets, Mr Worthington exhibited a report prepared by Borrelli Walsh (Cayman) Limited (***Borrelli Walsh***), the prospective PLs, which was based on information provided by the Company. This included a statement of the financial position and solvency of the Company (at [23]). The Company's assets include a very small sum in cash together with a debt owed by MRI Kenya in the sum of US$65.116 million, a debt owed by MRI Nigeria Limited in the sum of just over US$7 million and a small debt owed by one of the Company's subsidiaries in Nigeria.

21. Since 3 November 2011, funding for the Company (including funding for the Application and the administration in Mauritius) had generally been provided by Emerald by way of further unsecured loans which were interest free and repayable on demand.

The administration in Mauritius, the watershed meeting to consider the Restructuring Proposals and proceedings in Kenya

22. Mr Worthington has provided certain details of the law and procedure in Mauritius based I presume on the advice of the Zarara's Mauritian counsel or of the Administrator's counsel (in Walkers' most recent letter to the Court, dated 24 March, they stated that certain information had been provided by the Administrator's Mauritian counsel). No expert evidence has been filed for the purpose of the Application.

23. The Administrator is a chartered accountant and an insolvency practitioner registered under the laws of the Republic of Mauritius (and was formerly the managing partner of Grant Thornton, Mauritius).

24. Following his appointment, the first meeting of Zarara's creditors was held on 12 November 2020 (the ***First Creditors' Meeting***). At this meeting the Administrator explained the circumstances surrounding his appointment and that creditors should submit nominations for appointment to a creditors committee. He also explained that it was open to creditors at the meeting to propose and vote on the appointment of a different administrator. However, none of the creditors wished to make such a proposal and accordingly it was confirmed that the Administrator continued in office.

25. On 6 January 2021, the Supreme Court of Mauritius made an order extending until 31 March 2021 the deadline by which time the Administrator was required to hold a further meeting of creditors. The further meeting is called a watershed meeting and its purpose is to allow the creditors to vote on the future of Zarara. It appears that in the event that the watershed meeting is not held on or before that date, the Administrator's appointment and the administration will end (unless the Supreme Court of Mauritius grants a further extension).

26. After the Administrator's appointment an investor (the ***Investor***) had made a confidential approach to the Zarara board and the Administrator. The interest of the Investor had been known to the board (and I assume the Administrator) at the time of the First Creditors' Meeting. On 25 January 2021, a confidential and non-binding expression of interest was provided by the Investor to the Administrator. The Investor has expressed interest in negotiating a restructuring of Zarara based on the Restructuring Proposals. The identity of the investor has not been disclosed in the evidence filed in support of the Application because, for understandable commercial reasons, the Investor does not at this stage wish to have its identity made public pending further progress in discussions with the Administrator and the Company and the further development of the Restructuring Proposals. However, details of the Restructuring Proposals and some of the discussions with the Investor have been disclosed and are discussed below. The Company, as I have noted, prepared the Restructuring Proposals and is closely involved in the discussions with the Investor as part of the Company's overall plans for a restructuring and the survival of the Group.

27. The Administrator is, as I have noted, required to convene the watershed meeting of Zarara's creditors before 31 March, 2021 (unless the court in Mauritius grants an extension of time). At the watershed meeting the Restructuring Proposals will be considered by the creditors who will be invited to vote on whether to approve them.

28. On 16 March 2021, the Administrator wrote to Zarara's creditors inviting them to attend the watershed meeting on 30 March 2021 (this was initially scheduled for 26 March) and attach a report (the ***Administrator's Report***) in which he explained Zarara's financial position, the work he had done, his findings and recommendations.

29. His findings included the following statements (underlining added):

> *"(vii) Zarara is considered to have value only if further exploration can build upon the Pate-2 ST2 discovery and related regional discoveries at Pate-1 and Dodori-1 wells. However additional funding would be required to solve the present shortage of cash flow and complete the exploration process. Hence new or additional investors will have to be approached to fund in some way the continuing exploration work in and under the PSCs.*
>
> *(viii). Since my administration began, one potential investor was identified, and a non-disclosure agreement was signed with them. They have in a letter of intent addressed to the administrator expressed interest to invest in Zarara subject to the following conditions:*
>
> *a. all the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, should release, waive, and discharge all Zarara's debts and liabilities and in return the creditors of Zarara, save and except MRI Kenya Limited, and Emerald Holdings Limited, would become entitled to an unencumbered free carried 15% direct interest in the two PSC with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSC.*
>
> *b. The Government of Kenya should grant an extension of an additional 3-year term for the two PSCs subject to any other conditions as maybe imposed by the Government of Kenya and acceptable to the investor.*
>
> *c. the shareholders of Zarara should cede/transfer to the potential Investor a majority stake and controlling interest in Zarara, subject to any approval which may be required from the Government of Kenya, no payment would be made to the shareholders of Zarara.*
>
> *d. The potential Investor would then invest approximately US$15.0million which would be required to fund the future work program for the PSCs as agreed by the Government of Kenya.*
>
> *(ix) The Directors of Zarara have confirmed to me that the prospective investor has no interest in Zarara or any related company or party and was unknown to them prior to commencement of the administration."*

30. The Administrator's recommendations were as follows (underlining added):

> *"Deed of Company Arrangement (DOCA)*

A *Bearing in mind the insolvency of Zarara and in order to avoid Zarara being placed in liquidation, I am of the view that it would be in the Creditors interests for Zarara to secure fresh/additional investment/funding and to execute a Deed of Company Arrangement based on the proposal made by the potential Investor in order to safeguard the rights of the Zarara unsecured creditors so that the latter may be ensured of a realistic prospect of payment of their respective claims.*

B. *I therefore propose that at the watershed meeting, the Creditors considers and approve the hereunder resolution:*

"The Creditors having cognizance of the report of the Administrator and more especially of the fact that Zarara is insolvent, resolve that Zarara enters into a Deed of Company Arrangement (DOCA) under the following terms and conditions:

a. *All the creditors of Zarara, including MRI Kenya Limited, Emerald Holdings Limited, agree to release, waive and discharge all Zarara's debts, liabilities and obligations, including any claimed parent company guarantee, and immediately stay and then terminate/withdraw all pending suits/cases lodged against Zarara, its staff, officers or directors and/or any third parties before the Kenyan or any other Courts and in return the unsecured creditors of Zarara, save and except MRI Kenya Limited and Emerald Holdings Limited, be issued shares in SOHI-Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) such that they become entitled to an unencumbered free carried 15% direct interest in the two PSCs with respect to Blocks L4 & L13. Such free carried interest to continue unless and until a development is agreed as commercial by the Government of Kenya pursuant to the terms of the two PSCs.*

b. *The aforesaid waiver/discharge/withdrawal by the Creditors, the issuing of shares in SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or its commons parent company) to the Zarara Creditors, excluding MRI Kenya Limited, Emerald Holdings Limited, and the transfer of a majority stake and controlling interest in Zarara to the potential Investor shall become effective and be concluded simultaneously within seven days (7) of Zarara obtaining an extension of an additional 3-year term for the two PSCs subject to any other conditions as may be imposed by the Government of Kenya and acceptable to the investor.*

c. *As a result of the above, the Zarara Creditors, excluding MRI Kenya Limited and Emerald Holdings Limited, through SOHI-Gas Lamu Limited and SOHI-Gas Dodori Limited (or their common parent company) would eventually hold and benefit from the 15% Carried Interest (until commerciality as set out above, like the Government of Kenya) in the two PSCs. It is anticipated that the accruing increase in value of the 15% Carried Interest from the PSCs related to Blocks L4 & L13 could be crystallized by creditors, over time as they decide.*

d. *The Deed of Company Arrangement to be signed by Zarara and other parties within twenty-one (21) days completed from the date of the present resolution being passed and then completed or closed in*

terms of the above within a period of three (3) months as from the passing of the present resolution."

C. *Alternatively, if the above resolution is not approved by the Creditors at the Watershed Meeting, then it is my recommendation that Zarara be placed in liquidation being given that it is insolvent and have no funds to proceed any further with its business activities. Consequently, the Creditors shall be called upon to approve the following resolution:*

> *'Being given that the Resolution for the execution of a Deed under Company Arrangement, as recommended by the Administrator, has not been voted/approved, the Creditors resolve that it would be in their interests that Zarara be placed in Liquidation and the Administrator be and is hereby appointed as Liquidator.'*

D. *Finally, I would hasten to add that if neither the resolution for the execution of the DOCA as proposed above nor the resolution for Zarara being placed in liquidation is approved by the Creditors, the administration shall come to an end and the mandate of the Administrator shall lapse ipso facto. Consequently, the Administrator shall hand over the management and control of Zarara to its Directors and the latter may petition the Bankruptcy Division of the Supreme Court of Mauritius for an Order to wind up Zarara and appoint a Liquidator on the ground that Zarara is insolvent and is unable to pay its debts."*

31. The Administrator has taken steps to have his appointment recognised in Kenya, where the assets, property and business of Zarara are located. Recognition had been contested by some local creditors of Zarara and various applications to the High Court of Kenya have been required. On 12 March 2021, Kenyan court granted interim recognition of the Administrator's appointment, conditional upon the Attorney-General of Kenya being notified and publication of an advertisement in a national newspaper both of which conditions have been fulfilled (and on the further condition that the Administrator file a weekly report to the Kenyan court). The final hearing of the Kenyan recognition application is scheduled to take place on 19 May 2021.

32. However, as Walkers informed the Court in their letter dated 24 March, it appears that three Kenyan creditors of Zarara (the ***Kenyan Creditors***) recently (on 19 March) sought, and obtained, from a judge of the Kenyan court a direction that the Administrator should not proceed with the watershed meeting (although apparently no formal order to that effect has yet been drawn up or made). In that letter, Walkers explained the position as follows:

> *"26. ..... the Company has been informed by the Administrator's Kenyan legal counsel that:*

(a). *the recognition matter was mentioned in the Kenyan Court for Friday 19 March, 2021 and at such mention the Three Kenyan Creditors intervened and secured the Direction (which is still yet to be issued by the Kenyan Court);*

(b). *the basis of such creditors' intervention was that they believe their position as Zarara's creditors may be 'prejudiced' at the Watershed Meeting, although no grounds or evidence of this prejudice was advanced to the Kenyan Court (see paragraph (c) below for further details); and*

(c). *at the time the Kenyan Court made the Direction, the Kenyan Court (along with the Administrator's Kenyan Counsel) had not seen, and still have not seen, the application (or any evidence thereto) that had been made by the Three Kenyan Creditors and on which such creditors rely upon.*

27. *The Administrator is continuing to take legal advice with regard to the Direction, including how best to seek to set it aside. However, unfortunately any such possible action has been delayed because the Kenyan Judge who made the Direction is now on holiday and unavailable, and by the fact that the formal Order is yet to be issued."*

33. On 23 March, in response to the direction given by the Kenyan court, the Administrator wrote to all Zarara's creditors and said as follows:

"For avoidance of doubt, let it be clear that:

a. *if the Resolution set out at paragraph 5(B) of my report is approved by the Creditors, the release and/or waiver of the Creditors' Claims will not be effective until and unless (i) an extension is obtained from the Government of Kenya, (ii) the newly already identified investor (the "Investor") takes over the majority/controlling interest in the Company, and (iii) shares are attributed to the creditors in SOHI Gas Lamu Limited and SOHI Gas Dodori Limited (or their common parent company, SOHI Oil and Gas Limited) ("SOHI") as explained in my report; or*

b. *If this process is not completed within 3 months of the execution of the Deed of Company Arrangement (the "DOCA"), i.e., if no extension from the Government of Kenya is obtained or the Investor does not take over a majority/controlling interest in the Company and the shares in SOHI not transferred within 3 months as stated above, then the Company's Creditors shall not have to waive and/or release their respective claims.*

c. *I have spoken to the identified Investor and he has agreed that this process should be completed within 3 months of the execution of the DOCA, failing which the creditors shall neither have to waive nor release their claims against the Company.*

However, in the meantime, there have been some significant further developments that I deem it my duty to bring to your attention, namely:

a. *Creditor, "Sakson Drilling & Oil Services DMCC", has requested a deferral of the Watershed Meeting, to which I agreed. The meeting was to be deferred to Tuesday 30th March 2021 at 1:00 pm (Mauritius time).*

b. *Unfortunately, before I could provide notification of this deferral, I have been informed that on Friday 19th March 2021, three Kenyan Creditors of the Company, namely Oilfield Movers Ltd, Alterrain Services Kenya Ltd and the Kenya Revenue Authority, have sought and obtained an Order from the High Court of Kenya directing me not to proceed with the Watershed Meeting, on the basis that they would allegedly be 'prejudiced' on some unspecified basis.*

c. *I am given to understand that no written Order has yet been issued by the Court but have been advised by the Kenyan legal counsel that, at the sitting of the 19th March 2021, the Honourable Judge orally stated that if I were to proceed with the Watershed Meeting as proposed, the recognition of the Company's Administration proceedings in Kenya would be revoked and that I would be in contempt of the Kenyan Court. This has placed me in an untenable position.*

As stated in my report, the Company's Administration process automatically terminates on 31st March 2021, and in the absence of the Watershed Meeting being held by such date, the Company will be returned to its directors. Furthermore, the directors of the Company have informed me that if the Administration of the Company were to come to an end on 31st March 2021 by reason of the Watershed Meeting not being held, the Company will be placed in liquidation and in parallel Midway Resources international ("MRI"), the Company's ultimate owner and parent company, will also be placed in liquidation.

In fact, I have been informed that, currently, the directors of MRI have also already applied to the Grand Court of Cayman Islands (MRI's incorporation jurisdiction) for the appointment of provisional liquidators with a view to appointing insolvency professionals to undertake a restructuring of the debts of MRI and the Group, subject to the Company, ZARARA OIL & GAS LIMITED, being salvaged.

In the light of the above, unless the Creditors' Watershed Meeting proceeds on the rescheduled date of 30th March 2021 or no later than 31st March 2021 (subject to the Creditors agreeing to any necessary waiver of notice because of the delays experienced), then the Company will be placed in liquidation and inevitably, so will MRI, as communicated to me by the directors.

My recommendations, as set out in my report, will remain applicable if the Creditors of the Company, acting together, agree to the Watershed Meeting be held on 30th March 2021 or 31st March 2021. In which case, at the Watershed Meeting, the Company's Creditors will have the opportunity, in their wisdom, to resolve that either (i) the Company executes the proposed DOCA, or (ii) the Administration ends and the Company be returned to the directors, or (iii) the Company be placed in liquidation and a liquidator be appointed.

I am available to try and assist the Company's Creditors to see if there is an agreement to proceed with the holding of the Watershed Meeting as suggested. Otherwise, I shall have to comply with the Order of the Kenyan Court issued at the request of the three abovementioned Creditors and thus the Administration will slip towards termination as described."

34. Accordingly, it appears that, pending a possible application to the Kenyan court to set aside the direction, in order to avoid the revocation of the Kenyan's court's order granting the Administrator interim recognition, to avoid being in contempt of the Kenyan court and to avoid a failure to hold the watershed meeting before the 31 March deadline, the Administrator is hoping that Zarara's creditors will meet to or otherwise approve the Restructuring Proposals without his involvement and without him attending or chairing the (and possibly without there being a) the watershed meeting. This is obviously a highly unsatisfactory position for the Administrator to find himself in and it will be necessary to see what further developments occur during the period leading up to 30/31 March.

The Restructuring Proposals – Zarara's creditors

35. As can be seen from the Administrator's Report, the Administrator had concluded that Zarara's creditors should be given an opportunity to consider the Restructuring Proposals and that it was in their best interests to accept and approve the Restructuring Proposals by entering into a deed of company arrangement (***DOCA***).

36. The Restructuring Proposals referred to by the Administrator follow, but elaborate on and provide more detail concerning the mechanics of implementation than, those set out in the document considered by the Company's board at its meeting on 1 March 2021. Essentially they involve the Investor injecting sufficient further funds into Zarara to allow (or at least to provide a reasonable prospect of) Blocks L4 and L13 being further explored and developed so as to result in the extraction and sale of natural gas. In return, the Investor will receive a majority of the shares in Zarara (which will retain its 75% interest in the PSCs) and all Zarara's creditors, including MRI Kenya and Emerald, will release their claims against Zarara. Zarara's external creditors (that is excluding MRI Kenya and Emerald) will then be issued shares (whether that will give them all or only some of the shares is unclear in SGD, which will retain its 15% interest in the PSCs. The Kenyan Government will also retain its 10% interest in the PSCs. Zarara will be debt free and having sufficient funding to allow it to generate value and an income stream (for the benefit of itself, thereby benefitting the Investor and the Company as its shareholders, its former creditors and the Kenyan Government) from Blocks L4 and L13.

37. Mr Worthington in his evidence said that the Company had devised the Restructuring Proposals in order to ensure the survival of Zarara and consequently the Group and to provide a better outcome for the creditors of Zarara and the Group than would otherwise be available if the entities within the Group were to be put into liquidation. He pointed out that natural gas had been discovered in three wells drilled in Blocks L4 and L13 and that the presence of natural gas in these wells, together with some other regional gas discoveries, had considerably reduced the exploration risk associated with Blocks L4 and L13. This gave rise to the possibility of value being realised from the blocks. But this could only be done if there was further exploration work on Blocks L4 and L13 and this required further capital and investment. Hence the need but also the prospects of there being a return for a new investor.

38. Borrelli Walsh reviewed the Restructuring Proposals in their report. They did not undertake an independent review or assessment of the proposals but simply reported what they were told by the Company's directors. They noted that a restructuring of the Group had the potential for unlocking significant future cash-flows that would materially benefit all creditors and investors in the Group but that, absent a restructuring of Zarara and of the Company, both companies were likely to be put into insolvent liquidation. In that event they "*did not anticipate any recoveries from [the loans made by MRI Kenya to Zarara and by the Company to MRI Kenya] and [that] absent any other source of recovery (which [were] presently unknown, recoveries [were] unlikely to cover the costs and expenses of [the Company's] liquidation.*"

39. If the creditors approve the Restructuring Proposals, either at the watershed meeting if held on 30 March or at a subsequently held watershed meeting or otherwise, Zarara and the other parties will need to agree and sign a DOCA within twenty-one days. If and once that has been signed, there will be a further period of over two months during which the conditions to the DOCA can be satisfied and the further documentation required to give effect to the Restructuring Proposals can be negotiated and completed (it appears that the arrangements contemplated by the DOCA must be completed within three months of the passing of the creditors' resolution at the watershed meeting).

The Restructuring Proposals – the Company's creditors

40. As I have noted, the Restructuring Proposals operate at the Zarara level. If successfully approved and implemented in their current form they will result in the substantial claims of the Guarantee Creditors being released and the Company retaining the shares in MRI Kenya. MRI Kenya will own a minority interest in the shares of the restructured and solvent Zarara.

But the balance sheets and debt owed by the Company (and MRI Kenya) will still need to be dealt with.

41. In paragraph 74 of his Second Affidavit, Mr Worthington stated as follows:

> *"The Proposed Restructuring could allow the Company to attract further investment which will return the Company to solvency and allow it to fulfil its purpose of providing funding to the subsidiaries. From any such investment in the Company, the Company intends to reach compromises or agreements with certain of its third party creditors in order for them to be paid as quickly as possible to ensure the Company's continuation as a going concern. Moreover, as part of the Proposed Restructuring, Emerald Holdings Limited and MRI Management LLP, will be asked to compromise their debts in exchange for equity in the Group. Emerald Holdings Limited and MRI Management LLP have indicated that they would be receptive to such a proposal on the condition that the Proposed Restructuring is successfully implemented."*

42. Borrelli Walsh in their report (at [34]) stated that:

> *"34. We understand that the Company and its investors are supportive of initiatives to facilitate the Group's survival. To this end, [the Company's] management has advised that the proposed restructuring [of the Company] would include the following:*
>
> *34.1 debt-to equity conversion of certain connected party claims (we understand that connected party creditors with claims approximating US$3 million are amendable to this proposal):*
>
> *34.2 introduction of new capital to fund the Group's projects; and*
>
> *34,3 a compromise of the remaining creditor claims against [the Company]."*

43. If and once the claims of the Guarantee Creditors and the claims of Emerald are released, there will be a relatively modest balance of claims to be dealt with. While at this stage the detail of what would be offered to such creditors and the willingness of the external creditors to support the Restructuring Proposals and a Company (MRI Kenya) restructuring is unclear, the commercial logic and benefits of agreeing a Company (and MRI Kenya) restructuring once the Restructuring Proposals at the Zarara level have been agreed, are self-evident.

The need for and role of the PLs

44. Mr Worthington said that he and the Company's board believed that it was in the best interests of the Company that PLs were appointed as independent professional advisors and as officers of the Court to support the board in progressing and concluding the negotiations with

creditors at both the Zarara and Company level and in the implementation of the Restructuring Proposals.

45. The Restructuring Proposals were being put forward by the Administrator with the support of the Company's board and management. Mr Worthington considered that the PLs would be able to assist the board in and supervise this process. Furthermore, restructuring proposals, as I have noted, for the Company would need to be further developed and negotiated and the relevant documentation to give effect thereto would need to be prepared. Mr Worthington considered that once again the PLs would be able to assist the board in and supervise this process. Mr Worthington stated that in view of the directors' expertise, detailed knowledge of the Company's and Zarara's business, and their professional relationships with and understanding of the position of the key stakeholders, it was important to allow the board to continue to lead the restructuring process and manage the Company's operations on a day-to-day basis while the restructuring negotiations and the revisions to be made to the Company's and Zarara's activities in light of the restructuring were developed. Mr Worthington said that in his view the support of independent restructuring professionals to act alongside the board when implementing the proposed restructuring would be crucial to its success and that the appointment of "soft touch" JPLs would best achieve this objective, and promote the interests of the Company's creditors and other stakeholders.

46. The Company submitted, in addition, following the action taken by the Kenyan Creditors and the direction given by the Kenyan judge, that there was an even greater need for the appointment of PLs. The PLs, as independent professionals with their experience and expertise in restructurings and in structuring and conducting negotiations with creditors, across different group companies and jurisdictions, could be expected to play a constructive and useful role in facilitating further discussions and negotiations with the Kenyan Creditors and other creditors of Zarara, including the Guarantee Creditors.

