IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 113 and FSD 122 OF 2018 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CW GROUP HOLDINGS LIMITED

IN CHAMBERS

Appearances:	Mr David Allison QC, Ms Fiona MacAdam and Mr Jason Taylor of Walkers on behalf of the Company.
	Mr John Harris and Ms Allyson Speirs of Higgs & Johnson on behalf of Brownstone Ventures Limited.
	Mr Tom Lowe QC, Mr Marc Kish, Ms Gemma Lardner and Ms Ilona Groark of Ogier on behalf of Bank of China (Hong Kong) Limited.
In attendance:	Ms Joanne Collett and Ms Meenaa Azmayesh of Walkers, Hong Kong via video link
	Ms Eleanor Fisher and Mr Tim Womack on behalf of Kalo (Cayman) Limited.
	Ms Jodi Jones and Ms Kadie-Ann Prospere on behalf of PwC.
Before:	The Hon. Justice Raj Parker
Heard:	11 and 16 July 2018
Draft Judgment Circulated:	26 July 2018
Judgment Delivered:	3 August 2018

HEADNOTE

Company applying for appointment of provisional liquidators-section 93 of the Companies Law and sections 104(3) (a) and (b) of the Companies Law (2018 Revision)-Creditor applying at same time for appointment of provisional liquidators -section 104 (2) of the Companies law (2018 Revision)-whether appointment necessary-evidential basis-Court's discretion.

JUDGMENT

Introduction

1. CW Group Holdings Limited ("the company") acting by its board of directors applies by way of ex parte summons (on notice) to appoint joint provisional liquidators over the company pursuant to section 104(3) Companies law (2018 Revision) (the "Companies Law") and Order 4.6(2) of the Companies Winding Up Rules.

2. The company's application was filed simultaneously with and pursuant to a Winding Up petition presented by Brownstone Ventures Ltd ("Brownstone") dated 29 June 2018 which seeks the winding up of the company on the grounds that it is unable to pay its debts (within the meaning of section 93 of the Companies Law).

3. The company's application is also brought on this ground and on the basis that it intends to present a compromise or arrangement to its creditors.

4. It seeks to appoint Eleanor Fisher and Gordon MacRae of Kalo (Cayman) Ltd ("Kalo") together with Osman Mohammed Arab of RSM (Hong Kong) Ltd ("RSM HK") as joint provisional liquidators ("JPLs").

5. Notice was provided to the relevant creditors of the company including Brownstone, Fubon Bank (Hong Kong) Limited ("Fubon") and Bank of China (Hong Kong) Ltd ("BOC").

6. BOC applies by a summons dated 28 June 2018 seeking the appointment of provisional liquidators to the company pursuant to a winding up petition presented by Fubon on 22 June 2018, (a week earlier than the Brownstone petition).

7. BOC applies pursuant to section 104(2) of the Companies Law for the appointment of Simon Conway, Yat Kit Jong and Man Chun So of PwC as joint provisional liquidators (the "PwC nominees").

8. Both summonses came on for hearing before me and I heard the applications on 11 and 16 July.

9. Announcements have been made on the Hong Kong Stock Exchange in relation to both applications.

10. There is no dispute that the company is insolvent within the meaning of section 93 of the Companies Law. It is unable to pay its debts and these debts are substantial amounting to over US$ 166.2 million. In particular there are substantial amounts owed to creditor banks in Hong Kong and Singapore. Support for each of these summonses is divided between support for the company and support for BOC by creditor value, with a proportion of debt creditors where it is unknown.

Background

11. The company is the ultimate holding company for a group of companies. It was incorporated in the Cayman Islands on 11 June 2010 and its shares have been listed on the main Board of the Hong Kong Stock Exchange since 13 April 2012 with stock code 1322. It is one of the leading one-stop precision engineering solutions providers serving various industries worldwide. It has operations in Singapore, Hong Kong, Germany, Switzerland, Japan, Southeast Asia and India. It services customers who have businesses in precision machine tool engineering, electronics and semiconductor, automotive, oil and gas, marine, construction materials, as well as niche markets in aerospace, medical and renewable energy.

12. The companies in the group are currently experiencing financial distress due to both the unfavourable market conditions for a planned debt refinancing and the negative impact on the group's overall cash inflows and outflows due to certain supply issues relating to Computer Numeric Control ("CNC") machine centres. CNC machining is a process used in the manufacturing sector that involves the use of computers to control machine tools. Because there has been an insufficient supply of CNC machine tools this has caused longer delivery lead times and delays further down the production line together with higher turnover days for receivables.These events have caused severe financial pressure on the companies within the group.

13. Throughout May and June 2018 numerous bank creditors issued default notices and/or statutory demands on the company and froze the company's accounts.

14. All this has been set out in the first affirmation of Wong Koon Lup, dated 2 July 2018. Mr Wong is the Chairman and Chief Executive Officer of the group.

15. He states (in summary) at paragraph 11 (the Executive Summary) that: notwithstanding the present difficulties the company is balance sheet solvent taking into account its non-cash, unrealised assets (in particular a large amount of trade receivables) and the company believes that it and the group as a whole will be able to continue as a going

concern if the restructuring of its financial indebtedness can be negotiated, proposed and implemented.