The applicable law

47. Section 104(3) of the Act provides that the Court may appoint PLs after the presentation of a winding up petition on the application of the Company where two requirements are satisfied: (a) that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Act and (b) that the Company intends to present a compromise or arrangement to its creditors.

48. If PLs are appointed under section 104(3) of the Act with a view to a restructuring, it will be necessary to adjourn the hearing of the winding up petition. The Court's power to adjourn a winding up petition in order to facilitate such a restructuring is derived from section 95(3) of the Act which enables the Court upon hearing the winding up petition to adjourn the hearing conditionally or unconditionally.

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.

50. The relevant case law relating to section 104(3) of the Act was recently reviewed by the Chief Justice in *Sun Cheong Creative Development Holdings Limited* (unreported, 20 October, 2020) (***Sun Cheong***). The Chief Justice noted that under sections 104(3) and 95(3) of the Act, the Court has a broad and flexible discretion. The breadth and flexibility of the Court's power to appoint PLs to facilitate a restructuring was first described, prior to the enactment of section 104(3), in *In the Matter of the Fruit of the Loom* (unreported, 26 September 2000 but noted at 2000 CILR Note 7) (***Fruit of the Loom***) and the scope of the Court's discretion under section 104(3) had been affirmed by Parker J in *CW Group Holdings Limited* (unreported, 3 August 2018) at [36] (***CW Group Holdings***) and by Kawaley J in *ACL Asean Towers Holdco Limited* (unreported, 8 March 2019) … at [11]. The Chief Justice summarised the matters to which the Court may have regard when exercising this discretion as follows (underlining added):

> *"…… the 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" per Segal J in Grand T G Gold Holdings Limited (Unreported 21 August 2016) .... at [6(f)iv)]);*
>
> *b. Whether the refinancing is likely to be more beneficial than a winding up order; (Fruit of the Loom at p 9-10)*
>
> *c. <u>That there is a real prospect</u> of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; (Re Fruit of the Loom (ibid)); and*
>
> *d. The considered views of the board as to the best way forward. (CW Group Holdings at [72].*"

51. In *Fruit of the Loom*, the Chief Justice had said that (underlining added):

"[There] is a three-stage test….: (i) that the [PLs] should be satisfied that a refinancing and/or sale of the [company's business] as a going concern is likely to be more beneficial to the creditors that a liquidation realisation of the [company's] assets; (ii) that there is a real prospect of a refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; and (iii) that in the circumstances it is in the best interest of creditors to try to achieve such a refinancing and/or sale as a going concern."

52. The Chief Justice noted the following as regards the requirements of section 104(3)(b) (underlining added):

> *"47. Importantly, in that respect, the language of section 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.*
>
> *48. The requirements of this limb of the test were considered by Parker J in CW Group Holdings where he specifically considered the language that the Company "intends" to present a compromise or arrangement to its creditors. Parker J accepted (at [70] 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." The rationale for this approach was described by him as follows in terms which must now be regarded as settled principle in Cayman Islands law (at [36]:*
>
> > *"The rationale for that language is to give effect to the practice which has developed of appointing provisional liquidators to provide companies with some 'breathing space' before the actions of creditors, acting in their own interests, might interfere with attempts to reach a consensual restructuring or if that should prove not to be possible, a scheme of arrangement – see Esal (Commodities) Ltd [1985] BCLC 450 at page 460 Harman J."*
>
> *49. Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan."*

53. The Company submitted that:

(a). the Company was demonstrably unable to pay its debts within the meaning of section 93 of the Act. The evidence demonstrated that demands had been made by two substantial creditors in February and earlier this month, that the demands were not disputed and had not been met and that the Company did not have sufficient funds to enable these demands to be met.

(b). the evidence also demonstrated that the Company, in conjunction with and through Zarara, intended to proceed with the Restructuring Proposals; indeed, the Restructuring Proposals had now been presented and provided to Zarara's creditors by the Administrator. The Restructuring Proposals involved or contemplated a restructuring of the whole Group and the evidence showed that a restructuring of the Company's balance sheet was necessary and contemplated once Zarara's creditors had given their approval to the Restructuring Proposals. The Restructuring Proposals involved some of the debt owed by the Company, to the extent that the claims of the Guarantee Creditors were valid. A proposal to deal with the balance of the Company's liabilities and its equity had been outlined and would be further developed as part of the process for implementing or as a consequence of the approval of the Restructuring Proposals.

(c). the Court should, in the circumstances, exercise its discretion to appoint PLs. The Company was in the process of making *bona fide* proposals for a restructuring to the Group's creditors and while the process of consulting and obtaining the support of creditors was still at a relatively early stage, and while there had recently been challenges by and potential difficulties resulting from the action of the Kenyan Creditors, there was a real prospect that the requisite creditor support would be obtained and that the Restructuring Proposals and a restructuring of MRI Kenya and the Company would be successful. In view of the position of the Investor, the attitude and actions of the Administrator, the further time available within the Mauritian administration to allow the DOCA to be documented and implemented, the interim recognition of the Administrator's appointment by the Kenyan court (until 15 May) and the funding provided by Emerald, there were sufficient grounds for concluding that the Restructuring Proposals, and an arrangement with the Company's creditors and shareholders, were capable of being implemented. In addition, it was clear that the Restructuring Proposals were in the interests of Zarara's and the Company's creditors since the alternative was an insolvent liquidation of Zarara and the Company which was likely to result in creditors receiving nothing. As Mr Worthington had said in his Third Affidavit:

> *"... the Company's board (and that of Zarara) strongly believes that a successful Proposed Restructuring of Zarara combined with the provisional liquidation of the Company should provide a stable platform for the Company's group to continue as a going concern and have the best possible chance of repaying creditors and returning to profit, pending the future work program for the PSCs for Blocks 1.4 & L 13, Kenya."*

(d). the appointment of the PLs would assist in and promote the chances of a successful outcome to the restructuring negotiations (particularly, for the reasons I have already mentioned, in light of the recent developments in Kenya). As I have already noted, the Company considered that it was important and appropriate that the PLs be appointed on a soft touch basis to allow the Company's directors to retain a lead role in the negotiations in view of their knowledge and expertise. Mr Worthington's evidence made this clear. In his Second Affidavit he said as follows:

> *"77. I believe it is in the best interests of the Company that JPLs are appointed as independent professional advisors and as officers of this Honourable Court to support the Board through this period and the implementation of the Proposed Restructuring*
>
> *78. The purpose of this application is to allow the Board to continue to manage the Company on a day-to-day basis while its operations are mapped out. I believe the appointment will assist in preserving value for the Group's stakeholders while the details of the Proposed Restructuring are refined. I believe the support of independent restructuring professionals to act alongside the Board when implementing the Proposed Restructuring will be crucial to its success.*
>
> *79. I believe it is in the best interests of the Company that "soft touch" JPLs are appointed as I understand their appointment (subject to the terms of the order) will allow them to work alongside the Board and management who have significant industry experience and detailed first-hand knowledge of the Company's business (a belief which is shared with the Board). The continued involvement of the Board and the Company's management also allows the JPLs to leverage the benefit of their existing professional relationships with key stakeholders which will be invaluable if discussions regarding the Proposed Restructuring are to continue successfully."*

The position at the Hearing

54. At the Hearing, the Court was only presented with limited information concerning the proposed restructuring of Zarara, the status of discussions with the Investor, the attitude of the Administrator, the law and procedure governing the Mauritian administration and the process by and timetable within which the Restructuring Proposals would be considered by creditors and, if approved, implemented. It was unclear whether the Administrator supported the Restructuring Proposals, whether they had any prospect of being approved by creditors (on one reading of the Restructuring Proposals, Zarara's creditors were being asked to agree to release their claims against Zarara in return for a direct interest in the PSC's *before* the Investor had even agreed to invest) and whether there was sufficient time within which to document and implement the Restructuring Proposals, even if agreed (it was suggested that the administration in Mauritius had to be completed and therefore that the detailed terms of

the Restructuring Proposals had to be finalised and documented by 31 March, 2021, that is within just over two weeks after the Hearing). There was also no information as to how the PLs would be funded (the Company was on the evidence completely without funds) and whether they could perform a useful role. In these circumstances, I was not satisfied that it could be said that there was, to use the Chief Justice's phrase, "*a real prospect of*" the Restructuring Proposals being put to Zarara's creditors or of being approved. I therefore directed that the hearing of the petition be adjourned and that the Company file further evidence before 4pm Cayman time on 17 March 2021 to address the deficiencies in the evidence filed prior to the Hearing.

55. Of course, for the purpose of section 104(3), it is the Company's, not Zarara's creditors, that are relevant. The requirement of section 104(3)(b) is that the company intends to present a compromise or arrangement to *its* creditors. As I have noted above, the evidence in support of what type of restructuring was envisaged at the Company level was sketchy (see [74] of Mr Worthington's Second Affidavit, quoted above). However, based on that evidence, it was clear at the Hearing that a restructuring of the Company's debt and equity was dependent on the Restructuring Proposals being first 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. While no precise terms had yet been formulated or discussed with the Company's creditors and shareholders, and there was no timetable established, 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, according to Mr Worthington, the two key creditors, namely Emerald and MRI Management, had been approached and had indicated that they would be receptive to debt for equity swap if Zarara's Restructuring Proposals were successfully implemented. While the Company's ability to achieve a successful restructuring would also depend, *inter alia*, on the willingness of the Guarantee Creditors to release their claims, or on the Company demonstrating that it was not liable under the guarantees, there appeared to be a basis for restructuring negotiations at the Company level and a real (or realistic) prospect of a restructuring being agreed.

56. I also had a further concern. As I have noted, one of the Guarantee Creditors, Baker Hughes, had commenced an arbitration in London and they and the other Guarantee Creditors including Sakson had only been given very short notice of the Hearing. They had been told on 5 March that the Application had been filed but were only told of the date and time of the Hearing on the Friday before the Monday hearing. Other creditors had not been told of the Application until that Friday. While it is permissible for an application under section 104(3)

of the Act to be made *ex parte*, it is in my view important where possible for the views of creditors to be ascertained and for creditors to have a proper opportunity to file representations and submissions to the Court if they wish to do so. 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 PLs. If there is real urgency and a genuine and substantiated reason why creditors have not been consulted or cannot be given reasonable notice of the hearing, the Court can nonetheless proceed to appoint PLs but on this occasion I was not satisfied that the creditors including the Guarantee Creditors had been given adequate notice of the Hearing or that there was a good reason for the short notice or for appointing PLs immediately rather than adjourning the hearing for a short period to give the creditors proper notice of the adjourned hearing and an opportunity to appear at the adjourned hearing or file submissions, should they wish to do so. The evidence available at the Hearing did not indicate that the PLs needed to be appointed before the Administrator sent out the Restructuring Proposals or before the anticipated meeting of Zarara's creditors, or that there was any action which the PLs needed to take urgently before an adjourned hearing could be listed. I therefore directed that creditors be notified that the Hearing had been to provide the Company with an opportunity to file further evidence, that such further evidence had to be filed by 4pm Cayman Islands time on 17 March and that if creditors intended to appear at any adjourned hearing or to make representations or submissions to the Court they must give notice of an intention to appear to the Company's Cayman Islands attorneys and file such representations and submissions before that time.

The further evidence and developments after the Hearing

57. Following the Hearing, the Company filed a further affidavit from Mr Worthington (his Third Affidavit). He provided considerably more information and exhibited documents relating to the Mauritian administration; the extent and nature of the Investor's interest, the reasons why the Investor was considered reliable and the steps that had been taken to contact and have discussions with the Investor and the financial position of MRI Kenya. He also clarified the terms of and the anticipated mechanics for implementing the Restructuring Proposals and the manner in which the PLs would be funded (so that their costs and expenses would be paid). In particular, Mr Worthington confirmed that the Administrator had on 16 March sent his report to Zarara's creditors with a letter inviting them to attend the watershed meeting to vote on the restructuring proposal made in the Administrator's report and that the Administrator

supported the Restructuring Proposals; that the Restructuring Proposals had been updated and amended and that if Zarara's creditors voted in favour of the Restructuring Proposals at the watershed meeting, the parties would have a further twenty-one days in which to agree and execute a DOCA. He further confirmed that the Company's board understood that even after the DOCA had been signed Zarara will need further time in which to satisfy the milestones and conditions that will be set out in the DOCA and arrange for the agreement with the Investor to be finalised and executed. It was likely that this would take a further three months. Mr Worthington confirmed that the Company's board believed that provided that Zarara's creditors voted in favour of the proposals at the watershed meeting on 30 March, Zarara would have access to sufficient funding to enable it to complete the restructuring during that further three-month period since Emerald had confirmed that it was willing to provide further limited funding if there was a clear path towards the survival of the Company and the Group (including Zarara) as a going concern and that such survival was a real possibility; that such path had been determined by no later than 31 March 2021, and that the timetable to complete implementation of the restructuring did not exceed the current estimate (of twenty one days plus three months after the approval of the Restructuring Proposals at the watershed meeting). The funding that Emerald had offered to provide would also cover the anticipated remuneration and expenses of the PLs during this period (as I have noted already Emerald has been providing the funding of the Company and the Mauritian administration since November 2020). But, Mr Worthington pointed out, this funding was only available if the creditors supported the Restructuring Proposals at the watershed meeting including the agreement by the Guarantee Creditors to release the Company from its liability under the guarantees. In the event that this did not happen both Zarara and the Company would be forced into insolvent liquidation with the result that the Company's creditors were unlikely to make any recovery.

58. On 23 March 2021, Sakson filed the Sakson Written Submissions in opposition to the Application. These were in the form of a letter from a director of Sakson. The Sakson Written Submissions commented on the Company's evidence and referred to other facts and matters which were relied on by Sakson. Mr Sakkal stated that the matters "*deponed [sic] to herein-above [were] true to the best of [his] knowledge, and belief save as to matters deponed [sic] to on information and advice sources whereof have been disclosed.*" The Sakson Written Submissions did not state that Sakson intended to instruct attorneys or to be represented and appear at any adjourned hearing of the Application and I therefore concluded that Sakson was satisfied that the Application be dealt with by the Court by reference to the Sakson Written Submissions and the submissions and evidence filed by the Company, without the need for a further hearing.

59. The main points made in the Sakson Written Submissions can be summarised as follows:

(a). the Company had not demonstrated by way of evidence that the funds alleged to have been advanced by Emerald had been actually received and spent. Both Emerald and MRI Management were related parties and their demand letters should not be relied on and did not meet the evidential threshold to make and/or support the Application. The Company should have put in evidence bank statements reflecting receipt of funds and of how the money was spent. "*The Company [had] created fictitious and non-existent loans and expenses with group companies with a view to demonstrating to this Honourable Court that [the Company was] unable to pay [its] debts.*" Furthermore, if the Company had in fact received the funds, it had improperly failed to use the funds to meet its liabilities to Sakson.

(b). Sakson denied any knowledge of and were not parties to the phase 1 creditor agreements referred to by Mr Worthington.

(c). the admission by Mr Worthington that the Company had no assets other than its interest in Zarara "*smacks of fraudulent misconduct by the Company and its directors when it purported to issue the [guarantee in favour of Sakson] knowingly and intentionally aware that it would not perform [thereunder]*."

(d). the Company had never responded to Sakson's demand dated 6 December 2020 and it could not now dispute the amount demanded or assert and rely on counterclaims.

(e). the offer to creditors of a 15% free carrying interest in Block 4 and L13 was dependent on the Kenyan Government agreeing to renew or extend the term of the PSCs, which it had not yet done and could not be guaranteed.

(f). the Application (involving the appointment of PLs on a soft touch basis) was a ploy to shield the Company from creditors while the current board remained in control. It was a ploy to stop Sakson and the Company's other creditors taking steps to recover their debts. This was the sole purpose of the Application and should not be allowed by the Court.

(g). it would not be possible for the Mauritian administration to be recognised in Kenya before the 31 March deadline since the application for recognition would only be heard by the Kenyan court on 19 May.

(h). the watershed meeting had been cancelled by the High Court in Kenya and all creditors had been given a chance to make representations to the court. Sakson intends to make representations to the High Court in Kenya with respect to the debt owed to it by Zarara and the Company.

(i). the Company had not demonstrated that there was a realistic prospect that the Restructuring Proposals would be successful and approved. No details of the Investor had been tabled for consideration and assessment by creditors; Zarara did not have a renewed license from the Kenyan Government and there was no evidence to demonstrate that the Blocks L4 and Ll3 have commercially marketable gas.

(j). it was clear that the Company and Zarara had orchestrated a ploy to "*run away from [their] debts and leave the creditors stranded*". The Company had been paying its related companies to the detriment of independent service providers and the Application designed to prejudice the external creditors. The purpose of section 104(3) of the Act was to assist genuine attempts to restructure a company's liabilities, which was not the position in the present case. The Application was an abuse and should be dismissed by the Court.

60. In Walkers' letter of 24 March setting out the Company's response to the Sakson Written Submissions, the following main points were made:

(a). the Company rejected Sakson's allegations that it had been involved in fraudulent conduct and misled the Court in respect of its debts to MRI Management and Emerald. There was no evidence and no basis whatsoever for such allegations.

(b). the dismissal of the Application and the failure of the restructuring negotiations would not advantage Sakson and the other creditors of Zarara and the Company since it would only result in an insolvent liquidation of both companies and no return to Sakson and such creditors.

(c). the Company accepted that number of issues and matters remained to be satisfied and settled before the Restructuring Proposals could be successfully implemented and these were clearly set out in the Administrator's Report. Contrary to the suggestion made by Sakson, the Company was not required as part of the Application to demonstrate to the Court that the Restructuring Proposals were bound to succeed. Rather it was sufficient that they are shown to have, and Mr Worthington had, on behalf of the Company, explained why the Company's board believed that they had, a real prospect of success.

(d). the Application was not a "*ploy*" to avoid the repayment of debts which would otherwise be recovered by creditors should the Application be dismissed. On the contrary, the Application was made to give the Company (and the Group) the best possible chance of continuing as a going concern, repaying creditors and returning to profit. The alternative, should the Application be dismissed, will be for the Company (and the Group) to be liquidated with minimal recoveries to creditors.

(e). in the circumstances, the Sakson Written Submission did not provide grounds on which to dismiss the Application.

(f). there had been some discussions with Baker Hughes' Cayman attorneys, Kobre & Kim, who had asked for and been provided with the documents filed in these proceedings. On 22 March 2021, Walkers and the Company's onshore solicitors had contacted Kobre & Kim by telephone to confirm that the documents had been received and to ask if Kobre & Kim had any questions. They were told that the documents had been safely received and were being reviewed. They had not heard further from Kobre & Kim.

Analysis and decision

61. It is first necessary to consider whether the two requirements of section 104(3) of the Act, which go to the Court's jurisdiction, are satisfied in this case.

62. The first requirement, as I have noted, is that the Company is unable to pay its debts. I accept the Company's submissions on this point. I have carefully considered the points made in the Sakson Written Submissions but do not consider that they support or justify a different conclusion. Sakson did not formally file evidence in support of its opposition to the Application. Mr Sakkal did not swear an affidavit. Nonetheless, I consider that it is

appropriate to take into account the submissions and statements made in the Sakson Written Submissions. Mr Sakkal did, as I have noted, in substance include a statement of truth in the Sakson Written Submissions and clearly intended that his statements be relied on by the Court. However, in the absence of properly particularised affidavit evidence, supported by appropriate documentation, I do not consider that I can give much weight to the factual statements made in the Sakson Written Submissions, and cannot accept them where they conflict with the evidence filed by the Company. On the question of whether the Company is unable to pay its debts and whether the requirement of section 104(3)(a) is satisfied, there is no proper basis to reject the Company's evidence as to the existence and status of its liabilities to Emerald and MRI Management or as to its failure and inability to pay the sums demanded. The fact that Emerald and MRI Management are related parties does not undermine or preclude reliance on that evidence.

63. The second requirement is that the Company intends to present a compromise or arrangement to its creditors. In my view, this requirement is satisfied on the evidence. As I have noted, what is relevant here is the intention to present a compromise or arrangement to the Company's creditors. A plan to make proposals to the creditors of the Company's subsidiary, such as Zarara, would not be sufficient. But here, some creditors of Zarara are, or at least claim to be, creditors of the Company and a compromise or arrangement with the Company's other creditors is under discussion and contemplated as a necessary consequence of the acceptance of the Restructuring Proposals, since the Company envisages a Group and not just a Zarara restructuring. I am satisfied, following the filing of the Company's further evidence, 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 a proper process for conducting those negotiations is now underway. The absence of the identity of the Investor (whose involvement is critical to the credibility and viability of the Restructuring proposals) is a concern but appears to be understandable in view of the commercial sensitivities explained by Mr Worthington. Furthermore, Mr Worthington has confirmed that he considers that the Investor appears to be credible and to have the means to fund the contemplated investment. It also appears that there is no suggestion that the Investor is related to or connected with the Company or its shareholders. I do not consider that Sakson's allegations that the Restructuring Proposals are not being put forward in good faith or properly and that the Application is "*a ploy*" whose purpose is to prejudice and not protect the interests of creditors is made out.

64. Having satisfied myself that the Court has jurisdiction to grant the Application, I must now consider whether I should exercise my discretion to do so. I have concluded, following the filing of the Company's further evidence, that I should do so.

65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group and that the Restructuring Proposals are coherent and appear to offer Zarara's creditors an apparently attractive alternative to an insolvent liquidation of Zarara (and the Company). There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated; in particular, that the Investor proves to be reliable and of substance and prepared to commit the further funds required to allow the necessary further exploration of and work to be done at Blocks L4 and L13 and that the condition and state of those blocks meant (and there was a reasonable expectation) that such exploration and work would result in sufficient revenues and value creation to provide the Investor with a satisfactory return and other creditors with a material recovery. There would also appear to be reasonable basis for putting in place a restructuring of the Company's debt and balance sheet, if the Restructuring Proposals are approved and implemented, to allow the Company's creditors and shareholders to access and have the benefit of the recoveries to be made by MRI Kenya out of its retained minority shareholding in Zarara.

66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point. It remains to be seen whether Zarara's creditors (it remains unclear on the evidence whether all or only a particular majority of Zarara's creditors must give their approval) are willing to support the Restructuring Proposals on their current or possibly on revised terms. In particular, it remains to be seen whether the Guarantee Creditors including Sakson, assuming that they can establish that they have valid claims against the Company, will be persuaded and prepared, or can be required by a majority vote, to release their guarantees. They will obviously need to be satisfied that what is on offer is a fair and reasonable deal and a preferable alternative to a liquidation which they may need to fund if they wish to see claims brought against Zarara, the Company and possibly others. I note the allegations made and concerns expressed by Sakson, which for the purpose of the Application have not been proved or established but which will need to be dealt with if Sakson's support for the Restructuring Proposals is to be obtained. I also note that as matters currently stand, there appears to be a serious difficulty in the watershed meeting going ahead before the 31 March deadline (and there is no indication that even in the new and difficult circumstances there is any prospect of the Mauritian court granting and extension of time or of Emerald being prepared to extend its

funding to accommodate such an extension or delay in obtaining creditor approval) and a serious risk that the appointment of the Administrator will terminate. If that were to happen, it is unclear whether the restructuring of Zarara could proceed and whether Zarara's assets in Kenya could and would be protected and preserved. These problems, as I have said, give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track. The adverse developments in Kenya occurred only recently and their impact and Zarara's options remain under consideration. It remains possible, and I anticipate that the PLs can play a constructive and useful role in this regard, that there can be discussions with the Kenyan Creditors with a view to alleviating their concerns and for allowing more time in which the restructuring negotiations can progress and proceed (it is unclear whether the Kenyan creditors have a local priority which they are seeking to protect and if they do how that could be accommodated within the Restructuring Proposals).

67. In the circumstances, it seems to be right and appropriate to appoint the PLs in order to assist in and facilitate the restructuring negotiations and to give the Company and them the opportunity to stabilise the position and seek to have constructive discussions with the creditors of Zarara, and with Emerald as the funder whose continued support is critical to the process. It is clear that the time is short but that there may be sufficient time to secure a satisfactory result. Because of the possibility that there may be significant developments, and of the need as matters presently stand for approval of the Restructuring Proposals by Zarara's creditors, before 31 March, I have directed that the PLs provide the Court with an initial report on 1 April.

68. I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute "light-touch" for "soft touch", since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!). The form of order submitted by the Company provides for the Company's directors to retain the power to act with respect to matters within the ordinary course of the Company's business without the prior consent of the PLs but to require that they obtain the prior consent of the PLs for matters outside the ordinary course of business, including the restructuring negotiations. While I question (and indeed raised at the Hearing the issue of) whether in this case it is clear what is covered by the Company's ordinary course of business (where as I understand it, the *Company* has no funds save for what is provided by Emerald for the purpose of the restructuring negotiations and the provisional liquidation and is not therefore conducting business in any meaningful sense), I am prepared to make an order

using that terminology in the form proposed, provided it is made clear that the directors' unrestrained powers only allow them to make payments of limited amounts (I have included a threshold of US$10,000 in the order). Paragraph 7 of the order now reads as follows:

> *"Until further Order, the Directors shall retain all powers of management conferred upon them by the Company immediately prior to the date of this Order, subject to the JPLs' oversight and monitoring of the exercise of such powers pursuant to paragraph 5 hereof. In relation to matters related to the ordinary course of business of the Company, the Directors may exercise these powers without the approval of the JPLs. In relation to matters outside of the ordinary course of business of the Company (to include all matters related to the Company Restructuring and the Group Restructuring and the payment of any creditors save for payments of less than US$10,000), the Directors may only exercise these powers with the JPLs' prior approval. In the event that the JPLs and the Directors cannot agree upon a proposed action outside the ordinary course of the Company's business, the JPLs and the Directors have liberty to apply to this Court for directions. Specifically, and without limitation but subject to the foregoing, the Directors may continue to exercise the following powers:*
>
> *(a). to continue to conduct the ordinary, day-to-day, business operations of the Company;*
>
> *(b). to continue to operate and maintain the bank accounts of the Company in the ordinary course of the Company's business; and*
>
> *(c). subject to the approval and consent of the JPLs, to open and close bank accounts on behalf of the Company."*

A footnote point

69. I should briefly mention one further point. I have referred to above and quoted from the written resolutions signed by the Company's shareholders on 3 March. Resolution 3 was in the following terms (underlining added):

> *"Resolution 3*
>
> *IT WAS RESOLVED that, in the event that the compromises or restructuring arrangements proposed by the Provisional Liquidators are rejected by the Court or the Company's stakeholders or are otherwise incapable of being implemented the Shareholders hereby confirm that they revoke their requirement that the Company be wound up by the Court under section 92(a) of the Law and authorise the directors of the Company to take such steps as then deem appropriate to procure the withdrawal of the Petition."*

70. At the Hearing, I pointed out that this resolution in my view gave rise to a number of questions and issues. It must at least be strongly arguable that it precludes the Company seeking a winding up order in reliance on section 92(a) of the Act (that the Company had

passed a special resolution *requiring the Company to be wound up by the Court*). The decision to wind up appeared to be qualified and conditional. It was also unclear to me whether such a qualified authority to present a petition (or an authority subject to a condition subsequent) tainted or affected the petition more generally. Obviously, the shareholders' intention (and the intention of those who drafted the resolution) was to indicate that the Company was only using the winding up jurisdiction for the purpose of promoting a restructuring and compromise or arrangement with creditors as permitted by section 104(3) of the Act, and it might be said that resolution 3 was unobjectionable since it only gave the directors the authority, as between themselves and the shareholders, to apply to withdraw the petition at a later date if the restructuring negotiations failed. However, I would just note that there may be difficulties with this approach which may need to be considered on another occasion. In the absence of the point being taken by any opposing creditor I do not consider that I need to delve further into the issue, save to note that in this case, resolution 3 appeared to be inconsistent with the Company's evidence that if the restructuring negotiations failed, the Company would be wound up immediately.

HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 231 OF 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION) (AS AMENDED)

AND IN THE MATTER OF ORIENTE GROUP LIMITED

IN COURT

Appearances:

Mr Matthew Goucke, Ms Siobhan Sheridan and Ms Fiona MacAdam of Walkers on behalf of Oriente Group Limited (the "Company"/the "Petitioner")

Mr Jamie McGee of Bedell Cristin on behalf of Liu Chak Kwan Kelvin and Tsangs Group Holdings Limited (the "Creditors")

Before:	**The Hon. Justice Kawaley**
Heard:	**11 November 2022**
Date of decision:	**11 November 2022**
Draft Judgment: Circulated	**28 November 2022**
Judgment Delivered:	**8 December 2022**

HEADNOTE

Petition to appoint restructuring officers presented by company-whether prior filing of creditor's petition within the jurisdiction deprived the company of the right to commence and/or prosecute a restructuring petition-automatic stay triggered by presentation of restructuring petition-implications of creditor commencing foreign winding-up proceedings after the commencement of local restructuring proceedings-requirements for appointing restructuring officers- Companies Act (2022 Revision) as amended by Companies (Amendment) Act, 2021, sections 91A-91J, 94(a)-Companies Winding Up Rules 2018, as amended by Companies Winding Up (Amendment) Rules 2022, Order 1A

Introduction and Summary

1. The Company's Petition was presented on 21 October 2022 pursuant to section 91B of the Companies Act (2022 Revision) as amended by the Companies (Amendment) Act, 2021 (the "Act"). It was said to be the first petition to seek the appointment of restructuring officers under the new Part V of the Act[1]. According to the Petition, the Company was the parent company of a group of companies which was "*a leading Southeast Asian financial technology platform established by the co-founders of revolutionary internet companies Skype and Lu.com (NYSE: LU), and also Atomico, one of the leading global venture capital firms*" (paragraph 2). It sought the appointment of restructuring officers on the grounds that the Company:

> "*(a) is presently unable to pay its debts and is therefore 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, the law of a foreign country, or by way of a consensual restructuring*" (paragraph 5).

[1] The new Part V of the Act introduced by the Companies (Amendment) Act, 2021 entered into force on 31 August 2022 under the Companies (Amendment) Act, 2021, (Commencement) Order, 2022.

2. In the Company's Written Submissions, it was asserted that the "*Company has taken steps to, and intends to take further steps with the assistance of the Proposed Restructuring Officers, to develop and propose a holistic and viable restructuring plan to restructure the Group's financial indebtedness*"[2]. 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. It was also submitted (and supported through evidence) that "***24 Noteholders*** *(representing approximately* ***46% by value of the Notes****) have expressed their support for the Proposed Restructuring*".[3] This evidence was not challenged by the Creditors, who appeared in opposition to the Petition. However, the Creditors noted that one of the 24 Noteholders was a related party as he was a director of the Company. 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. It was clear from Mr Goucke's clear, comprehensive yet concise Written Submissions and the supporting evidence that the legal and evidential requirements for granting the Company's application had been met.

3. The only opposition which was ultimately advanced rested on a technical jurisdictional challenge which seemed to me to be a tactical ploy. The point seemed designed to discredit the apparently straightforward proposition that the Creditors' filing of a winding-up petition in Hong Kong the day before the present hearing (seemingly without the knowledge of local counsel) was a flagrant breach of the automatic stay triggered by the filing of the present Petition. Be that as it may, I concluded that the jurisdictional challenge was clearly misconceived and, having rejected it, the sole objection raised by the Creditors to the substantive application to appoint restructuring officers fell away. I accordingly granted the Company's application on 11 November 2022 in the following terms substantially based on the draft form of order submitted by counsel to the Court and set out in full by way of appendix to this Judgment.

[2] Paragraph 30.
[3] Written Submissions, paragraph 40(a).

4. These are the reasons for that decision to appoint Mr Kenneth Fung of FTI Consulting (Hong Kong) and Mr Andrew Morrison and Mr David Griffin of FTI Consulting (Cayman) Limited as joint restructuring officers ("JROs") of the Company.

The jurisdiction to appoint restructuring officers

The statutory regime

5. Section 91B of the Act so far as is relevant provides as follows:

> "*1) 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 [the Companies Act], the law of a foreign country or by way of a consensual restructuring.*
>
> *...*
>
> *(3) The Court may, on hearing a petition under subsection (1) —*
>
> *(a) make an order appointing a restructuring officer;*
>
> *(b) adjourn the hearing conditionally or unconditionally;*
>
> *(c) dismiss the petition; or*

> *(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.*
>
> *(4) A restructuring officer appointed by the Court … shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the powers to act on behalf of the company.*"

6. The only issues which arose for consideration as regards these statutory provisions were: (a) whether the two preconditions for presenting a petition had been met; (b) whether restructuring officers should be appointed; and, if so, (c) what powers should be conferred on them. The Companies Winding Up Rules, 2018 as amended by the Companies Winding Up (Amendment) Rules, 2022 (the "CWR") introduce, inter alia, the following new procedural requirements applicable to restructuring petitions:

> "***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***
> *1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.*
>
> *(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.*
>
> *(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.*

(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).
(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.
(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.
(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."

Practical application of the statutory regime

7. In the Company's Written Submissions, the following important argument was advanced:

"*43. It is respectfully submitted that given that certain of the statutory provisions regarding the appointment of restructuring officers in the Cayman Islands are substantially similar to the statutory provisions previously in force regarding the appointment of provisional liquidators for the purposes of implementing a compromise or arrangement with creditors (or classes thereof) (that is, 'light touch' provisional liquidation proceedings), case law*

authorities in respect of restructuring or 'light touch' provisional liquidation are likely to be both relevant and persuasive."

8. I gratefully adopt those submissions 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) of the Companies Act (2022 Revision) before the restructuring officer regime became operative on 31 August 2022. The solvency test for restructuring purposes is the same as that applicable to winding-up proceedings as well (section 93 of the Act, "*Definition of Inability to pay debts*"). Secondly, and less technically and more practically, the cases under the former regime record valuable judicial and legal experience in essentially the same commercial sphere. Lady Mary Arden, delivering a Distinguished Guest Lecture in the Cayman Islands earlier this year, sagely stated:[4]

> "*The common law is the language of commerce. Commercial law is widely considered to be much more flexible and facultative under the common law system because under that system the courts take one case at a time and focus on the facts to see if the rule that was laid down in case A applies in case B. There is a constant process of refining the law in the light of experience, not of refining the law in terms of abstract intellectual analysis. Or as one of my former colleagues recently put it, as a broad generalisation, the courts tend to oil the wheels of commerce rather than throw grit in the engine*[5]." [Emphasis added]

9. Two passages from cases under the old 'light-touch' provisional liquidator regime, which were placed before me, I considered to be of particular assistance in the present case. Firstly, and most authoritatively as regards the governing legal principles, the following dicta of Anthony Smellie CJ (as he then was) in *In re Sun Cheong Holdings* [2020 (2) CILR 942] lucidly paints an instructive

[4] '*Taking Stock of Recent Case Law of the Judicial Committee of the Privy Council –its Breadth and Depth'*, 25 March 2022, paragraph 84: https://www.judicial.ky/news-publications/speeches.
[5] *Procter v Procter* [2021] EWCA Civ 167, [2021] Ch 395 para 8 per Lewison LJ.

portrait of the old statutory scheme which applies with equal force to the restructuring officer regime:

> "*35 Under ss. 104(3) and 95(1) of the Companies Law, the court has a broad and flexible discretion. The breadth and flexibility of this discretion was first described by this court in In re Fruit of the Loom (11) ("Fruit of the Loom"). The breadth of the court's discretionary power under s.104 (3) to facilitate the rescue of a company was described as follows (Cause 823 of 1999, at 7–8):*
>
> *'The discretionary power vested in the Court by section 99 [as it then was] 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. In the absence of jurisdiction given by specific statutory powers in the Courts for the making of administration orders over the affairs of companies, it is apt that the flexible discretionary power given in section 99 for the appointment of provisional liquidators be used to enable the rescue of a company where it is just to do so in the sense described above.' [Emphasis added.]*
>
> *36 This discretion was affirmed more recently by Parker, J. in CW Group Holdings Ltd. (4) (Cause No. FSD 113 and 122 of 2018, at para. 36) ('CW Group Holdings'), and by Kawaley, J. in In re ACL Asean Towers Holdco Ltd. (1) ('ACL Asean') (Cause No. FSD 171 of 2018, at para. 11).*
>
> *37 As to how the court's broad discretion is to be exercised, there is no prescriptive list of factors to be taken into consideration. However, 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,' per Segal, J. in In re Grand TG Gold Holdings Ltd. (12) ("Grand TG Gold") (Cause No. 84 of 2018, at para. 6(f) (iv));
(b) Whether the refinancing is likely to be more beneficial than a winding-up order (Fruit of the Loom (Cause 823 of 1999, at 9–10));
(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 (Fruit of the Loom (ibid.)); and

(d) The considered views of the board as to the best way forward (CW Group Holdings (Cause No. FSD 113 and 122 of 2018, at para. 72))."

10. Secondly, and more recently, helpful practical guidance as to how to evaluate the evidence relating to a proposed restructuring was given by Nicholas Segal J in *In re Midway Resources International*, FSD 51 of 2021, Judgment dated 30 March 2021 (unreported):

"*65. As I have noted, I am satisfied that the evidence now shows both that the Company intends to present a compromise or arrangement to its creditors and to promote a restructuring of the Group… There appears to be a rational basis for accepting the Restructuring Proposals, provided that the assumptions on which they were based were validated…*

66. As I have noted, the restructuring negotiations are at a relatively early stage. Indeed, in view of the recent developments in Kenya, they are currently at a particularly precarious point…These problems…give rise to serious doubts and concerns as to the prospects of success of the Restructuring Proposals. Nonetheless, I am satisfied that all is not yet lost and there remain a number of ways in which the restructuring negotiations could be put back on track…

67. In the circumstances, it seems to be right and appropriate to appoint the 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…"

11. Construing the terms of section 91B (1), (3) and (4) in light of previous cases dealing with the largely similar now-repealed provisional liquidation for restructuring regime, it may confidently be stated that the jurisdiction to appoint restructuring officers is a broad discretionary jurisdiction to be exercised where the Court is satisfied that:

(a) the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;

(b) the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and

(c) 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 petitioning for the appointment of restructuring officers.

The effect of the statutory stay on other proceedings and related procedural concerns

12. The new '*Company Restructuring*' section in Part V of the Act contains statutory stay provisions which might be said to turbo-charge the degree of protection filing a restructuring petition affords to the petitioning company in contrast with the former remedy of presenting a winding-up petition for restructuring purposes. The presentation of a winding-up petition only definitively stays

proceedings (and dispositions of company property etc.) when a provisional liquidator is appointed or a winding-up order is made. When a restructuring petition is presented and has not been withdrawn or dismissed, all civil proceedings against the petitioning company are stayed even before a restructuring officer has been appointed. Section 91G provides:

> "***Stay of proceedings***
>
> *91G. (1) At any time —*
>
> *(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and*
>
> *(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,*
>
> *no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.*
>
> *(2) Where at any time referred to in subsection (1), there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —*
>
> *(a) the company acting by its directors;*

(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on regulated business,

may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(3) In this section —

(a) references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country; and
(b) references to other proceedings include any court supervised insolvency or restructuring proceedings against the company." [Emphasis added]

13. On a preliminary analysis it seems clear that once a petition is presented under section 91B (1) of the Act, "*no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company*" here or abroad. Because section 91G (1) adds to these words "*and no winding up petition may be presented against the company*", this initially suggests that the "*other proceedings*" previously referenced do not include a winding-up petition presented within the jurisdiction against the restructuring petitioning company. Yet section 91G (3) explicitly provides that "*In this section…other proceedings include… any court supervised insolvency or restructuring proceedings*" [Emphasis added].

14. Mental gymnastics appeared to be required to construe the section as providing by necessary implication, as the Creditors contended, that either:

(a) a section 91B petition cannot validly be presented when a creditor's winding-up petition is already pending before this Court; or

(b) the section 91G stay of proceedings simply does not 'bite' on winding-up proceedings previously commenced against the restructuring petitioner.

15. The new procedural regime introduced by Order 1A (enacted by the Rules Committee chaired by the Honourable Nicholas Segal) in two notable respects appears to recognise the need to mitigate the potentially extensive reach of the new statutory stay provisions. Order 1A provides:

> "***Presentation, Filing and Advertisement of Petition (O.1A, r.1)***
> *1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Act shall be presented by filing it in Court in accordance with GCR Order 9.*
>
> *(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.*
>
> *(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.*
>
> *(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).*

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.
(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers."
[Emphasis added]

The Company's factual case

16. The Company's primary substantive evidence was provided through the First Affirmation of Chu Lawrence Sheng Yu affirmed on 21 October 2022 ("First Chu"). The affiant is a co-founder of the Company and its direct and indirect subsidiaries and also a director of, *inter alia*, the Company's corporate director. He avers that the Company is the parent company of a group of companies incorporated in, *inter alia*, the Philippines, Indonesia and Vietnam. The main business is financial technology and microfinance sold through cash lending and buy-now-pay-later products. Since the Company's incorporation on 15 March 2017, its technology platform has acquired more than 8 million registered users, 1000 merchant partners and transacted business worth more than US$350 million. The Company and the Group have been adversely affected by the impact of the Covid-19 pandemic on Southeast Asian economies and consumers and, more recently, global negative factors including rising interest rates.

17. As regards the Company's financial position, it is averred in First Chu that it is balance sheet solvent. The Company has issued 34 Convertible Notes to 34 holders with the latest maturity date being 23 February 2023. As at 30 June 2022, US$36,657,567 was due and outstanding to Convertible Noteholders. In addition, 69 Promissory Notes were issued to Promissory Noteholders to whom US$54,154,067 was due and outstanding as at 30 June 2022. Roughly US$3 million is owed under separate notes and the affiant himself is owed US$3 million under a shareholder loan. The Company and certain members of the Group have defaulted on certain secured and unsecured loans. Various statutory demands have been served under Cayman Islands and Hong Kong law, winding-up proceedings commenced in the Cayman Islands and arbitration proceedings commenced in Hong Kong, by various Noteholders.

18. The Company addressed the need for a Note Restructuring in May 2022 and the Board initially hoped an out of Court resolution could be found. However, the various payment demands caused the Board to seek the assistance of the Court. The Board believes (for reasons which the affiant plausibly explains) that the Company can continue as a going concern and return to profitability if a restructuring occurs. Although the precise legal vehicle for implementing the restructuring has not yet been worked out, the broad outlines of the proposal (as set out in First Chu) were summarized in the Company's Written Submissions (at paragraph 32) as follows:

> "…
> *(a) a debt for equity swap: 60% of all outstanding principal, accrued interest and late penalty fees on the Notes will be converted into new preferred shares in the capital of the Company;*
>
> *(b) revision to certain key terms and conditions of the Notes, including extensions to principal and interest payment schedules and applicable interest rates: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes shall be subject to a 2 year extension of the maturity date with the applicable interest rate being 8% per annum. Additionally, relevant noteholders will also have the option to convert their*

interest into new preferred shares in the capital of the Company (at a discount of 25%); and

(c) payment in cash: 20% of all outstanding principal, accrued interest and late penalty fees on the Notes will be repaid in cash (if available following completion of the latest fundraising round…"

19. In October 2022, the Company informed Noteholders (except those who had taken actions against the Company, who represent only 1.7% of all Notes) of their plans to file the Petition and of the Proposed Restructuring: "*in response, twenty-four Noteholders expressed support for the Proposed Restructuring generally and the appointment of the JROs, representing approximately 46% of the Notes*" (First Chu, paragraph 59 (a)). The affiant also deposes that "*advanced discussions have occurred and are ongoing with a strategic investor to fund the cash element of the Proposed Restructuring and inject capital for the future business operations*" (paragraph 66 (c)). Because of, *inter alia*, existing management's strong connections with both customers and founders and financial interest in the success of the Group, the best interests of creditors lay in a restructuring taking place " *under the control of existing management with the assistance of, and subject to the supervision of, the proposed JROs and this Honourable Court*" (paragraph 67).

20. The First Affirmation of Geoffrey Prentice, another director, explained advertisement of the Petition and also how a circular was sent directly to all creditors of the Company between 31 October 2022 and 7 November 2022 including a link to the Petition.

Findings on Creditors' preliminary point: was the Petition improperly presented by the Company because a winding-up petition was pending before the Court?

21. The Creditors' Skeleton Argument summarized their preliminary objection as follows:

> "*3. It is the Creditors' position that the provisions of the Companies Act (2022 Revision) (the 'Act') and the Companies Winding Up Rules (the 'Rules') do not permit the presentation of an RO Petition in circumstances where a Winding Up Petition in respect of the Company has already been presented, served and advertised by a creditor and is extant.*
> *4. Alternatively, even if an RO Petition could be presented in such circumstances, the Court should not in any event permit an RO Petition to be presented in circumstances where (i) the Company has failed to respond to a statutory demand validly served; (ii) has failed to make any offer, compromise or arrangement for its debts; (iii) the Winding Up Petition has been presented, a hearing date has been appointed, and it has been advertised in accordance with the Rules; and (iv) where it is therefore plain that the filing of the RO Petition has been undertaken for the purpose of obstructing the Winding Up Petitioner by improperly obtaining the benefit of the moratorium conferred by section 91G of the Act.*"

22. It was easy to accept that if a petition could validly be filed for restructuring purposes while the petitioning company was itself the respondent to an extant winding-up petition, this would interfere with the winding-up proceedings in a significant way which was unthinkable under the longstanding pre- 31 August 2022 legal position. This point was vividly supported by the following submission about the timing of the Company's filing:

> "*14.…It is not appropriate because the petitioning creditor is put to the costs of the Winding Up Petition, on which he is ordinarily entitled to a winding up order as of right (Re Demaglass Holdings Ltd (Winding Up Petition: Application for Adjournment) [2001]*

> *2 B.C.L.C. 633), and the Winding Up Petition is left in a state of limbo in direct contradiction of the Rules, which require the Winding Up Petition to proceed to hearing on the appointed hearing date.*"

23. This was, forensically, an effective way of advancing a difficult point. It encouraged one to begin the statutory analysis on the well-trodden terrain of winding-up law as it has always been rather than to tread gingerly on the unfamiliar statutory path of the new legislative regime. When one focusses on the new legislative provisions as a whole, it is difficult to find any literal or contextual support for the proposition that a restructuring petition was not intended to be presented when a winding-up petition was already before the Court. Mr McGee correctly identified the best possible textual support for his client's construction of section 91G:

> "*17…The Company asserts that 'no suit, action or other proceedings … shall be proceeded with' captures the Petition filed by the Creditors. That is plainly wrong. If 'suit, action or other proceedings' was meant to include winding up petitions presented in this Court then the words 'no winding up petition may be presented against the company' would be wholly redundant. Therefore, the moratorium conferred by section 91G clearly only applies to restrain winding up petitions being presented 'after the presentation of a petition for the appointment of a restructuring officer under section 91B' and not one presented before the presentation of an RO Petition.*"

24. It is tempting to allow the tail of the past to wag the dog of the present; but that would involve abandoning all attempts to undertake any recognised form of statutory interpretation. It is clear that section 91G imposes a stay on broadly defined civil proceedings which have already been commenced against a company which subsequently petitions to appoint restructuring officers. The primary question of construction is whether the term "*other proceedings*" expressly or by necessary implication includes winding-up proceedings. Mr Goucke submitted that it was clear that this included winding-up proceedings. I agreed, because that term is itself expressly defined by section

91G (3) in terms which include winding up proceedings: "*references to other proceedings include any court supervised insolvency or restructuring proceedings against the company.*"

25. The second question of construction is why section 91G (1), after stating in general terms that no proceeding shall be continued or commenced against the company petitioning for restructuring officers, goes on to further state "*and no winding up petition may be presented against the company*". It is true that these words may be viewed as superfluous if the earlier term "*other proceedings*" is read as already capturing winding-up proceedings. But this potential ambiguity was in my judgment insufficient to override the clear terms in which the word "*other proceedings*" are explicitly defined.

26. In fact, the 'superfluous' express reference to the prohibition on presenting winding-up proceedings after the filing of restructuring petition may also be seen as reinforcing the legislative intention that once a restructuring petition has been filed (and not withdrawn or dismissed), it takes precedence over the traditional creditor's remedy of presenting a winding-up petition, even if the character of the proceeding is restructuring in nature. The words may therefore be understood as added for emphasis, and perhaps in part to meet the point Mr McGee validly made about the traditional expectations of unpaid creditors in relation to petitioning to wind-up an insolvent company. This would also be consistent with the drafters of the restructuring officer regime being mindful of the sea change the new stay provisions were introducing. A winding-up petition's presentation does not trigger the protection of an automatic stay of proceedings; this only occurs when a provisional liquidator is appointed or a winding-up order is made under section 97 (1) of the Act. An automatic stay on filing a section 91B petition is a significant innovation.

27. The Creditors' counsel also sought to deploy alleged inconsistencies between the Rules and the construction of section 91G for which the Company contended. It is rarely possible to use subsidiary legislation as an aide to construing primary legislation. But if one is anxiously searching

for some sense of legislative purpose which may be reflected in the CWR, it is to the new provisions of Order 1A that one must turn. The following arguments were advanced in this regard:

> "*18. The Rules also support the Creditor's contended interpretation of the RO Regime:*
>
> *a. O.1A, r5 sets out the procedure that applies where a winding up petition is presented after an RO Petition is presented. That rule is quite clear in its terms and could not be interpreted as applying to the converse situation that exists here.*
>
> *b. Notwithstanding the detailed provisions of O.1A, r5, there is absolutely nothing in the Rules that refer to, or set out, the procedure that applies where a winding up petition is presented before an RO Petition. If it was intended that an RO Petition could be filed after a winding up petition had been presented then the absence of any provision whatsoever for the procedure that is to apply would be extraordinarily remiss.*"

28. CWR Order 1A provides as follows:

> "***Concurrent Petitions (O.1A, r.5)***
>
> *5. (1) An application for leave to present a winding up petition in respect of a company to which section 91G of the Act applies shall be made by summons and heard by the judge assigned to the proceedings commenced under section 91B of the Act.*
>
> *(2) If leave is granted to present a winding up petition pursuant to section 91G of the Act, the winding up petition will be assigned to the same judge assigned to the proceedings commenced under section 91B of the Act.*
>
> *(3) In circumstances where leave to present a winding up petition has been granted pursuant to section 91G of the Act and the petition for the appointment of a restructuring*

officer has not been heard, the Court may hear the winding up petition and the petition for the appointment of a restructuring officer at the same time.

(4) In circumstances other than those specified in Order 1A, rule 5(3), the Registrar shall fix a date for the hearing of the winding up petition in consultation with the judge assigned to the proceedings commenced under section 91B of the Act.

(5) Where a petition for the appointment of a restructuring officer has been presented and a restructuring officer (or an interim restructuring officer) has not been appointed under section 91B or 91C of the Act, the company shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the directors to be most expedient for the purpose of bringing the petition to the notice of such parties.

(6) In circumstances other than those specified in Order 1A, rule 5(5), the restructuring officer (or interim restructuring officer) as applicable, shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to him to be most expedient for the purpose of bringing the petition to the notice of such parties.

(7) In circumstances where a petition for the appointment of a restructuring officer has been presented or a restructuring officer (or an interim restructuring officer) has been appointed pursuant to section 91B or 91C of the Act, the Court may give directions as to

the manner in which the winding up petition is to be advertised or dispense with the requirement to advertise the winding up petition."

29. It is obviously correct that Order 1A, rule 5 deals exclusively with the procedure for obtaining leave to "present" a winding-up petition and does not explicitly deal at all with applications for leave to continue winding-up petitions presented before a petition to appoint restructuring officers was filed. Taking this point at its highest, it supported the following potential conclusions about the legislative policy underpinning the relevant rules: the drafters of Order1A must have assumed that there was no need to deal with applications for leave to continue winding-up petitions presented before a section 91G petition was filed, because it was not legally possible for a restructuring petition to be filed once a winding-up petition had been presented against the same company. It is precisely to avoid Evel Knievel-scale leaps of logic such as this, that subsidiary legislation must be construed in conformity with the primary legislation under which the subsidiary legislation was made and cannot be used as aide for ascertaining the meaning of the primary statute. In any event, Order 1A must be read as a whole.

30. The tight default time limits for advertising under Order 1A, rule 1 mandate: (a) advertising within 7 business days after filing; and (b) a hearing 21 days after filing are not applicable to winding-up petitions. This suggests that the learned drafters of the new CWR provisions were keenly aware of the practical implications of the broader stay provisions applicable to restructuring petitions. These provisions appear to be designed to protect the rights of creditors by conferring an opportunity to be heard in relation to a restructuring petition as soon as possible. The need to consider introducing such safeguards which are not found in the procedural regime for winding-up petitions only arises because the section 91G stay (unlike the winding-up stay) operates from the date of filing of a petition to appoint restructuring officers.

31. In my judgment construing the intended scope of section 91G according to the natural and ordinary meaning of the words in their context does not result in any absurdity and is not inconsistent with

the entirely rational legislative purpose of ensuring that any pending civil proceedings should be stayed if a section 91B petition is filed. The legal effect of the unambiguous provisions of section 91G (1): "*no suit, action or other proceedings…shall be proceeded with…against the company…except with the leave of the Court…*", cannot be nullified because no express provision is currently made in the CWR for an application for leave to proceed with proceedings which are clearly intended by the terms of the Act to be automatically stayed when a restructuring petition is filed. Seeking to construe Order 1A, rule 5 in conformity with the primary legislation under which it was made, rather than with a view to undermining the primary legislative scheme, it seemed reasonable to assume that section 91G in any event confers a sufficient statutory power on the Court to grant leave for pre- section 91B petition proceedings to be proceeded with against the relevant company irrespective of any governing rules under Order 1A, rule 5 of the CWR. Further and in any event, in my experience it is entirely unremarkable for there to be changes introduced by primary legislation that are not comprehensively dealt with in the related rules[6].

32. For these reasons I ruled before considering the merits of the present application that the presentation of the Company's Petition was not invalidated because it was presented after the Creditors' winding-up petition had been filed.

[6] In *New Skies Satellite BV-v- FG Hemisphere Associates LLC* [2005] Bda L.R. 59, the Court of Appeal permitted enforcement of a foreign arbitral award under a 1993 statute despite the absence of any rule of court permitting leave to serve out in respect of such awards.

Findings: the merits of the Company's section 91B Petition

Advertising requirements

33. The Company was unable to comply strictly with the requirement under Order 1A, rule 1 (5) that the Petition be advertised within 7 business days of the date of filing and not less than 7 business days due to delays on the part of the Court. It was submitted:

> "*12. In our respectful submission, the creditors and shareholders of the Company have not been unfairly and/or unduly prejudiced as a result of the failure to strictly comply with the requirement to advertise the RO Petition 'not more' than 7 business days following the filing of the RO Petition and 'not less' than 7 business days before the hearing of the RO Petition in circumstances where the Company distributed a detailed circular to all creditors and shareholders of the Company variously between 31 October and 7 November 2022, which included details of the hearing of the RO Petition.*"

34. I had little difficulty in accepting that since the Company had directly notified all unsecured creditors of the Petition and its contents together with the hearing date at least 7 calendar days before the hearing, no material prejudice was caused by the failure to comply with the formal advertising requirements. The manifest legislative function of the advertising requirements is to bring the proceedings to the attention of as many creditors as possible; it is inherently improbable that each creditor in every case will read the prescribed notice. The actual notice given to each creditor through the emailed Circular in the present case was in real world terms more effective notice than would have been achieved through strict compliance with the advertising requirements.

35. Advertising is a default notice requirement, not an inflexible rule and the Court is expressly empowered to dispense with advertising a restructuring petition. The purpose of the rule is to ensure that creditors are aware that a petition has been filed and when it will be heard. Advertisements do not serve any abstract ritual function in and of themselves. Where petitioners have reliable

electronic contact information for creditors, it may well be appropriate for applications to be made on the papers to dispense with the need for advertising in whole or in part. Had it been necessary to do so in the present case, I would have retrospectively waived the advertising requirements under the relevant rule. In the event, I simply accepted the submission that the failure to comply strictly with advertising requirements in relation to the Petition provided no grounds for declining to proceed with the hearing on its merits.

Was the company unable to pay its debts or likely to become unable to pay its debts?

36. Section 91B petitioners are likely in most cases to have little difficulty in establishing this limb of their petitions. It is unlikely that management's admissions as to cash-flow or balance sheet insolvency will lack credulity. Typically it is petitioning creditors' assertions of insolvency which are denied by overly optimistic and/or unrealistic managers. There is rarely any commercial advantage to be gained by a solvent company falsely professing its insolvency. In the present case the Company's own detailed disclosures of its financial difficulties were not only entirely credible but corroborated by the fact that, *inter alia*, the Creditors had presented a winding-up petition based on an unsatisfied statutory demand to this Court. The Company was accordingly deemed as a matter of law to be insolvent under section 93(a) of the Act.

Did the Company intend to propose a compromise or arrangement to its creditors?

37. Although the Creditors' Skeleton Argument suggested that they proposed to oppose the Petition on its merits, Mr McGee realistically abandoned any opposition after his clients' technical objection to the Petition had been rejected. The Creditors being in breach of the section 91G stay through presenting a second winding-up petition against the Company in Hong Kong, it would have been difficult for the Court to hear them or place much reliance on their objections as to the merits of the Petition.

38. The Company's unchallenged evidence was in any event compelling. 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 the JROs. This preliminary support lent further credence to the Company's management's view that value for creditors would most likely best be 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. The fact that the Company was facing individual debt collection proceedings tangibly demonstrated the practical need for the protection of the section 91G stay which a restructuring under the supervision of the JROs and this Court would provide.

Summary of findings on merits of Petition

39. In summary, I considered that the grounds for appointing restructuring officers were very strongly made out in a case where the evidence showed that all Noteholders (the main unsecured creditor class) had been notified of the hearing and:

(a) 46% in value had signified their positive support for the application; and

(b) 0% (save for the Creditors) positively opposed the application on its merits.

Conclusion

40. For the above reasons on 11 November 2022, I made an Order appointing the JROs in the terms set out in the Appendix hereto.

_____

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

APPENDIX

(body of Order dated 11 November 2022)

"***IT IS ORDERED*** *that:*

1 Mr Kenneth Fung of FTI Consulting (Hong Kong) Limited of Level 35, Oxford House, Taikoo Place, 979 King's Road, Quarry Bay, Hong Kong, and Mr Andrew Morrison and Mr David Griffin, both of FTI Consulting (Cayman) Ltd, Suite 3212, 53 Market Street, Camana Bay P.O. Box 30613, Grand Cayman KY1-1203, Cayman Islands be appointed as Restructuring Officers of the Company.

2 The Restructuring Officers shall not be required to give security for their appointment.

*3 The Restructuring Officers, acting jointly and severally, and without prejudice to the powers retained by the Company's board of directors (the '**Board**') pursuant to paragraph 5 below, are hereby, until further Order, authorised to take the following actions, within and outside of the Cayman Islands, without further sanction by the Court:*

3.1 monitor, oversee and supervise the Board in its management of the Company, and take all necessary steps to develop and implement a restructuring of the Company's financial indebtedness in consultation with the Board and under the general supervision of the Court:

(a) in a manner designed to allow the Company and its subsidiaries or such joint-ventures, associated company or other entities in which
*the Company has an interest (the '**Group**') to continue as a going concern;*
(b) with a view to making a compromise or arrangement with the Company's creditors or any class thereof and any corporate and/or capital reorganisation of the Company and/or the Group (including but not limited to any share subscription and placement of shares in the Company and/or the Group); and
*(c) including (without limitation) by way of a scheme of arrangement between the Company and its creditors or any class thereof pursuant to section 86 and/or 91I of the Companies Act (2022 Revision) (the '**Act**' and a '**Scheme**') and/or by way of an analogous process available in any other foreign jurisdiction and/or by way of a consensual process which may include disposal of certain of the assets of the Company and/or the Group with a view to maximising value and returns for the creditors of the Company,*
*(the '**Restructuring**');*

*3.2 seek recognition of these proceedings (the '**Restructuring Proceedings**') and/or the appointment of the Restructuring Officers in any jurisdiction that the Restructuring Officers consider necessary, together with such other relief as they may consider necessary for the proper exercise of their functions within that jurisdiction;*

3.3 review the actions and activities of the Board and the continuation of the business of the Company and/or the Group (and attend Board meetings of Group entities) so as to ensure that the Board is acting

with a view to protecting the position of, and maximising returns to, the creditors and other stakeholders of the Company;

3.4 review and approve in advance filings to be made by the Company with regulatory bodies, and responses to quasi-governmental bodies as appropriate;

3.5 seek out investors and financiers for the purpose of investing in and/or providing finance to the Company;

*3.6 monitor, consult with and otherwise liaise with the creditors and shareholders of the Company to determine whether the Restructuring will be successfully approved and implemented, including the establishment of a creditors' committee if deemed appropriate by the Restructuring Officers (in their absolute discretion) with such committee to operate as if it were a creditors' committee under Order 9 of the Companies Winding Up Rules, 2018 (as amended) (the '**Rules**');*

3.7 review the financial position of the Company and the Group, and, in particular, assess the feasibility of proposals for the Restructuring;

3.8 operate and open or close any bank accounts in the name of and on behalf of the Company and to be joint (and not several) signatories on such bank accounts should the Restructuring Officers determine that it is appropriate or necessary to do so, and to receive funds for the purpose of paying the costs and expenses of the Restructuring Proceedings and the related Restructuring;

3.9 act in the name and on behalf of the Company, and execute all agreements, deeds, receipts and other documents and, for that purpose, to use the Company seal when necessary;

3.10 subject to the sanction of the Court for transactions in excess of US$1 million, draw, accept, make and endorse any bill of exchange or promissory note or borrow funds for the purpose of the day to day expenses of the
Restructuring Proceedings, in the name and on behalf of the Company, with the same effect in respect of the Company's liability as if the bill or note had been drawn, accepted, made or endorsed or the loan had been entered into by or on behalf of the Company in the course of its business;

3.11 prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against the estate of such contributory, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt, insolvent or sequestrated contributory and rateably with the other separate creditors;

3.12 make payments to creditors which may have the effect of preferring such creditors, in order to minimise the interruption to the day to day activities of the Company;

3.13 to authorise the Board to exercise such of the above powers relating to the Company on such terms as

the Restructuring Officers consider fit;

3.14 to take such steps as the Restructuring Officers may consider necessary or appropriate in respect of any and all proceedings to which the Company is party in the Cayman Islands and/or elsewhere, including but not limited to, the proceedings in respect of the Cayman Islands Winding Up Petition, the Hong Kong Winding Up Petition and the arbitration commenced on or about 27 May 2022 at the Hong Kong International Arbitration Centre; and

3.15 do all other things which are incidental to the exercise of the powers set out above.

4 The Restructuring Officers are hereby directed to:

4.1 notify all known creditors and shareholders of the Company, of their appointment in such manner as the Restructuring Officers shall determine in accordance with Order 1A, rule 7(3) of the Rules;

*4.2 prepare a report about the financial condition of the Company within 28 days of the date hereof and at least every three months thereafter or as the Court may otherwise request from time to time (the '**Reports**'), including but not limited to the matters in Order 1A, rule 8(2) of the Rules;*

4.3 file the Reports with the Court, and serve the Reports on all known creditors and shareholders of the Company, in a manner to be determined by the Restructuring Officers in their absolute discretion;

4.4 if deemed appropriate by the Restructuring Officers, to enter into a protocol with a foreign officeholder and/or the Board which sets out the terms upon which the foreign officeholder/Restructuring Officers and/or the Board shall cooperate with respect to the management of the Company. If entered into, such protocol to be included with the Restructuring Officers' next Report to the Court;

4.5 prepare and advise upon the Restructuring, including a Scheme if appropriate and/or in respect of any other proposal in respect of the Company's indebtedness; and

4.6 without limiting their powers hereunder, to discuss and consult with the Board (or any relevant sub-committee thereof) in respect of the exercise of the powers conferred on them pursuant to this Order relating to matters concerning the Company and/or the Group prior to the exercise of the same (if circumstances permit).

*5 The Board is hereby authorised to continue to manage the Company's day-to-day affairs in all respects and exercise the powers conferred upon it by the Company's Memorandum and Articles of Association ('**M&A**'):*

5.1 subject to the Restructuring Officers' oversight and monitoring of the exercise of such powers in relation to matters relating to the ordinary course of business of the Company pursuant to paragraph 3 hereof;

5.2 subject to the Restructuring Officers granting prior approval of the exercise of such powers and to matters outside the ordinary course of business of the Company;
provided always that should the Restructuring Officers consider at any time that the Board is not acting in the best interests of the Company and its creditors, the Restructuring Officers shall have the power to report the same to the Court and seek such directions from the Court as the Restructuring Officers are advised to be appropriate;

5.3 save that, for so long as the Restructuring Officers are appointed:

(a) any change to the members of the Board and the members of the Board's subcommittees, other than by resignation, shall be approved by the Restructuring Officers before such change becomes effective, provided that the Restructuring Officers shall not unreasonably withhold their approval; and
(b) no new shares shall be issued nor shall any rights attaching to shares be altered without the prior approval of the Restructuring Officers in relation to the Company;

5.4 without limitation to the foregoing, the Board continues to retain the following powers:

(a) to continue to conduct the ordinary, day to day, business operations of the Company;
(b) subject to paragraph 3.8 above, to continue to operate the bank accounts of the Company in the ordinary course of the Company's business; and
(c) subject to the approval and consent of the Restructuring Officers (which will not be unreasonably withheld), to open and close bank accounts on behalf of the Company.

6 The Board is hereby directed to:

6.1 provide the Restructuring Officers, within 3 business days of a request for the same, with such information as they may require in order that the Restructuring Officers should be able to properly carry out their duties and functions and exercise their powers under this Order and as officers of the Court, without purporting to impose any conditions as to the confidentiality of such information or its use, including, without limitation, such information as the Restructuring Officers may reasonably require to enable them to monitor the cash-flow of the Company and the Group and to prepare the Report; and

6.2 provide the Restructuring Officers with advance materials, advance notice of all of the Company's Board meetings and such meetings of management or subcommittees of the Board as the Restructuring Officers may request, and to permit the Restructuring Officers to attend such meetings at their discretion and to provide promptly upon their request copies of the minutes of all such meetings.

7 That notwithstanding the presentation of the Petition and the Winding Up Petition, in the event an Order for the winding up of the Company is subsequently made on the Winding Up Petition:

7.1 payments made into or out of the bank accounts of the Company;

7.2 dispositions of the property of the Company; and

7.3 any transfer of shares or alteration in the status of the Company's members,
in each case, by or with the authority of the Restructuring Officers (made between the date of presentation of the Winding Up Petition and the date of any winding up order), and in the course of the Restructuring Officers carrying out their duties and functions and/or the exercise of their powers under any Order granted pursuant to the Petition, shall not be voided by virtue of section 99 of the Act.

8 Pursuant to section 91G of the Act, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the Company, no resolution shall be passed for the Company to be wound up and no winding up petition may be presented against the Company, except with the leave of this Honourable Court and subject to such terms as this Honourable Court may impose.

*9 With respect to liabilities incurred and falling due during the period in which the Restructuring Officers are in office, in addition to the powers at paragraph 3 above, the Restructuring Officers are hereby be empowered to (subject to sections 91D and 109 of the Act, Order 20 of the Rules and the Insolvency Practitioners' Regulations 2018 (as amended) (the '**Regulations**')):*

9.1 discharge debts incurred by the Company (acting by the Board and/or the Restructuring Officers) after the commencement of these Restructuring Proceedings (including those of the Company's legal and professional advisors) as expenses or disbursements properly incurred in the Restructuring Proceedings;

9.2 render and pay invoices with respect to the Restructuring Officers' remuneration at their usual and customary rates on account out of the
assets of the Company on the basis of and subject to the requirements of the Regulations;

9.3 appoint and engage clerks, servants, employees, managers and agents (whether or not as employees of the Company and whether located in the Cayman islands or elsewhere) to assist them in the performance of their duties for the purpose of the Restructuring Proceedings, and to remunerate them out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations; and

9.4 appoint, retain and employ attorneys, barristers, solicitors or other lawyers and professional advisors either (a) jointly with the Board for and on behalf of the Company; or (b) by the Restructuring Officers personally, in the Cayman Islands, Hong Kong and/or elsewhere as the Restructuring Officers may consider necessary the purpose of advising and assisting the Restructuring Officers in the execution of their powers and the performance of their duties in accordance with Order 25 of the Rules, and to remunerate such attorneys, barristers, solicitors or other lawyers and professional advisors for their reasonable fees and expenses out of the assets of the Company as an expense of the Restructuring Proceedings on the basis of and subject to the requirements of the Regulations.

10 The title of these proceedings be appended with the words '(Restructuring Officers Appointed)'.

11 The costs of and incidental to this Petition shall be paid forthwith out of the assets of the Company as an expense of the Restructuring Proceedings.

12 The Restructuring Officers be at liberty to apply generally.

13 A case management conference shall be listed for hearing on or about 11 March 2023 for the purpose of the Court assessing the progress made with respect to the formulation of any compromise or arrangement."

HCMP 2227/2021 & HCCW 81/2021
(HEARD TOGETHER)
[2022] HKCFI 1686

HCMP 2227/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2227 OF 2021

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

and

IN THE MATTER of Sections 670, 671, 673, and 674 of the Companies Ordinance (Cap 622)

AND

HCCW 81/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 81 OF 2021

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32)

and

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 May 2022

Date of Decision: 27 May 2022

Date of Reasons for Decision: 6 June 2022

R E A S O N S F O R D E C I S I O N

Introduction

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and its Scheme Creditors; and

(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company ("**Winding-Up Petition**"), which the Company asks me to dismiss and order that the costs are paid by the Petitioner. I deal with this in [44].

2. On 12 January 2022 I made an order for the Company to convene a meeting of its creditors to consider a proposed scheme of arrangement restructuring its debt ("**Convening Order**"). After an adjournment, the Scheme Meeting was duly convened on 1 March 2022. At the Scheme Meeting the resolution was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors voted for the Scheme.

3. The Scheme seeks to restructure the Company's indebtedness in order to return the Company to a solvent going concern. A successful restructuring would give the Scheme Creditors a much higher recovery (estimated to be 100% of the principal under the Scheme's Term Extension Option). Absent restructuring, the Company would be liquidated and the Scheme Creditors' estimated recovery would be approximately 8.5% to 23.1%.

4. The background to the Company and the need for the Scheme are in brief as follows. The Company is a Bermuda-incorporated entity and its shares have been listed on the Main Board of The Stock Exchange of Hong Kong Limited ("**SEHK**") since 28 January 1993. The Company is an investment holding company. The Company's subsidiaries are principally located in Hong Kong, Mainland China, and the British Virgin Islands. The Company is also part of a wider group ("**Group**") ultimately held by Century Sunshine Group Holdings Limited ("**Century Sunshine**") which is an exempted company incorporated in the Cayman Islands and listed in Hong Kong (Stock Code: 509).

5. The Group's key businesses consist of the development and production of green fertilisers, including ecological fertilisers, functional

fertilisers and general fertilisers; a with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK$1,138,523,000 and net current liabilities of HK$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong ("**Petition**"). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators ("**PLs**") in Bermuda:

(1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: *Re Rare Earth Magnesium Technology Group Holdings Ltd*[1].

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Clauses 1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Clause 7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Clauses 7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the

---

1 [2020] HKCFI 2260; [2020] HKCLC 1295.

Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Clause 7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Clause 7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Clause 7.12 of the Scheme).

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Clause 7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Clause 9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

Relevant Principles

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*[2]. The Court considers in particular the following:

(1) whether the scheme is for a permissible purpose;

(2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;

(3) whether the meeting was duly convened in accordance with the Court's directions;

(4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;

(5) whether the necessary statutory majorities have been obtained;

(6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

(7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

---

2 [2020] HKCFI 467; [2020] HKCLC 379 at [7].

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*[3]).

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

(1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.

(2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.

(3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.

(4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried

---

[3] [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].

out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

(5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

See *Re China Oil Gangran Energy Group Holdings Ltd*[4].

20. The Scheme Creditors correctly voted as a single class for these reasons:

(1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.

(2) The Scheme Claims are the Company's general unsecured debts.

(3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2nd affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in The Standard and Sing Tao Daily on 18 January 2022.

---

4 [2021] HKCFI 1592; [2021] HKCLC 911 at [15]–[16].

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Company*[5]; *aff'd The Peninsular and Oriental Steam Navigation Company v Eller and Co*[6]; *Re CIL Holdings Ltd*[7]).

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *section 674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

> "A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes, and I would normally expect it to have its views independently

---

5 [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).
6 [2006] EWCA Civ 432.
7 (Unrep., HCMP 2799/2002, 2 April 2003) at [8]–[12] and [18] (Kwan J).

> verified by an insolvency practitioner or other suitable professionals."[8]

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd*[9]. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors' Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

Transnational Cases

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it

---

8 *Re Century Sun International Ltd, supra*, footnote 3 at [23].
9 [2020] HKCA 973; [2020] HKCLC 1549 at [37].

would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*[10].

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*[11], in an English law context:

> "There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad."

---

10 *Supra*, footnote 4 at [21]–[23].
11 [2021] EWHC 222 (Ch) at [29] (Miles J).

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*[12] provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process[13]. Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US$ denominated debt and for the relevant agreements to be governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States[14]. This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*[15]:

---

12 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.
13 *China Oil supra* [24] referring to *China Singyes supra* [18(2)].
14 See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495.
15 *Ibid* [36].

> "The second issue is answered by the Privy Council's decision in *New Zealand Loan and Mercantile Agency Co v Morrison*[16]. The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors '*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result.*'[17] The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company's listed status."

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*[18].

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law[19]. In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of

---

16 [1898] AC 349.
17 Lord Davey pp357–8.
18 *Supra.*
19 *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

United States Bankruptcy Code. This is explained by Glenn J (who dealt with the *Chapter 15* application in *Winsway*[20]) in his judgment in *In re Agrokor d.d*[21]. In pages 184 to 185 Glenn J explains the position as follows:

> "The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"

33. As a matter of United States law a confirmed *Chapter 11* plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under *Chapter 15* does not operate as a discharge and that Glenn J acknowledges this.

34. On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement

---

[20] *Supra*.
[21] 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia's *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

> "From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law.[22] That would be unfortunate, indeed."

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on page 187:

> "Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located **in the United States. *Id.***" (emphasis added)

---

[22] As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound" by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

36. It is clear from this passage that recognition under *Chapter 15* operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under *Chapter 11* which purports to have worldwide effect, recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which *Gibbs* is concerned) and a court within its jurisdiction recognising, pursuant to a process such as *Chapter 15*, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under *Chapter 15* does not constitute a compromise of debt governed by United States law, which satisfies the Rule in *Gibbs*. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and

recognition under *Chapter 15*[23]. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and *Chapter 15* recognition will not protect them.

Modification of the Scheme

38. The Company seeks to modify the Scheme terms slightly in order to accommodate SEHK's comments on the structure of the Term Extension Share Placement. The amendments are in summary as follows:

(1) Subject to complying with the public float requirement, the Company will issue in one lot all shares under the Term Extension Share Placement, instead of five instalments as originally proposed.

(2) The Term Extension Interest payable to the Scheme Creditors will no longer be subject to any cap; the original proposal was a 5% cap.

---

[23] By way of example: Hilong Holding Limited (Stock Code 1623), GCL New Energy Holdings (Stock Code: 451), MIE Holdings Corporation (Stock Code: 1555), Golden Wheel Tiandi Holdings Company Limited (Stock Code: 1232), Modern Land (China) Co., Limited (Stock Code: 1107) and E-House (China) Enterprise Holdings Limited (Stock Code: 2048). In *Winsway* the scheme was recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to constitute "*foreign non-main proceedings*" as defined in the **UNCITRAL Model Law** as incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My understanding is that it was thought by *Winsway's* legal advisers that the Company's COMI might be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute "*foreign main proceedings*" and the *Chapter 15* application was framed accordingly. For obvious reasons it is unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore jurisdiction or an establishment as defined in paragraph (f) of Article 2. Article 16 paragraph 3 provides that "*In the absence of proof to the contrary, the debtor's registered office ..... is presumed to be the centre of the debtor's main interests*". I would have thought that it would be apparent from evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme and its background that most, if not all, of these companies do not have their COMI in the place of incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14–10358 (REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for recognition under *Chapter 11*.

(3) The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.

39. The Company seeks the Court's permission to modify the Scheme terms to meet SEHK's requirements. In this connection, the Company relies on Clause 119 of the Scheme:

> "The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise… If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition."

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors' recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, "foisting" on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd*[24].

---

[24] [2022] HKCFI 1128 at [8].

Determination

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

(1) Schemes of arrangement and capital reductions;

(2) applications to appoint provisional liquidators; and

(3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*[25]:

---

[25] [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

> "I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge's clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them."

The Winding Up Petition

44. The Company seeks an order dismissing the Winding-Up Petition. The Petitioner, who appeared today through Justin Ho did not object, but the Petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Gall, for the company (in both actions)

Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global Investment SPS (the creditor in HCMP 2227/2021 & the petitioner in HCCW 81/2021)

Attendance of the Official Receiver was excused (in HCCW 81/2021)

In re Modern Land (China) Co.

United States Bankruptcy Court, Southern District of New York

Jul 18, 2022

22-10707 (MG) (Bankr. S.D.N.Y. Jul. 18, 2022)

22-10707 (MG)

07-18-2022

In re: MODERN LAND (CHINA) CO., LTD., Debtor in a Foreign Proceeding.

SIDLEY AUSTIN LLP Counsel to the Foreign Representative By: Anthony Grossi, Esq. MAPLES AND CALDER (CAYMAN) LLP Attorneys for Debtor in a Foreign Proceeding for the Cayman Islands By: Caroline Moran KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Willa Wang, Esq. KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Heidi Hockberger, Esq.

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

Chapter 15

MAPLES AND CALDER (CAYMAN) LLP Attorneys for Debtor in a Foreign Proceeding for the Cayman Islands By: Caroline Moran

KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Willa Wang, Esq.

KIRKLAND ELLIS LLP Attorneys for the Ad Hoc Group By: Heidi Hockberger, Esq.

MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION AND RELIEF *2

2

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

This case raises the important questions of whether and when, under Chapter 15 of the Bankruptcy Code, a bankruptcy court may recognize and enforce a scheme of arrangement sanctioned by a court in the Cayman Islands, the debtor's place of incorporation, that modifies or discharges New York law governed debt. The Debtor here is a holding company for a large group of businesses, most of which are incorporated in the Cayman Islands or the British Virgin Islands ("BVI"), but that conduct most or all of their business in the People's Republic of China ("PRC"). Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 adopts the center of main interest ("COMI") concept, permitting recognition of a foreign proceeding in a debtor's center of main interest (a "foreign main proceeding") or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." While the statute establishes a presumption that a debtor's COMI is its place of incorporation, the presumption can be overcome where other factors support finding the COMI to be elsewhere. Should this Debtor's Cayman sanctioned Scheme be recognized and enforced by this Court? On the facts of this case, the Court concludes the answer is yes. For the reasons explained below, this Court **GRANTS** the Motion recognizing the Cayman Proceeding as a foreign main proceeding and recognizing and enforcing the Scheme.

I. BACKGROUND

Proceeding, (II) Recognition of a Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code (the "Motion," ECF Doc. # 4), filed by Mr. Zhang Peng, in his capacity as the authorized foreign representative (the
3 "Foreign Representative") of Modern Land *3 (China) Co., Limited (the "Debtor"). A proposed recognition order is attached to the Motion as Exhibit A. ("Proposed Recognition Order," ECF Doc. # 4-1.) The Debtor is the subject of a foreign proceeding (the "Cayman Proceeding") concerning a scheme of arrangement (the "Scheme" or "Cayman Scheme") between the Debtor and certain holders of the existing notes (the "Scheme Creditors"), under section 86 of the Cayman Islands Companies Act 2022 (the "Companies Act") and currently pending before the Grand Court of the Cayman Islands (the "Cayman Court").

The following declarations were filed in support of the Motion: (i) a declaration of the Foreign Representative ("Peng Declaration," ECF Doc. # 5); (ii) a declaration of the Debtor's Cayman Islands counsel, Caroline Moran ("Ms. Moran") (ECF Doc. # 6); and (iii) the Foreign Representative's statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (ECF Doc. # 3). The Foreign Representative also filed supplemental briefing addressing the *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 ("Rare Earth Briefing," ECF Doc. # 12) and *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("Global Brands Briefing," ECF Doc. # 19.)

The objection deadline was set for June 29, 2022, at 4:00 p.m. (*See* ECF Doc. # 9). There were no objections filed in response to the Motion. The hearing to sanction the Scheme by the Cayman Court was scheduled for July 5, 2022, at 11:00 a.m. (Motion ¶ 34.)

On July 5, 2022, the Debtor filed a supplemental declaration of Ms. Moran addressing the hearing to sanction the Scheme. ("Supplemental Moran Declaration," ECF Doc. # 20.) Annexed to the Supplemental Moran
4 Declaration as Exhibit A is a report of the scheme meeting held on *4 June

A hearing on the Motion was held on July 7, 2022. At the hearing, the Court directed the Foreign Representative's counsel to file further supplemental briefing by July 12, 2022. On July 12, 2022, the Foreign Representative filed (i) a supplemental brief ("Supplemental Brief," ECF Doc. # 23), (ii) a second declaration by the Foreign Representative ("Supplemental Peng Declaration," ECF Doc. # 24), and (iii) a third declaration by Ms. Moran ("Third Moran Declaration," ECF Doc. # 25).

B. The Debtor's Business Operations and Preexisting Capital Structure

On June 28, 2006, the Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) The Debtor is the ultimate holding company of a group of companies comprising the Debtor and its subsidiaries, including the following: Great Trade Technology Ltd., a holding company incorporated with limited liability in the BVI; the Modern Land HK Companies; and Jiu Yun Development Co., Ltd., a holding company incorporated with limited liability in Hong Kong (collectively with Great Trade Technology Ltd., the Modern Land HK Companies, and together with the Debtor, the "Company"), that carries out real estate investment and development in the PRC and the United States. (*Id.* ¶ 7.) The Company is a property developer focused on eco-friendly residences in the PRC with four product lines: MOMA; Modern Eminence MOMA; Modern Horizon MOMA; and Modern City MOMA. (*Id.* ¶¶ 8, 10.)

As of June 30, 2021, the Company had a contracted sales gross floor area of 2.08 million square meters and aggregate unsold gross floor area of 16.77
5 million square meters in the PRC. *5 (*Id.* ¶ 11.) During the first half of 2021, the Company purchased a total of 20 new projects with an aggregate gross floor area of 3.56 million square feet. (*Id.*)

The Debtor's shares have been listed on the Stock Exchange of Hong Kong Limited since July 12, 2013. (*Id.* ¶ 9.) As of December 31, 2021, the authorized share capital of the Debtor was $80 million divided into eight billion ordinary shares of a par value of $0.01 each, of which 2.79 billion of the ordinary shares were issued and fully paid.[1] (*Id.*) As of June 30, 2021, the

[1] All dollar amounts are calculated in USD.

As part of the Company's $1.42 billion of bonds payable, the total principal amount outstanding under the existing notes ("Existing Notes") is $1.34 billion. (*Id.* ¶ 13.) The Existing Notes are the subject of the Scheme with each series of notes issued by the Debtor having different maturity dates and different interest rates. (*Id.* ¶¶ 13-14.) The remaining indebtedness is not being restructured and will be unaffected by the Scheme and this Chapter 15 case. (*Id.* ¶ 14.) As of June 30, 2021, the Debtor's current assets amounted to $12.49 billion on a consolidated basis[2] and these assets were located in the PRC and the United States. (*Id.* ¶ 15.) Some of the assets were pledged to secure certain banking and other facilities granted to the Company and
6 mortgage loans granted to buyers of sold properties. (*Id.*) *6

[2] As of June 30, 2021, the Company's current assets consist of the following: a) inventory of $145.79 million; b) properties under development for sale of $6.92 billion; c) properties held for sale of $895 million; d) trade and other receivables of $1.78 billion; e) amount due from related parties of $129.27 million; f) restricted cash of $570.69 million; and g) bank balances and cash of $2.06 billion. (Motion ¶ 15.)

C. The Cayman Proceeding

Market concerns over the operations of Chinese property developers were intensified due to reduced lending for real estate development, the impact of COVID-19 on macroeconomic conditions, and certain negative credit events. (*Id.* ¶ 18.) These conditions led the Company to experience liquidity pressures due to limited access to external capital to refinance debt and reduced cash generated from sales. (*Id.*) The Company failed to meet two repayments arranged for October 2021 and February 2021 which constituted events of default. (*Id.*) These amounts remain unpaid. (*Id.*)

On October 26, 2021, the Debtor appointed Sidley Austin LLP as its legal advisor. (*Id.* ¶ 20.) On November 5, 2021, the Debtor appointed Houlihan Lokey (China) Limited as its financial advisor. (*Id.*) The Company commenced discussions with the ad hoc group of holders of the Existing

certain Scheme Creditors holding $1,083,272,000 of the Existing Notes-representing 80.75% of the aggregate outstanding principal amount of all Existing Notes-had agreed to the RSA. (Motion ¶ 24.)

On April 14, 2022, the Debtor filed a petition (the "Scheme Petition," ECF Doc. # 6-1) with the Cayman Court commencing the Cayman Proceeding, seeking an order that (i) directed the Company to convene a meeting on the Scheme for a single class of creditors only (the "Scheme Meeting"), (ii) requested a convening hearing (the "Convening Hearing"), and (iii) sought the appointment of the Foreign Representative. (*Id.* ¶ 32.) Following the Convening Hearing on May 31, 2022, the Cayman Court entered the order
7 (the "Convening Order") *7 scheduling the Scheme Meeting for June 29, 2022, scheduling the Sanction Hearing for July 5, 2022, and appointing the Foreign Representative. (*Id.* ¶ 34; Peng Decl., Ex. B.)

The Convening Order states that Scheme Creditors will be notified properly of the Scheme Meeting and will have the opportunity to raise questions and objections to the Scheme at the Scheme Meeting and/or at the Sanction Hearing. (Motion ¶ 37; Peng Decl., Ex. B.) At the Scheme Meeting, a vote will be held to determine whether the Scheme Creditors that are present and voting in person or by proxy will approve the Scheme. (Motion ¶ 38.) If a majority of creditors representing at least seventy-five percent in value of the Scheme Creditors present and voting at the Scheme Meeting votes in favor of the scheme, the Scheme is approved.[3] (*Id.*)

3 As detailed in Section I.G., below, the Scheme Creditors voted overwhelmingly to approve the Scheme- 99% in number and 94.8% in amount. No objections to the Scheme were raised either in connection with the Cayman sanction hearing or this Court's recognition hearing.

D. Description of the Scheme and Issuance of New

The Scheme's effect will be to release the Scheme Creditors' claims related to the Existing Notes documents. (*Id.* ¶ 26.) In return, each Scheme Creditor will receive a pro rata share of the following consideration (the "Scheme Consideration"): cash consideration of $22.916 million; and the

existing indebtedness under the Existing Notes. (*Id.* ¶ 28.) The Debtor will also be issuing the New Notes on the Restructuring Effective Date. (*Id.*)

On the Restructuring Effective Date, following the distribution of the Scheme Consideration and the issuance of the New Notes, all outstanding
8 Existing Notes will be *8 canceled and all guarantees in connection with the Existing Notes will be released. (*Id.* ¶ 29.) Additionally, the Scheme provides for releases by Scheme Creditors of any claim related to the restructuring against the Debtor and its affiliates. (*Id.* ¶ 30.) If the Scheme is approved by the requisite majorities of creditors and sanctioned by the Cayman Court with a sealed copy of the Sanction Order filed with the Cayman Islands Registrar of Companies, the Scheme will then bind all Scheme Creditors regardless of how, or if, they voted. (*Id.* ¶ 31.)

E. Rare Earth Briefing

On June 6, 2022, the High Court of the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Court") ruled in *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (the "*Rare Earth* Opinion"). In dicta, the *Rare Earth* Opinion speculated that "recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt." *Rare Earth* Opinion ¶ 36. The *Rare Earth* Opinion relies heavily upon this Court's decision in *In re Agrokor d.d.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018). Specifically, the Hong Kong Court points to this Court's explanation that "Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*." *Rare Earth* Opinion ¶ 35 (citing *In re Agrokor*, 591 B.R. at 187). From this statement, the Hong Kong Court concludes that "[r]ecognition does not appear as a matter of United States' law to discharge the debt." *Id.* ¶ 36.

On June 17, 2022, the Debtor filed the Rare Earth Briefing noting that the Hong Kong Court's statements principally rely on the application of United States law. (Rare Earth Briefing ¶ 8.) The Debtor notes that a federal court's

and valid discharge of the Existing Notes, which are governed by New York law, as a matter of New York state law. (*Id.*)

This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Waite said in *Gebhard*, "the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries." *Id.* at 548. Chapter 15 limits
10 a U.S. bankruptcy court's authority *10 to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law governed debt any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.[4]

La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399, which refuses to recognize a discharge or modification of English law governed debt approved by a court outside of England. *See Agrokor*, 591 B.R. at 192-96.

F. The Global Brands Briefing

1. *The Debtor Does Not Intend or Expect to Seek Recognition of the Scheme or any Chapter 15 Order of this Court in Hong Kong*

The Court entered an order on June 27, 2022 (ECF Doc. # 18) requiring the Foreign Representative to file a supplemental brief addressing another recent Hong Kong court judgment, *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 (*"Global Brands"*). The court in *Global Brands* stated that, in the future, recognition and enforcement by the Hong Kong court of schemes sanctioned in the Cayman Islands and BVI depended upon common law principles developed by Hong Kong courts that would ordinarily apply a center of main interests test rather than the place of incorporation as had been done in the past. Because the Debtor and its affiliates conduct their business in the PRC, and the Debtor's common stock trades on the Stock Exchange of Hong Kong Limited, this Court wanted to know whether the Debtor intends to seek recognition and enforcement in Hong Kong of the Cayman Scheme and of any order of this Court recognizing and enforcing the Cayman Scheme. In short, the Foreign Representative's answer is that the Debtor does not
11 intend or expect to seek *11 recognition and enforcement of the Scheme or this Court's order recognizing and enforcing the Scheme in Hong Kong.

Given that the Existing Notes are issued by a Cayman Islands entity and are governed by New York law, the Foreign Representative submits that the implementation and effectuation of a Cayman Islands scheme of arrangement and recognition and enforcement of the scheme under Chapter 15 of the Bankruptcy Code are all that is required to effectuate the Restructuring. (Global Brands Briefing ¶ 5.) Further, the Foreign Representative notes that the solely affected creditors, the holders of the Existing Notes, also agree with this position. (*Id.* ¶ 6.) The RSA and the

2. The Scheme Can Become Effective Without Recognition in Hong Kong

According to the Foreign Representative, nothing in the RSA or in any of the Scheme documents necessitates or requires recognition and/or enforcement of the Scheme by the Hong Kong Court for the Scheme to be effective. (*Id.* ¶ 8.) Under the terms of the Scheme, once the Cayman Court sanctions the Scheme and the Sanction Order has been delivered to the Cayman Companies Registrar, the Scheme will become effective. (*Id.*) The Foreign Representative notes that the restructuring will ultimately become effective upon entry of the Sanction Order by the Cayman Court and the Proposed Recognition Order by this Court. (*Id.*) Further, the Foreign Representative argues that this Court does not need to consider whether the Scheme would be recognized and enforced in Hong Kong in making its determination whether to recognize and enforce the Scheme pursuant to section 1521 of the Bankruptcy Code. (*Id.* ¶ 9.) This argument relies on the *Agrokor* case, where this Court enforced the modification of both English law and New York law-governed debts pursuant to a Croatian insolvency proceeding,
12 even though *12 jurisdictions following the *Gibbs* Rule may not have treated the modification of English law-governed debts as effective. (*Id.* ¶ 10.)

3. *Global Brands is Distinguishable*

The Foreign Representative believes it is unlikely that a court in Hong Kong will be asked to consider whether the Scheme is effective in Hong Kong. (*Id.* ¶ 15.) The Foreign Representative does not intend to seek relief in Hong Kong or to obtain any assets located in Hong Kong, and they argue the risk of a dissenting Scheme Creditor seeking enforcement of the Existing Notes in Hong Kong is de minimis. (Id.) It is, of course, for the Debtor to decide whether to seek recognition and enforcement in Hong Kong, and for Hong Kong Court to decide whether to recognize and enforce the Scheme if the issue is presented by the Debtor or any other party that has standing to raise the issue in Hong Kong.

G. The Outcome of the Cayman Proceeding

Ms. Moran notes that the Scheme Creditors overwhelmingly approved the

creditors voted against the Scheme representing less than 1.23% ($16,319,000) of the total principal amount outstanding under the Existing Notes. (*Id.*)

On July 5, 2022, the Cayman Court presided over the Sanction Hearing and found that the Scheme satisfied the requisite elements to be sanctioned. (*Id.* ¶ 7.) Ms. Moran notes that no creditor raised any objection during the Sanction Hearing. (*Id.*) The Cayman Court entered the Sanction Order which sanctions and approves consummation of the Scheme and authorizes
13 and effectuates the Scheme Restructuring. (*Id.* ¶ 8.) *13

H. Supplemental Briefs

A hearing on the Motion was held on July 6, 2022. ("Transcript," ECF Doc. # 21.) The Court expressed its concerns regarding the Debtor's COMI and, with respect to possible recognition as a foreign nonmain proceeding, whether the Debtor established that it was engaged in "non-transitory activity." (Transcript at 45:6-24.) Counsel to the Foreign Representative filed the Supplemental Brief on July 12, 2022.

The Debtor asserts that it's COMI is in the Cayman Islands because it is, and publicly identifies as, a Cayman-incorporated company. (Supp. Brief ¶ 1.) The Foreign Representative states that the Debtor's historical corporate counsel is a Cayman Islands law firm, Conyers Dill & Pearman, which provided general corporate advice on the issuance of the Existing Notes. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes make clear that the Debtor is a Cayman entity. (*Id.* ¶ 3.) The Debtor notes that when it first defaulted under the Existing Notes, BFAM Asian Opportunities Master Fund, LP ("BFAM,") issued a "statutory demand" (the "Statutory Demand") against the Debtor, threatening a winding up petition that would be filed under the laws of the Cayman Islands. (*Id.* ¶ 4.) The Statutory Demand prompted the restructuring negotiations and the RSA. (*Id.* ¶ 5.)

1. *Insolvency Procedures in the Cayman Islands*

The Debtor notes that liquidation of a Cayman Islands incorporated

18-23).)

The Foreign Representative notes that most of the Restructuring-related activities took place in the Cayman Islands. (Supp. Peng Decl ¶ 6.) Maples
14 and Calder (Cayman) LLP *14 ("Maples"), the Debtor's Cayman counsel since November 2021, advised the Debtor with respect to practical elements of the Restructuring during negotiations of the RSA. (Third Moran Decl. ¶ 25.) The RSA put Scheme Creditors on notice that the proceeding to sanction the Scheme would occur in the Cayman Islands. (Supp. Brief ¶ 8.) The Debtor completed each of the steps needed to sanction the Scheme by the Cayman Court. (Supp. Peng Decl. ¶ 10.) These steps included holding the Scheme Meeting in the Cayman Islands that was chaired by an individual who resides in the Cayman Islands and was engaged directly by the Debtor for the purposes of the Scheme Meeting. (Third Moran Decl. ¶ 25.) The chairman of the Scheme Meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*)

2. *Debtor's Arguments in Favor of Foreign Main*

The Debtor relies on the Scheme Creditor's expectations that the Debtor's COMI is the Cayman Islands. (Supp. Brief ¶ 11.) The Debtor notes that creditor expectations were formed via the publicly available descriptions of the Debtor in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (*Id.*) The Debtor notes that creditor expectations were reinforced by certain actions including: (i) BFAM's negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplating an insolvency proceeding in the Cayman Islands. (*Id.*)

The Debtor notes that no Scheme Creditor-including the two Scheme Creditors that voted against the Scheme-objected to the Debtor's COMI

The Debtor notes that Cayman Islands law requires that liquidation proceedings of Cayman Islands-incorporated companies take place in the Cayman Islands under the supervision of a Cayman Islands-appointed liquidator. (*Id.* ¶ 13.) This requirement was made clear in the documents related to the issuance of the Existing Notes.[5] (*Id.*)

5 The Debtor's argument is misleading. Neither the Debtor nor any of its creditors filed a winding up petition that would have resulted in the appointment by the Cayman court of one or more provisional liquidators, who are independent fiduciaries. *See* Cayman Companies Act §§ 94, 104. Rather, here, the Debtor filed the Scheme Petition under section 86 of the Cayman Companies Act, which does not by itself result in the appointment of JPLs. The benefit of a winding up order is that it enables the court in appropriate cases to issue a moratorium similar to our automatic stay preventing creditors from taking action to recover on their claims while the parties try to reach agreement on a scheme. The Cayman court in this case issued the Convening Order appointing the Debtor's president as the Foreign Representative and scheduling the Scheme Meeting. No JPLs were appointed, meaning that there was no independent fiduciary overseeing the process. The Debtor and its professionals had already negotiated the RSA and were proceeding rapidly to a consensual scheme of arrangement without the necessity of a winding up petition, JPLs and a moratorium. In many Cayman cases where the debtor hopes to negotiate a scheme of arrangement, a winding up order and appointment of JPLs precedes the negotiation of the scheme. Such matters are often referred to as a "light touch" restructuring. *See In the Matter of Midway Resources Int'l*, Grand Court of the Cayman Islands, Cause Number: FSD 51 of 2021 (NSD) (Nicholas Segal J.) (30 March 2021), at [68] ("I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute 'light-touch' for 'soft touch', since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!").

The Debtor maintains its registered office in the Cayman Islands to which all communications may be addressed, and where matters such as the administration of annual filings and the payment of annual fees with the Cayman Registrar are dealt with. (*Id.* ¶ 14.) The Debtor is also required to

16 Debtor identified at least 35 entities- representing a minimum of over half a billion dollars of the outstanding principal of the Existing *16 Notes-that are domiciled in the Cayman Islands. (*Id.*) But it is undisputed that despite its domicile in the Cayman Islands, the Debtor and its affiliates are managed and conduct their business in the PRC.

Finally, the Debtor's restructuring activities have been centralized in the Cayman Islands and undertaken by Cayman Islands actors. (*Id.* ¶ 16.) These activities include: (i) Maples advising the Debtor on all aspects of the Restructuring, including the terms of the RSA, the Practice Statement Letter, the Explanatory Statement, and all Cayman Court documents; (ii) preparing for and appearing at hearings in front of the Cayman Court in the Cayman Islands; (iii) the convening of the Scheme Meeting by the Cayman Court; and (iv) the Scheme Meeting, which was chaired by an individual who resides in the Cayman Islands, was engaged directly by the Debtor for the purposes of the Scheme Meeting, and who held proxies for the majority of the Scheme Creditors and attended and voted at the Scheme Meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor notes that its board of directors did not host meetings that were physically located in the Cayman Islands during the restructuring due to international travel restrictions and changes in business practices resulting from the COVID-19 pandemic. (*Id.*)

The Debtor also argues that it was not necessary for its Cayman counsel or its Scheme Chairperson to wrest control of the Debtor from its previously existing management or take possession of its property like a joint provisional liquidator ("JPL"). (*Id.*) The Debtor asserts that such activities are not required or appropriate in a consensual scheme of arrangement. (*Id.*) A scheme of arrangement, by its nature, is driven by negotiation and compromises between a company and its creditors. (*Id.*) The Debtor argues that holding scheme chairpersons to the same standard as a JPL would create a perverse incentive for companies to enter into liquidations rather than a value maximizing, consensual resolution with their creditors via a

17 scheme of *17 arrangement.[6] (*Id.*) The Debtor argues that this would dictate that the restructuring activities in liquidations, but not schemes, would

> by management, with a view to suspending the powers of the directors and/or (b) the scheme of arrangement was contentious including where there is a risk that minority creditor(s) might seek to frustrate the restructuring through the presentation of a winding up petition. (Third Moran Decl. ¶ 7.)

3. *Foreign Nonmain Arguments*

The Debtor asserts that it has substantial connections to the Caymans including issuing debt and holding assets in the Caymans, retaining counsel and employing professionals in the Caymans, and holding itself as an entity that could only be liquidated effectively in the Caymans. (*Id.* ¶ 19.) The Debtor argues that this is sufficient to find that the Debtor has non-transitory business connections with the Caymans. (*Id.*) The Debtor notes that its maintenance of a registered office in the Cayman Islands, compliance with the corporate formalities required to maintain its status as a Cayman entity, and representations to creditors that it is a Cayman-incorporated entity also support finding non-transitory connections with the Caymans. (*Id.*)

The Debtor also argues that the alternative to recognition of the Cayman Proceeding is to potentially deny the Debtor the ability to implement a consensual restructuring and force the Debtor into a Cayman liquidation. (*Id.* ¶ 20.) The Debtor argues that it would leave all parties in a worse position. (*Id.*)

II. *LEGAL STANDARD*

A. Foreign Main Proceeding

To obtain recognition, the foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C. § 1517(a)(1). Under section 1502(4) of the Bankruptcy Code, the term "foreign main proceeding" means "a
18 foreign proceeding pending in the country where *18 the debtor has the center of its main interests ." 11 U.S.C. § 1502(4); *see, e.g., In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.DN.Y. 2017) (recognizing foreign main proceeding); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416-17 (Bankr.

of the Chapter 15 petition, without regard to the debtor's historic operational activity. *See Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests.").

The Bankruptcy Code establishes that "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). However, this presumption can be overcome. *See, e.g. ABC Learning*, 445 B.R. 318, 328 (Bankr. D. Del. 2010); *aff'd*, 728 F.3d 301 (3d Cir. 2013) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located); *In re Basis-Yield Alpha Fund (Master)*, 381 B.R. 37, 51-54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *SphinX*, this court explained that these factors *19 should not be applied "mechanically"; rather, "they should be viewed in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.*; *see also Fairfield Sentry*, 714 F.3d at 137 (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application). The *SphinX* court also noted that "because their money is ultimately at stake, one generally should defer . . . to the creditors' acquiescence in or support of a proposed COMI." 351 B.R. at 117.

19

The Second Circuit and other courts often examine whether a Chapter 15 debtor's COMI would have been ascertainable to interested third parties,

most disputes." *Fairfield Sentry*, 714 F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136-37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

If a debtor's COMI has "shifted" prior to filing its Chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. *See Fairfield Sentry*, 714 F.3d at 138 (concluding that "a court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith . . .
20 . . The factors that a court may consider in *20 the analysis are not limited and may include the debtor's liquidation activities"). Courts ask whether there is evidence pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations" that would support denying recognition. *Id.*; *see also Ocean Rig*, 570 B.R. at 687 (granting recognition of foreign main proceeding where debtors shifted COMI from jurisdiction that only provided a liquidation option to jurisdiction that permitted reorganization, taking steps to shift COMI beginning one year before the foreign filing and where notice was given to creditors throughout the process of shifting COMI). The court in *Suntech* noted how "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." 520 B.R. at 416. Various factors could be relevant, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or

debtor did not conduct any activities in the Cayman Islands, and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group. *Id.* So, the issue was whether the debtor's COMI should be measured at the time of the commencement of the Chapter 15 case or when the Foreign Proceeding was commenced. *Id.* But in *Suntech*, the Cayman
21 Court appointed JPLs and *21 authorized them to exercise a host of additional powers (including acts on behalf of the debtor, possession of its property and collect all debts, dealing with all questions relating to or affecting the assets or the restructuring etc.) *Id.* at 417-18. The JPLs assumed control of the debtor's affairs, met with employees and creditors, opened a bank account in the Cayman Islands funded with transfers from one of the debtor's other accounts, and filed claims. *Id.* The *Suntech* court found the debtor's COMI on the date of the commencement of the chapter 15 case was the Cayman Islands and the JPLs did not manipulate the debtor's COMI in bad faith. *Id.* Therefore, the court overruled a creditor's objection to finding the debtor's COMI to be in the Cayman Islands.

The *Suntech* court's analysis and conclusion that COMI was in the Cayman Islands was consistent with the Second Circuit's analysis in *Fairfield Sentry*. In both cases, court-appointed fiduciaries assumed substantial control over the debtors' liquidation (in the case of *Fairfield Sentry*) and scheme proceeding (in the case of *Suntech*). So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding COMI in the Cayman Islands in this case given that no JPLs were appointed. While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court's supervision of the Debtor's Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor's COMI for the proceeding involving
22 the single class of Existing Note holders was in the Cayman Islands.[7] *22

7 It would be ironic if a scheme proceeding, following the appointment of JPLs in a contentious case where JPLs were needed to facilitate agreement between the debtor and its creditors, was recognized as a foreign main proceeding, but in a case such as this one where the Debtor and its professionals successfully negotiated the RSA with overwhelming creditor

The Foreign Representative's counsel argues, in the alternative, that the Scheme Proceeding satisfies the requirements to be a foreign nonmain proceeding. Recognition and enforcement can be granted as discretionary relief under sections 1507 and 1521 of the Bankruptcy Code even in a nonmain proceeding. The Court concludes that the Scheme Proceeding was not a foreign nonmain proceeding.

Courts recognize a foreign proceeding as a "foreign nonmain proceeding" if "the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending." 11 U.S.C. § 1517(b)(2). Section 1502(2) defines "[e]stablishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012) ("*Millennium Glob. I*"). Additionally, courts have required proof of more than a "mail-drop presence" to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) ("*Constellation I*") (citation omitted). Due to the "paucity of U.S. authority" on this question, the court in *Millennium Glob. I* cited a "persuasive" English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84-85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

Whether the debtor has an "establishment" in a country is determined at the time of filing the Chapter 15 petition. *See Beveridge v. Vidunas* (*In re O'Reilly*), 598 B.R. 784, 803 (Bankr. W.D. Pa. 2019). Several factors "contribute to identifying an establishment: the economic impact of the debtor's
23 operations on the market, the maintenance of a 'minimum level of *23 organization' for a period of time, and the objective appearance to creditors whether the debtor has a local presence." *Millennium Glob. I*, 458 B.R. at 32. *See In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an "establishment"

See also Lavie v. Ran (*In re Ran*), 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign "bankruptcy proceeding and associated debts [themselves] . . . demonstrate an establishment . . . [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *Rozhkov v. Pirogova* (*In re Pirogova*), 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)

III. *DISCUSSION*

For the reasons outlined below, the Court **GRANTS** the Motion for recognition of the Cayman Proceeding as a foreign main proceeding. The Court does not explicitly address the following aspects of the Motion because they are uncontroversial and satisfied by the uncontested facts: (i) whether the Debtor meets the eligibility requirements under section 109(a) of the Bankruptcy Code; (ii) whether the Cayman Proceeding is a foreign proceeding as defined in section 101(23) of the Bankruptcy Code; (iii) whether the Cayman Proceeding has been commenced by a duly authorized foreign representative; (iv) whether the Scheme Petition meets the requirements of section 1515 of the Bankruptcy Code; (v) whether the
24 Debtor is entitled to *24 additional relief under section 1521 of the Bankruptcy Code; (vi) whether the Scheme is procedurally fair; (vii) whether the interests of creditors and other interested parties are sufficiently protected; (viii) whether the Foreign Representative is entitled to additional relief under section 1507 of the Bankruptcy Code; and (ix) whether recognition of the foreign proceeding is contrary to the public policy of the United States.

A. Recognition is Not Warranted as a Foreign Nonmain Proceeding.

The Court finds that recognition of the Cayman Proceeding as a foreign nonmain proceeding is not warranted because recognition would be inconsistent with the goals of foreign nonmain proceedings. Further, neither

1. Recognition as a Nonmain Proceeding Would Be Inconsistent with the Goals of UNCITRAL Model Law

The Court declines to recognize the Cayman Proceeding as a foreign nonmain proceeding because such a recognition would not comport with the stated goals of foreign nonmain proceedings. The UNCITRAL Model Law on Cross-Border Insolvency explains that in a foreign nonmain proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." United Nations, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, 12 (2014) (the "Guide"). The Guide further explains that "[u]nlike 'foreign main proceeding,' there is no presumption with respect to the determination of establishment . . . [t]he commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank
25 accounts, or of property would not in principle *25 satisfy the definition of establishment." *Id.* at 47. These provisions support the administration of a restructuring proceeding by a single foreign court.

In the present case, the Cayman Scheme pertains to the Existing Notes held by the Scheme Creditors. (Motion ¶ 13.) The language of the UNCITRAL Model Law on Cross-Border Insolvency therefore requires, for the purposes of recognition of the Cayman Proceeding as a foreign nonmain proceeding, that the Existing Notes be assets in the Cayman Islands. However, this Court is not persuaded that the Existing Notes are assets within the meaning of Article 23, subsection 2 of the Model Law. As the Guide explains, "the existence of debts . . . would not in principle satisfy the definition of establishment." Guide at 47.

2. *There is Insufficient Evidence to Support a Finding of Nontransitory Economic Activity in the Caymans*

The Cayman restructuring cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding. In *Lavie v. Ran*, 406 B.R. 277, 286-87 (S.D. Tex. 2009), the bankruptcy court explained that if "the proceeding and associated debts alone could suffice to

the court cited *Ran* and agreed that if "a foreign trustee could merely point to a foreign bankruptcy itself, which is subject to a recognition petition, as evidence of an establishment, the statutory requirements for recognition would be pointless." The court in *Pirogova* denied recognition of a foreign nonmain proceeding despite the Debtor's ownership of an apartment in Russia, her Russian utility bills, her vehicles in Russia, and her Russian yacht club membership, as well as the debtor's ongoing bankruptcy proceeding in
26 Russia. *Id.* at 480. *26

In the present case, the Debtor's connections to the Cayman economy are far more tenuous than those discussed in *Pirogova*. The Debtor maintains a registered office in the Cayman Islands to which all communications may be addressed or served, and where the administration of annual filings and the payment of annual fees are registered. (Supp. Brief ¶ 1.) The Debtor also initiated the restructuring proceeding in its country of incorporation, the Cayman Islands. (*Id.*) However, the Debtor has been unable to point to any additional connections to the Cayman Islands that might constitute nontransitory economic activity, and therefore falls well short of the standards set in *Ran* and *Pirogova*.

3. *The Debtor's Business Activities Have No Local Effect on the Marketplace*

The court explained the standard for nontransitory economic activity in *In re Creative Fin., Ltd.*, 543 B.R. at 520-21. There, the court explained that recognition required "a showing of a *local effect on the marketplace*, more than mere incorporation and record-keeping and more than just the maintenance of property." *Id.* at 520 (emphasis added). In that case, the debtor, a foreign exchange trading business, was organized under the laws of the BVI, and admittedly engaged in bad-faith actions to pursue a restructuring proceeding there. *Id.* at 513. Nevertheless, the tenuous nature of the connection between the debtor's business activities and the BVI marketplace supported the court's denial of recognition as a foreign nonmain proceeding. *Id.* at 521.

In the present case, despite the absence of apparent bad faith, the Debtor

27 than just the *27 maintenance of property." *In re Creative Fin., Ltd.*, 543 B.R. at 520. The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.

B. Recognition Is Warranted as a Foreign Main Proceeding

The Court recognizes the Debtor's COMI in the Cayman Islands. Section 1516(c) provides that "[i]n the absence of evidence to the contrary, the debtor's registered office . . . is presumed to be the center of the debtor's main interest." 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of Chapter 15, the Scheme Creditors' expectations and intentions, the judicial role in the Cayman Scheme, the function of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor's good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.

1. *Recognition as a Foreign Main Proceeding is Consistent with the Goals of Chapter 15*

Recognition of the Cayman proceeding as a foreign main proceeding would comport with the goals of Chapter 15. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 126, *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008), the court explained that:

> Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: "[t]he purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the

28 *28

Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court.

The Second Circuit has recognized that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation." *Fairfield Sentry*, 714 F.2d at 138.

Here, the Debtor argues that denial of recognition of the Debtor's COMI in the Cayman Islands may leave the Debtor "with the alternative of converting a highly consensual Scheme into a Cayman liquidation in an effort to obtain such chapter 15 recognition at a later date." (Supp. Brief ¶ 23.) The Debtor also contends that this "would not maximize the value of the Debtor's assets, as it would divert additional funds towards an entirely new insolvency process in an effort to potentially achieve the relief requested" in the Motion. (*Id.*) Such an outcome would clearly diverge from Chapter 15's stated goal of maximizing the value of the debtor's assets, as well as facilitating the rescue of a financially troubled business. Further, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

2. *Recognition of this Proceeding is Consistent with Creditors' Expectations*

The Scheme Creditors' expectations that their loan agreements would be governed by Cayman law supports recognition of COMI in the Cayman Islands. (Supp. Brief ¶ 11.) When determining a Debtor's COMI, "creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments." *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017); *see also Constellation I*, 600 B.R. at 274 (listing
29 cases in which offering *29 memoranda and indentures were evaluated for

the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (Supp. Brief ¶ 11.)

The Debtor's actions reinforced these expectations, particularly the fact that (i) BFAM initiated negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplated an insolvency proceeding in the Cayman Islands. (*Id.*) It is incontrovertible that the Scheme Creditors understood that the Debtor is a Cayman Islands company and expected that its debts would be restructured pursuant to the law of the Cayman Islands if a restructuring became necessary. (*Id.*) *See In re Ascot Fund Ltd.*, 603 B.R. 271, 283 (Bankr. S.D.N.Y. 2019) (finding COMI in the Caymans, in part, because "[f]rom the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law.")

In *In re SPhinX, Ltd.*, 351 B.R. at 117, the Court explained that "[v]arious factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.* The *SPhinX* court reasoned that "because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI." *Id.* In *SPhinx*, ultimately,
30 the Court found that COMI was outside of the Caymans, but *30 the concept remains, when a Court considers COMI factors, the protection of the creditors' interests is paramount. *Id.*

The decision in *In re Serviços de Petróleo Constellation S.A.* ("*Constellation II*") also underscores how "Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor's COMI." 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (finding COMI in Luxembourg, in part, because the creditors' expectations of the location of the insolvency proceeding); *see In re Chiang*, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (noting how "the location of the COMI is an objective determination based on the

no evidence of exploitation or untoward manipulation or thwarting of third-party expectations, and interests of creditors and other interested parties sufficiently protected).

In *In re Oi Brasil Holdings*, 578 B.R. at 226-229, the court considered whether, having initially recognized Brazil as the Debtor's COMI, subsequent events caused the COMI to shift to the Netherlands. To evaluate whether the COMI had shifted, the court considered creditor expectations, concluding "that purchasers of the notes understood that they were investing in Brazilian-based businesses, and [the debtor's] place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes." *Id.* at 229. It was notable in this case that "the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment." *Id.* at 226;*see also In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (holding third party and creditors' expectations weigh in *31 favor of finding COMI); *Constellation II*, 613 B.R. at 508 (noting "[c]ourts in the Second Circuit also look to the expectations of creditors with regard to the location of a Debtor's COMI.")

31

In the present case, the Scheme Creditors made loans to Modern Land, a Cayman-incorporated holding company that carries out the business of real estate development in the PRC. (Motion ¶¶ 6-7.) Given the statutory presumption included in section 1516(c) of the Bankruptcy Code, the creditors could reasonably have concluded that the Debtor's registered office in the Cayman Islands was its COMI, subjecting it to the Cayman Companies Act, and in turn subjecting the creditors' agreements with the Debtor to Cayman law. Further, "nearly half of the Debtor's wholly owned subsidiaries are Cayman entities." (Supp. Brief ¶ 7.) Given the proclivity of Courts in the Second Circuit to consider creditor expectations when making a COMI determination, therefore, this factor supports a finding of the Cayman Islands being the Debtor's COMI.

The creditor expectations in this case are further evidenced by the overwhelming creditor support. Not one Scheme Creditor objected to the Debtor's COMI being located in the Cayman Islands, including the two

(*Id.*, Supp. Moran Decl. ¶ 4.) In this case, definitive creditor expectations and overwhelming creditor support solidify a finding of COMI in the Cayman Islands.

3. *The Judicial Role in the Cayman Scheme is Prevalent in this Case*

Another factor supporting COMI being in the Cayman Islands is the ongoing restructuring proceeding itself. In *In re Suntech Power Holdings Co.*,
32 520 B.R. at 418, a *32 Cayman-incorporated holding company primarily conducting business in China filed for Chapter 15, seeking recognition. Over creditors' objections, this Court found COMI in the Cayman at the time of the filing, while acknowledging that COMI had been in China prior to the filing. *Id.* The *Suntech* court discussed at length the role of the JPLs, who conducted much of the Debtor's business from the Cayman Islands following the petition. *Id.*

In the present case, unlike in *Suntech*, there are no objections to recognition as a foreign main proceeding. The Scheme Creditors in this case overwhelmingly approved the Scheme. (Motion ¶ 65.) Modern Land is not subject to the control of JPLs, but there were no issues about the propriety if any actions by management, and the Debtor and its professionals successfully negotiated an RSA with very broad creditor support. (Third Moran Decl. ¶ 7.) There was no need for the appointment of JPLs. (Supp. Brief ¶ 16.)

Furthermore, the Debtor in this case identifies itself as a Cayman-incorporated company in press releases and in official memoranda. (*Id.* ¶ 1.) The Debtor maintains its registered office in the Cayman Islands, and maintains a statutory register of members (i.e. shareholders), mortgages, charges, and directors in the Cayman Islands. (*Id.*) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing Notes, is a law firm located in the Cayman Islands. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands. (*Id.* ¶ 3.) Lastly, the first demand upon the Debtor following its

objected to the Debtor's COMI being located in the Cayman Islands, and 99% in number of the Scheme Creditors present and voting at the Scheme Meeting representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.* ¶ 12.)

Cayman law further provides that only the Cayman Court can conduct an effective liquidation of a Cayman Islands-incorporated company. (Third Moran Decl. ¶ 16.) The Debtors assert that, pursuant to Cayman law, a suit against a member of the Debtor's board of directors would require the application of Cayman law, even if such director did not live in the Cayman Islands. (*Id.* ¶ 24.) Next, nearly half of the Debtor's direct wholly owned subsidiaries are Cayman entities. (Supp. Brief ¶ 7.) The Debtor further identified at least 35 entities- representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes-that are domiciled in the Cayman Islands. (*Id.*)

The Debtor asserts, importantly, that as of the time of the filing of the Chapter 15 petition, the restructuring efforts were the Debtor's "primary business activity . . . to ensure the Debtor's survival." (*Id.* ¶ 8.) The "vast majority of Restructuring-related activities took place in the Caymans," and the Debtor's Cayman counsel advised the Debtor as a matter of Cayman Islands law. (*Id.*) For example, the Scheme Meeting took place in the Cayman Islands, the Scheme Meeting was presided over by a Cayman Islands resident, and the chairman of the meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor's Cayman counsel also appeared at both hearings before the Cayman Court to obtain permission to convene the Scheme Meeting and to sanction the Scheme. (Third Moran Decl. ¶ 25.) The Scheme received the support of Scheme Creditors
34 representing approximately 95% of the value of the Existing Notes. *34 (Supp. Brief ¶ 9.) Given the strong support for the Scheme, the fact that the restructuring was the primary business activity of the Debtor at the time of the filing of the Chapter 15, the ongoing activities pertaining to the restructuring itself support recognition of the Cayman Islands as the Debtor's COMI in the present case.

exempted company with limited liability. (Motion ¶ 6.) While the Debtor's exempted company status places certain limitations upon its operations in the Cayman Islands, this Court has held that exempted companies can have a Cayman COMI. In *Ocean Rig*, 570 B.R. at 705, this Court held that "[i]t also does not matter that [the debtor] is classified as 'exempted' under the Cayman Companies Law, even though 'exempted' company status appears to limit that company's activities in the Cayman Islands . . . [w]hile exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there." The *Ocean Rig* Court subsequently concluded that the Cayman Islands was indeed the debtor's COMI, and recognized the foreign main proceeding. *Id.* at 707. Therefore, in the present case, the Debtor's status as an exempted company does not jeopardize its COMI in the Cayman Islands.

4. *Choice of Law Principles Support a Finding of COMI in the Cayman Islands*

When conducting a COMI analysis, Courts in this Circuit additionally consider the jurisdiction whose law would apply to most disputes. *Olinda Star*, 614 B.R. at 43. "[T]his factor weighs in favor of a COMI in" the jurisdiction whose law applies. *Id.* at 44; *see also Constellation I*, 600 B.R. at 280 (stating that "because Parent/Constellation is a Luxembourg incorporated entity, that depends upon Luxembourg law for its existence
35 and its corporate *35 operations, the Court found that Luxembourg law should be considered the law that applies to *most* of Parent/Constellation's disputes"). In the present case, the Foreign Representative explained that the Debtor, as a Cayman-incorporated company, "depends on Cayman Islands law for its existence and is subject to Cayman Islands laws and regulations." (Supp. Brief ¶ 13.) The Foreign Representative further explained that the requirements of Cayman law were "made clear in the documents related to the issuance of the Existing Notes." (*Id.*) While the Existing Notes as governed by New York law, the Cayman Islands is the jurisdiction whose law would apply to most disputes over corporate actions that may arise in the Cayman Proceeding, this factor supports finding a

foreign bankruptcy proceeding."

The Scheme Creditors here include only holders of Existing Notes. The Debtor's capital structure includes substantial debt governed by Hon Kong law. The Court has no reason to address the COMI of any insolvency or scheme proceeding involving creditors with claims other than holders of the Existing Notes. Creditor expectations in such a case could point to COMI somewhere other than the Cayman Islands.

5. *The Debtors Seek Recognition in Good Faith*

Many of the cases in which courts have denied recognition of a foreign main proceeding in a debtor's country of incorporation involved instances of bad faith, which are not present in the Debtor's petition for recognition. For example, in *Creative Finance*, the court found that the debtor's principal "and
36 his associates-and hence the Debtors-were guilty of bad faith in *36 numerous respects." 543 B.R. at 513. Among other transgressions, the debtors in *Creative Finance* sought to manipulate a liquidator, ignored important inquiries, and sought to deny a disfavored creditor the opportunity to benefit from the proceeding. *Id.* In contrast, in *Fairfield Sentry Ltd.*, 440 B.R. at 64-65, the Court held that "[t]here being no showing of bad faith on the part of the BVI Liquidators, and given that the [d]ebtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the [d]ebtor's COMI lies in the BVI." *See also Codere* Transcript at 20:1-21:25 (reasoning that "the lack of objections and the overwhelming support for the scheme of arrangement in this case suggests that there has not been insider exploitation, untoward manipulation, overt thwarting of third-party expectations. . . . Those sorts of things could evidence bad faith COMI manipulation.").

SPhinX was even more explicit in its consideration of the Debtor's bad faith as the basis for rejecting recognition. There, the Bankruptcy Court explained that "a primary basis for the Petition, and the investors' tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper . . . this litigation strategy [seeking to frustrate a settlement

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, the court denied recognition of a Cayman scheme proceeding seeking to restructure an open-end investment firm as either a foreign main or nonmain proceeding. 374 B.R. at 126. The *Bear Stearns* court emphasized the Debtor's operational history, considering the location of its employees, managers, books and records, and liquid assets. *Id.* at 130. The court
37 therefore *37 denied recognition of COMI in the Cayman Islands because the United States, not the Cayman Islands, was "the place where the Funds conduct the administration of their interests on a regular basis." *Id.* However, *Fairfield Sentry* subsequently clarified that:

> A court may look at the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith, but there is no support for [the] contention that a debtor's entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor's liquidation activities.

714 F.3d at 138.

The *Fairfield Sentry* court also emphasized that "[t]here was no finding of bad-faith COMI manipulation." *Id.* at 139. In the present case, like in *Fairfield Sentry*, the Debtor is a holding company with subsidiaries that conduct business around the world. (Motion ¶ 7.) The Debtor is similarly engaged in a restructuring proceeding pursuant to the laws of its country of incorporation. (*Id.* ¶ 21.) The *Fairfield Sentry* court explained that "[it] matters that the inquiry under Section 1517 is whether a foreign proceeding *'is pending* in the country where the debtor *has* the center of its main interests.' 11 U.S.C. §1517(b)(1) (emphasis added)." 714 F.3d at 134. The same is true in this case too.

In *In re Ran*, 390 B.R. 257 (Bankr.S.D.Tex. 2008), the bankruptcy court denied recognition of an Israeli bankruptcy proceeding as either a foreign main or nonmain proceeding. On remand from the district court, the

faith motive in seeking recognition of a foreign proceeding may appropriately be considered in determining the location of a debtor's center
38 of *38 main interests." *Id.* at 297. Indeed, despite the court's distaste for making findings based upon the debtor's apparent bad faith, the court nevertheless devoted an entire section of its analysis to the foreign representative's motive. *Id.* at 295. So, while the presence of bad faith did not play an explicit role in the court's decision in *Ran*, the questionable motivations of the foreign representative clearly informed the court's analysis.

In the present case, the Debtor has not engaged in COMI-shifting behavior, nor has it sought to deceive the Court or the Scheme Creditors in its pursuit of a Cayman restructuring. Instead, as discussed above, the Debtor seeks recognition of a proceeding under Cayman law, a fact which the Scheme Creditors likely factored into their decision to conduct business with the Debtor in the first place.[8] Given the absence of COMI-shifting and the Debtor's good-faith petition for recognition under chapter 15, this factor supports recognition of COMI in the Cayman Islands.

[8] *See Suntech*, 520 B.R. at 418:

> Nor does the evidence support a finding that the Debtor's creditors would have expected it to restructure its businesses in China. The Debtor's largest creditor group was the Noteholders. The Indenture was governed by New York law and the parties to the Indenture submitted to the non-exclusive jurisdiction of the New York state and federal courts. In addition, when the representatives . . . who held approximately 50% of the debt, met with the Debtor's representatives, they urged the Cayman Islands as the most logical restructuring venue. The Debtor was incorporated in the Cayman Islands and the Cayman Islands employed a predictable, flexible and cost effective method for dealing with restructuring.

IV. CONCLUSION

Opinion Case details

Therefore, the Court recognizes the Cayman Proceeding as a foreign main proceeding. Additionally, the Court, in the exercise of discretion, recognizes and enforces the Cayman Scheme.

A separate order will be entered granting the requested relief.

Opinion Case details

CACV 207/2005 AND CACV 210/2005

CACV 207/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 207 OF 2005

(ON APPEAL FROM HCCW NO. 1139 OF 2004)

IN THE MATTER of LEGEND INTERNATIONAL RESORTS LIMITED

and

IN THE MATTER of the Companies Ordinance, Cap. 32

CACV 210/2005

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 210 OF 2005

(ON APPEAL FROM HCCW NO. 1139 OF 2004)

IN THE MATTER of LEGEND INTERNATIONAL RESORTS LIMITED

and

IN THE MATTER of the Companies Ordinance, Cap. 32

Before: Hon Rogers VP and Le Pichon JA in Court

Date of Hearing: 7-9 February 2006

Date of Handing Down Judgment: 1 March 2006

J U D G M E N T

Hon Rogers VP:

1. This is an appeal from a judgment of Kwan J given on 6 June 2005. The judge had before her two applications. The first was an application on the part of the petitioning creditor, Morgan Stanley Emerging Markets Inc. ("the petitioner") for the appointment of the provisional liquidators of Legend International Resorts Ltd ("the Company"). The second application was a summons issued by the Company to strike out the winding-up petition on the grounds that it disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious or an abuse of the process of the court.

2. The judge dismissed the application to strike out the petition but refused the appointment of provisional liquidators. At the conclusion of the hearing of this appeal, judgment was reserved which we now give.

Background

3. The Company is a Hong Kong company with nominal capital of HK$120 million and a paid-up capital of HK$115,954,000. Almost 60% of the shares of the Company are held by Metroplex Berhad ("Metroplex"), a Malaysian company which is listed on the Kuala Lumpur stock exchange. 40% of the Companies' shares are held by Sinophil Corporation, which is incorporated in the Philippines and listed on the Philippine Stock Exchange. Metroplex holds 22% of Sinophil. As recorded in the judgment steps are being put in train for Metroplex to take over the shareholding held by Sinophil.

4. The Company's business consists of the operation of a casino in Subic Bay in the Philippines. The premises are leased from the Subic Bay Municipal Authority ("SBMA"). According to the audited accounts of the Company, the Company has made losses in each of the last six years commencing with the year ended 31 January 2000. Those losses have been in excess, and in some years greatly in excess, of HK$100 million per year.

5. The operation of the casino in Subic Bay is under a licence from the Philippine Amusement and Gaming Corporation ("Pagcor"). It is the Company's position that it holds an exclusive licence to operate such a casino.

6. In July 1997 the Company entered into a Facility Agreement. The Société Générale Asia (Singapore) Ltd was the coordinating arranger and agent of what was in effect a syndicated loan. There were a number of financial institutions that were the lenders. The Facility Agreement provided for a revolving credit facility of up to an aggregated principal amount of US$33 million. A year later, in July 1998, the Company defaulted on the repayment of advances under the Facility Agreement and in respect of the interest which had accrued and other outstanding amounts. Naturally, this constituted an event of default under the terms of the Facility Agreement. In December 1999 Société Générale Asia served a written demand for payment within ten days of the total amount then owing, which was US$26,375,450.93. This was, but one symptom of the financial difficulties into which the Company and Metroplex had fallen.

7. In December 2000 Metroplex had sought assistance from the Corporate Debt Restructuring Committee in Malaysia but, eventually, that route had proved to be unfruitful. As set out in the judgment below Metroplex endeavoured to solve its financial difficulties by seeking an order for a scheme of arrangement. In the course of the applications in Malaysia to restructure

Metroplex draft scheme documents in respect of the Company were exhibited as part of that endeavour. That endeavour also seems to have proved unfruitful and the majority of the creditors did not support the proposed scheme. One matter which emerged from the scheme documents was that Metroplex owed the Company some US$151,708,107.

8. The petitioning creditor is a Delaware company incorporated under the provisions of the General Corporations Law of Delaware. It would seem that its business comprises of, or includes in a major respect, the acquisition of distressed debt in the secondary debt market. Although the law of Delaware does not prevent it from lending money for its corporate purposes, section 126 of the General Corporations Law of Delaware provides that:

> "Banking power denied.
>
> (a) No corporation organized under this chapter shall possess the power of issuing bills, notes, or other evidences of debt for circulation as money, or the power of carrying on the business of receiving deposits of money.
>
> (b) Corporations organized under this chapter to buy, sell and otherwise dealing notes, open accounts and other similar evidences of debt, or to loan money and take notes, open accounts and other similar evidences of debt as collateral security therefore, shall not be deemed to be engaging in the business of banking."

9. The petitioner has filed specific evidence that it does make loans and buy and sell loans and, as such, contends that it is indeed a financial institution conducting what is commonly referred to as investment banking.

10. As part of its ordinary business the petitioner had, prior to the presentation of the petition, acquired the debt previously owed to Keppel Bank of Singapore Ltd which was part of the syndicated loan referred to above.

11. This petition was presented on 3 November 2004. Two days later the Company filed a petition in the local court in the Philippines for corporate

rehabilitation, that has been referred to as the Rehab Petition. The Rehab Plan annexed to the Rehab Petition closely followed the draft scheme document which had been exhibited to affidavits in Malaysia. As part of the proposal for reconstruction, it dealt with the debt owed by the Company to Metroplex and the debt owed as part of the syndicated loan. It did not deal with either of the debts which were owed to SBMA or Pagcor. The allegation is that the Company owes SBMA an amount which is equivalent to more than the US$13 million and Pagcor an amount which is equivalent to more than US$4 million.

12. When the petition was presented, the petitioner sought the appointment of provisional liquidators. The application for the appointment of provisional liquidators was expressed to be in conjunction with an application in Malaysia for appointment of provisional liquidators in respect of Metroplex. In relation to those proceedings it need only be said that the petitioner had presented a petition to wind up Metroplex but that petition has not been pursued.

13. The basis upon which the application for the appointment of provisional liquidators was made was that they should be empowered to explore a restructuring scheme for the Company. It was said that although the business of the Company was such that there was scope for producing value to the creditors it was not in the best interests of the creditors that the restructuring process should remain in the hands of the then current management. Although it was suggested that the amount which the Company's casino derived as revenue based on the number of seats at the gaming tables and slot machines was considerably less than might be expected and also that there had been dealings with other companies all of which could be the subject of investigations by the provisional liquidators, it was not overtly suggested or said

that the assets of the Company were in jeopardy. Certainly that was not the basis on which the application for appointment was made.

The hearing of the applications in the court below

14. On the hearing of the applications in the court below the Company sought to strike out the petition on the basis that the petitioner was not a creditor of the Company since it was not entitled to take an assignment of the loans under the syndicated loan. The point which was raised was that the petitioner did not come within the meaning of an "Eligible Transferee" as used in the Facility Agreement and defined in Clause 1.01 thereof. The judge dismissed that contention and held that the petitioner did have locus to present a winding-up petition.

15. The second basis for seeking to strike out the petition was that it was said that the presentation of the winding-up petition was an abuse of the process because the petitioner's predominant purpose was to be able to obtain control of the Company's administration. It was also said that the petition had been presented not to achieve a winding-up but in order to have provisional liquidators appointed with a view to proferring a scheme of arrangement. The judge was not satisfied that there had been any abuse of the winding-up procedure, remarking that the petition should only be struck out in plain and obvious cases.

16. With regard to the appointment of provisional liquidators the judge observed that she did not consider that the protection of assets basis for the appointment of provisional liquidators had been made out. Indeed, it would appear that the application for the appointment of provisional liquidators had initially been put, not upon the basis that there was a requirement for the protection of the assets which might be in jeopardy but that the provisional

liquidators should be appointed for the purpose of exploring, formulating and pursuing a corporate rescue. In this respect, although the judge said at paragraph 92 that the court had jurisdiction to appoint provisional liquidators to explore, formulate and pursue a corporate rescue, she went on to hold that the circumstances did not warrant such an application at that time, although the judge clearly left open the possibility of a further application being made at a later time.

This appeal

17. On this appeal Mr Barlow, who appeared on behalf of the Company, argued that the petition should be struck out for the same reasons as he had argued in the court below. At the hearing, this court indicated that it did not consider that the petition should be struck out albeit no order was made immediately.

18. The argument that the petitioner was incompetent to present a creditor's winding-up petition was on the basis that it could not take a valid assignment of the rights of a lender under the Facility Agreement. The point at issue was whether the petitioner could bring itself within the definition of "Eligible Transferee". In the Facility Agreement that was defined as meaning "any bank, deposit taking company or other financial institution, wherever incorporated, duly authorised to carry on its business and to participate in the Facility".

19. The substance of the point was that the Facility Agreement was a "revolving credit" facility. The Company was entitled to request the making of an advance during the period of the agreement and even if money were repaid the Company was entitled to request further advances. It was thus said that the identity of any lender was of significance because the lender had to be

in a position whereby it could provide the various loan amounts as and when required. The argument thus ran that the definition of Eligible Transferee had to be read in the context of the Transferee being in the nature of a bank.

20. In this regard reliance was placed by Mr Barlow on the decision of Steel J in *The Argo Fund Limited v Essar Steel Ltd* [2004] EWHC 128. However that was a decision on a summary judgment application where, of course, the court had to be satisfied that there was no viable argument. That case had been tried later by Aikens J. His decision is reported in [2005] EWHC 600. In my view, considerable care has to be taken in considering the judgment in relation to the present case. Whereas "Transferee" was defined in the relevant agreement as meaning a bank or other financial institution and Aikens J held after a trial that the plaintiff in that case did constitute a financial institution, it must still be borne in mind that he did so in the context of the particular contract which he was considering. His reasoning turned upon the fact that financial institution in the terms of that contract meant an entity which was capable of lending money. In doing so he rejected the argument that in that case the requirement was that the principle activity of the transferee had to be the provision of finance in the primary lending market.

21. In my view, the assistance to be derived from the reasoning in that case as regards this case is the importance of considering the terms of the particular contract and the significance of the provision. It was emphasised that the definition in the present contract was that the Transferee should be a bank, deposit taking company or other financial institution and it was said that the words financial institution should be restricted to an entity which was similar to a bank or deposit taking company. In my view, the words financial institution still should be given their ordinary meaning. There is no apparent reason emerging from a consideration of the Facility Agreement why the financial institution involved should be restricted to a bank or deposit taking

company. It would have to be an entity which was capable of lending money of the appropriate amount. Over and above that I see no warrant for restricting the term Eligible Transferee any further.

22. On the evidence filed in this case, it is clear that the petitioner does lend money in the ordinary course of its business and although it is primarily involved with buying distressed debt in the secondary debt market, it is capable of and does lend money. The fact that it is not entitled under the laws of the state of its incorporation, namely Delaware, to conduct banking business, does not prevent it from lending money and on the basis of the evidence and arguments that have been presented to-date, I have no doubt that the petitioner does come within the definition of Eligible Transferee.

23. This court was made fully aware that some two months, or slightly more, after the presentation of the petition the Company issued proceedings in the Commercial Court in London seeking a declaration that there had been no effective transfer by way of novation of the debt to the petitioner. In doing so, the Company relied upon the fact that the facility agreement was to be governed by and construed in accordance with the laws of England although under Clause 23.02 of the Facility Agreement the parties irrevocably submitted to the non-exclusive jurisdiction of the courts of Hong Kong and England. The commencement of those proceedings could hardly be suggested to lead to an acceleration of the resolution of the challenge to the ability of the petitioner to present the petition. Rather, the commencement of those proceedings and the refusal of the petitioner to accept service of those proceedings without formal orders, has, if anything, led to yet further prolongation of the litigation of the disputes between the parties.

24. With regard to the case presented on the basis that the petition was an abuse of process, it would seem that there are arguments which could be

made. The ultimate question must nevertheless be as to whether the petitioner indeed seeks a winding-up order. The fact that a petitioner might be content with a reconstruction of the Company or some other arrangement does not mean that, if all else fails, the petitioner will not seek a winding-up order. If it were the intention of the petitioner never to seek a winding-up order then the matter of abuse would be of significance. It would seem, however, that if a petitioner chooses not pursue to seek a winding-up order when the time comes, the ultimate outcome would be that the petition would be dismissed with costs against the petitioner. The net effect is similar, therefore, to that if the petition is struck out at an early stage. The major difference is one of timing.

The appointment of provisional liquidators

25. The power to appoint liquidators is contained in section 192 of the Companies Ordinance Cap. 32. That provides:

> "For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators, provisionally or otherwise, in accordance with sections 193 and 194."

26. Section 193 relates to the appointment and powers of provisional liquidators and section 194(1) relates to the appointment of liquidators but where a winding-up order is made. Section 193(1) provides that the court can appoint a liquidator provisionally at any time after the presentation of a petition and subsection (2) provides that the appointment may be made at any time before the making of a winding-up order. Subsection (3) gives the court power to limit or restrict the powers of the provisional liquidator in the order appointing him. That, no doubt, is a reference to the powers of the liquidator which are dealt with generally in section 199. Those powers are specifically made subject to section 193(3). Generally speaking the powers under section 199 are directed to an orderly winding-up of the Company and the

eventual dissolution of the business. There is a power given under section 199(1)(b) for the liquidator to carry on the business of the Company, but even then there is a specific limitation that that may only be done in so far as it may be necessary for the beneficial winding-up the Company. Section 199(1)(e) provides that the liquidator may compromise or make an arrangement with creditors or persons claiming to be paid as creditors and taken together with the provisions of section 166 it is clear that the liquidator is given power to apply to the court for a scheme of arrangement.

27. Traditionally the primary object of appointing a provisional liquidator has been regarded as the need to maintain the status quo and to prevent anybody from obtaining priority over other creditors. The appointment was not only provisional but contingent. The appointment was made where it was clearly shown that the Company was insolvent, either by admission by the Company itself or upon other evidence. The purpose of the appointment was to protect the assets of the Company and hence some danger to the assets, not limited to malfeasance, had to be shown.

28. Recently there has developed a practice in England that provisional liquidators could be appointed in respect of insurance companies even if it could not be shown that there was jeopardy to the assets. The reason for the development of that practice lay in the fact that the insurance policies themselves might have otherwise lapsed. Whilst holders of insurance policies might not be creditors, they were in a position when they might become creditors.

29. In Hong Kong Madam Justice Yuen in the case of *Re Keview Technology (BVI) Limited* [2002] 2 HKLRD 290 extended the powers of the provisional liquidators in order to enable a corporate rescue to be explored. It is important to note, however, that the provisional liquidators had been

appointed, in the first place, because there was a threat of disruption of the factory and seizure of stock by unpaid employees and other creditors. There is thus no doubt that the traditional basis for the appointment of provisional liquidators had been made out. The judge said in paragraph 19:

> "It might be thought paradoxical to extend powers to provisional liquidators to attempt to save the company, when they were appointed upon the presentation of a petition to wind it up. However, the Court retains a discretion whether to order a company to be wound-up, and so long as the Petitioner did have *locus* to present the petition and intends to seek a winding-up order if the rescue attempt should fail, I do not see any jurisprudential objection to empowering provisional liquidators to proceed along rescue lines at least in a case such as the present."

30. In doing so the judge observed that it was not the role of the court to legislate and the court could only operate within the existing framework of the law. That approach was adopted by this court in the case of *Re Luen Cheong Tai International Holdings Ltd* judgment 23 January 2003. In that case at first instance the judge had observed at paragraph 29:

> "In *Keview*, it was held by Yuen J (as she then was) that there is no jurisprudential objection in extending the powers of provisional liquidators appointed under section 193 of Cap. 32 to carry out a corporate rescue role. It seems to me a logical extension of *Keview* that if provisional liquidators may be empowered by the court to facilitate a restructuring proposal, this recognised function of the provisional liquidators could provide the rationale for appointing them in the first place."

31. It was in that context that this court whilst dismissing the appeal felt it necessary to say in paragraph 12:

> "The judge below referred to decisions in which similar orders had been made in circumstances where administration orders were not available. In particular, the judge referred to the decision in *Re Keview Technology (BVI) Limited* [2002] 2 HKLRD 290 where the application had the support of 100% of the company's outside creditors. In that case Yuen J (as she then was) held (at paragraph 19) that there was no jurisprudential objection to extending the powers of provisional liquidators in order to enable a corporate rescue to take place provided that a winding up order would be sought should the rescue attempt fail. Once it has *been established* that the grounds for the appointment of

> provisional liquidators exist on the basis that it is likely that a winding up order would be made *and that circumstances exist which justify the making of the appointment on the basis of the protection of assets*, the fact that the applicant for the appointment wishes that the provisional liquidators be granted powers to facilitate a restructuring of the company can be no bar to the appointment and is not intrinsically objectionable. Whether such powers should be granted and the scope of those powers including any restrictions would depend on the particular circumstances such as the support of the creditors." (*emphasis added*)

32. In the meantime, it appears that before the appeal in the *Re Luen Cheong Tai International Holdings Ltd* had been heard, other courts at first instance had, at least indicated, that appointment of provisional liquidators could be made on the basis that that a corporate rescue should be explored without reference to the question as to whether the assets were in jeopardy. This ultimately led to the bald statement in paragraph 92 of the judgment below which was as follows:

> "I hold that it is within the jurisdiction of the court to appoint provisional liquidators to explore, formulate and pursue a corporate rescue."

33. In my view, the court should not attempt to extend the statutory law albeit for expediency. The appointment of provisional liquidators is a statutory power given to the court. It is not a common law power which can be extended, as in the case of the development of the law in relation to *Mareva* injunctions and *Anton Piller* orders. As Madam Justice Yuen observed in the *Keview* case it is not the function of the court to legislate. In the Report on Corporate Rescue and Insolvent Trading by the Law Reform Commission of Hong Kong published in October 1996, recommendation was made for the introduction of a law which would enable corporate rescues to take place far more conveniently than at present. Even now, nearly 10 years later, no such law has been enacted. It is not appropriate for this court to examine the reasons why no such law has been introduced. The fact of the non-introduction is, nevertheless, indicative that it is not a straight forward

matter in respect of which there are no differences of views as to its desirability or what the provisions of any such law should be.

34. The rationale of corporate rescues is that, if successful, there is almost certainly likely to be a better return to creditors and also shareholders than if the particular company went into liquidation. Overseas, there have been a number of successful corporate rescues but there have been an equal or perhaps greater number when rescue has failed. In Hong Kong, there have also been some very high profile successful corporate rescues. Nevertheless, whether a law should be introduced remains a matter of policy for the administration and the legislature. Amongst other things, any such law has to cater for the rights of secured creditors, in respect of both fixed and floating charges; it normally has to cater for the need for there to be further borrowing, in practice thus necessitating giving the lenders in respect of any new loans what has been called super priority. The position of directors also needs to be catered for. Major difficulties can arise in respect of insolvent trading and the liability of the relevant person(s), namely, for example the provisional supervisor has to be limited. Some of the relevant matters dealt with in the Report and in overseas corporate rescue legislation are matters of policy. Not least amongst these are the rights of the employees and the effect introduction of a corporate rescue regime would have on their rights both under contract and under other legislation.

35. The law on the appointment of provisional liquidators at present is contained in section 192 and the following sections and it is clear on the wording of those sections that the appointment of a provisional liquidator must be for the purposes of the winding-up. Provided that those purposes exist there is no objection to extra powers being given to the provisional liquidator(s), for example those that would enable the presentation of an application under section 166. There is, nevertheless, a significant difference between the

appointment of provisional liquidators on the basis that the Company is insolvent and that the assets are in jeopardy and the appointment of the provisional liquidators solely for the purpose of enabling a corporate rescue to take place. The difference, may, in most cases, be merely a matter of emphasis, but in the final analysis the difference exists.

36. Another way of putting the same point is that a scheme of arrangement may well be a viable alternative to winding-up. If it proves to be so, the winding-up will cease and the scheme will take effect. The power of the court under section 192 is to appoint a liquidator or liquidators for the purposes of the winding-up not for the purposes of avoiding the winding-up. Whatever benefits may be said to arise and however convenient it may be said to be for the court to be able to appoint provisional liquidators for other purposes it seems to me that primary purpose of appointing provisional liquidators must always be the purposes of the winding-up. Restructuring a company is an alternative to a winding-up.

37. I would only make one further observation in this respect that is in relation to the case of *SFC v. Mandarin Resources Corporation Ltd.* This case is reported on appeal at [1997] HKLRD 405. It is suggested in the written submissions of the petitioner that that case is authority for the proposition that provisional liquidators may be appointed to investigate the affairs of a company. Having re-read my own decision at first instance and that of the Court of Appeal I find it difficult to understand how it can be suggested that the appointment of provisional liquidators in that case was other than to protect the assets which were shown to be likely to be in real jeopardy.

38. In the judgment below in this case, the judge came to the conclusion, as already observed, that the protection of assets basis for the appointment of provisional liquidators had not been made out. She did so on

the basis that there had been appointed a rehabilitation receiver in the Philippines who, every three months, was required to report to the court there on the general condition of the Company. In the context of the situation which existed at the date of the hearing of the application before the judge below, it appeared that the Rehab proceedings were not merely on going but were potentially viable. Furthermore the court was presented with a situation where none of the other creditors had supported the application for the appointment of provisional liquidators. On this appeal evidence was admitted as to what had taken place since the hearing in the court below. Amongst other matters it now appears that all the debts comprised under the loans of the Facility Agreement are now either owed to the petitioner or Avenue Asia Special Situations Fund III, L. P. ("Avenue Asia"). The fact that Avenue Asia might be taking over some of those loans apparently became known to the judge after the hearing in the court below and before the written decision was handed down. Nevertheless, at that stage there had been no confirmation that the transfer had taken place.

39. The appeal was presented primarily on the ground that it was necessary to appoint provisional liquidators for the purpose of entering into discussions with relevant parties, particularly the petitioner and Avenue Asia and the other remaining creditor under the Facility Agreement, Ta Chong Bank Limited, Taiwan, to explore the feasibility of restructuring Company pursuant to a scheme of arrangement under section 166. It may be noted that it was only after counsel had been questioned by the court as to whether the petitioner's case was that provisional liquidators were necessary for the purpose of preservation of assets that Mr Crystal QC, who appeared on behalf of the petitioner, began to argue a case on that point in his reply speech.

40. When asked as to the exact terms of the order which was sought, Mr Crystal later produced a proposed draft order. The first order was limited

to the provisional liquidators taking possession of the assets and property of the Company in Hong Kong. It may be noted that it has not been shown that there are any other assets in Hong Kong other than the statutory books and records, assuming those are here.

41. In addition to calling an informal meeting of creditors and formulating a scheme, the draft order also included giving power to the provisional liquidators to take such steps as they may be advised in the Philippines whether in the court or with the Rehab Receiver but only after further leave from the court had been obtained.

42. On the basis of the matter as it was before the judge I do not consider that there are grounds for disturbing her decision. The judge came to the conclusion that the assets of the Company were not in jeopardy and although it was considered that there was power in the court to appoint provisional liquidators simply for the purpose of pursuing a corporate rescue, the judge considered it was not then appropriate particularly in the light of the proceedings than being undertaken in the Philippines.

43. On the basis of the evidence before the judge and the circumstances that existed at the time, I do not consider that it can be said that the judge fell into error. In those circumstances this court must be extremely wary of interfering. The judge was exercising her discretion. Unless there are grounds for holding that the discretion was exercised wrongly, this court cannot interfere simply because it might have exercised the discretion another way. Moreover, if circumstances have changed since the hearing below, that may be grounds for the making of a new application to the judge but not for allowing an appeal. As already noted, however, the judge specifically had in mind that the circumstances might change and that then there might be grounds for appointing provisional liquidators.

44. This court was informed that the matter would be referred back to the judge within two weeks of the judgment of this court. It appears to me that it is far more suitable for the judge to be able to reconsider the matter than for this court to do so, even if it were open to this court to interfere with the exercise of the judge's discretion whether to appoint provisional liquidators.

45. In the first place it seems to me that this court would be asked to act on a different factual basis to that which the judge addressed. To that extent Mr Barlow's point that this court was being asked to exercise first instance jurisdiction has validity. It is particularly undesirable for this court to be asked to appoint provisional liquidators in a situation where it is clearly envisaged that there will have to be substantial monitoring of the role of the liquidators. This is all the more so where the appointment of the provisional liquidators is very much a matter of discretion based upon the court's assessment of what is achievable and what is not. Part of the reason for seeking the appointment of provisional liquidators is that it will give the provisional liquidators status to apply to the courts in the Philippines and to deal with the Rehab Receiver. No evidence has yet been given that those ends would be accomplished even if provisional liquidators were appointed.

46. If a new application were to be made to the judge, there would appear to be grounds for suggesting that there have been material changes in the circumstances. In particular, it would appear that the proposed rehabilitation plan presented on 4 November 2004 was now no longer viable. The proposed plan appears to have envisaged two schemes of arrangement. They are expressed to have been under section 166A of the Ordinance but that was probably a mistake for section 166. Nevertheless, Mr Barlow argued that the reduction of capital could be effected under section 58 of the Ordinance and that approval of creditors was not required and creditors could not have opposed under the terms of section 59. That may be correct but the proposed reduction

in what was termed the Scheme B whereby the creditors under the Facility Agreement would have their loans restructured in a major way would no longer appear to be viable.

47. On the assumption of the applicability of the rules relating to the proposed Rehab Plan, which both parties appeared on this appeal to accept as being the relevant rules, any modification of the proposed Rehab Plan had to be submitted to the court not later than one year after the date of the initial hearing. That date has passed and, indeed, the 18-month period, which appears to be non-extendable, for approving of disapproving the rehabilitation plan is fast approaching in May.

48. The Company appears still to be running at a loss, despite the optimistic view of the Rehab Receiver that, if the bulk of the expenses of the Company are ignored, there may have been a surplus over the last six months. What is perhaps particularly relevant is that the audited accounts which have been obtained in respect of the last two years have been so heavily qualified by the accountants that they could scarcely be said to be worth the paper they are written on. That is so even taking into account that they show that the Company was running at a loss. Once it is appreciated that the Company is running the casino on a day-to-day basis there are, probably, grounds for suggesting that some creditors may be being preferred to others. There, thus, may well be legitimate grounds for arguing that the assets of the Company are in jeopardy.

49. Even if it were established that the assets of the Company were in jeopardy it would be necessary for the court to consider whether the appointment of provisional liquidators would serve any useful purpose. From the point of view of the protection of assets the difficulty arises that there is a Rehab Receiver in place still in the Philippines and it is no by no means clear as

to what effective steps can be taken by provisional liquidators in respect of those assets. To-date neither the Rehab Receiver nor the court in the Philippines has acknowledged the rights of the petitioner. It may well be that even after this judgment, they may not be prepared to deal with the petitioner, or anybody appointed on the petitioner's application, unless and until the matter has been resolved in the Commercial Court. In this context, it is also relevant that the order sought in this court did not encompass giving the provisional liquidators any power or authority over the assets of the Company, other than the normal assets, namely, the books and records of the Company.

50. If the appointment of provisional liquidators cannot be shown to be likely to achieve any beneficial effect as regards the preservation of the assets of the Company the purpose of appointing provisional liquidators becomes problematic.

51. I would also add that it is by no means clear as to what scheme could be proposed by provisional liquidators. Without the cooperation of Metroplex, the financial creditors, namely, primarily the petitioner and Avenue Asia, would appear unlikely to be able to propose any plan which could save the Company. In those circumstances it may well be that the only viable course is for the petitioner to press for a winding up. Indeed, it would appear to be rather surprising that the petition has been allowed to linger for so long. There is no doubt as to the insolvency. On the face of the evidence which is now before the court, the petitioner's locus appears clear. It is by no means apparent as to what evidence in that respect the Company can now adduce. In my view, as in all other cases of winding up petitions, the court should take control of the proceedings and not permit adjournments and delays unless strictly necessary.

Hon Le Pichon JA:

52. I agree.

Hon Rogers VP:

53. The appeals are therefore dismissed with an order *nisi* of costs in favour of the respondents to the respective appeals.

(Anthony Rogers)
Vice-President

(Doreen Le Pichon)
Justice of Appeal

Mr Michael Crystal QC & Mr Charles Manzoni, instructed by Messrs White & Case, for the Petitioner/Appellant in CACV 207/2005

Mr Barrie Barlow & Mr William Wong, instructed by Messrs Richards Butler, for the Company/Appellant in CACV 210/2005