16. The board has, together with professional advisers retained (which include lawyers in Singapore, Hong Kong and Cayman, as well as RSM Singapore as restructuring advisers) already taken steps to engage with the company's creditors with a view to developing the terms of a proposed restructuring. In that connection proceedings have been commenced in Singapore and Hong Kong for the appointment of provisional liquidators and to secure a moratorium on claims. RSM Singapore were appointed in early June 2018 to develop a solution for the group.

17. He refers to the risk the company faces of these plans being prejudiced by the taking of enforcement action by creditors who are not supportive of the proposed restructuring.

18. He goes on to state that the board does not believe that a winding up of the company is in the best interests of creditors and that the commencement of official liquidation would have a prejudicial effect to the value of the company and the group and would result in a materially worse outcome for the creditors of the company and the creditors of the group as a whole. It would affect the listing status of the company on the Hong Kong Stock Exchange and would be detrimental to shareholders. Furthermore winding up would greatly reduce the collectability of accounts receivables and consequently the company's ability to pay creditors.

19. He refers to the fact that the board is mindful of its fiduciary duties to act in the best interests of the company's creditors and also its desire to protect the efforts made to date in relation to the proposed restructuring. As a result he states that the board believes it to be in the best interests of creditors to appoint Cayman JPLs on a 'soft touch' basis as special restructuring professionals and independent officers of the court so that they could assist the board in continuing to pursue the proposed restructuring in a controlled and efficient manner in coordination with the other proceedings which may involve parallel schemes of arrangements in due course.

20. 'Soft touch' terms would importantly allow existing management to continue to manage the business. He says that existing management has key relationships with creditors, suppliers and other stakeholders and they will work to ensure that the proposed restructuring can be implemented with minimal disruption and so assist in maximising the group assets.

The competing submissions

21. In this case two winding up petitions have been presented in respect of the company and it is common ground that it is demonstrably insolvent. There is an urgent need for the relief sought. However, there are competing applications concerning the appointment of joint provisional liquidators. Not only are the applications materially

different as a matter of law and evidence in support, they are likely to lead to very different outcomes.

22. The key issue is: which proposal should be pursued, the one proposed by the company as set out above, or the one proposed by BOC?

23. Counsel for the company, Mr David Allison QC ("Mr Allison QC"), argued in summary as follows. The company was of the clear view that the appointment of its proposed JPLs to pursue a restructuring was necessary to prevent an irreversible destruction of value that would result from the company entering in to an official liquidation process. Such a process would follow from BOC's application and would inevitably lead to a lower return to the creditors of the company and would frustrate recent substantial efforts by the board to ensure that the maximum possible return to all creditors is achieved.

24. On the other hand there was a real prospect that a 'soft touch' provisional liquidation procedure which left existing management in place, would enable the successful promulgation of a proposed restructuring of the company's financial indebtedness to enable the company (and the wider group) to continue as a going concern in the best interests of the body of general creditors. The company has identified the representatives from Kalo and RSM HK as their preferred provisional liquidators because of their pre-existing knowledge of the company's financial affairs and creditor relationships, geographical cross-border restructuring expertise and global reach.

25. They would be independent officers of the court who would report to the court on the conduct of the provisional liquidation, including as to matters such as the cooperation of management; the financial position of the company; and the prospects of achieving a successful restructuring.

26. Counsel for BOC, Mr Tom Lowe QC ("Mr Lowe QC"), argued in summary as follows. BOC and those creditors which support it have no confidence in the current management of the company. It is alleged that they have been guilty of misconduct and mismanagement. BoC therefore consider that 'truly' independent insolvency practitioners appointed with relevant powers are necessary to protect the company's assets pending determination of the winding up petitions filed. BOC seeks the appointment of the PwC nominees as JPLs to prevent ongoing alleged mismanagement, prevent any further dissipation of company assets and to investigate a number of allegedly questionable transactions and the company's books and records more generally.

27. He argued that BOC has real concerns over the proposed appointment of the representatives nominated by the company as the intention would seem to be to provide the company (and by extension its management) with the benefit of a moratorium without providing any assurances to the company's creditors with regard

to increased transparency, truly independent officeholders and removal of those members of management that have led the company to its current position.

28. Furthermore the company's application is not supported by any sort of restructuring plan or evidence that such a plan could be agreed or that a restructuring could occur in the short term. The company's application is in effect, Mr Lowe QC submitted , to adjourn the BOC petition for a substantial period in the hope that there will be a restructuring, with no plan in place to suggest that will occur and in the meantime to continue with management who appear to have been guilty of wrongdoing.

The law and legal submissions

29. Section 104 of the Companies law provides as follows:

(1) Subject to the provisions of this section and any rules made under section 155, the court may, at any time after the presentation of the winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company...on the ground that:-

(a) there is a prima facie case for making a winding up order; and
(b) the appointment of a provisional liquidator is necessary in order to:-

(i) prevent the dissipation or misuse of the company's assets
(ii) prevent the oppression of minority shareholders; or
(iii) prevent mismanagement or misconduct on the part of the company's directors

(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that:-

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

(b) the company intends to present a compromise or arrangement to its creditors.

(4) a provisional liquidator shall carry out only such functions as the Court may confer on him and his powers may be limited by the order appointing him.

30. There is no dispute that the company may act, as it does here, through its board of directors without the sanction of a resolution of shareholders passed in general meeting - see *Re CHC Group Ltd* (unreported, McMillan J, 24 January 2017, Cause No: FSD 5 of 2017 (RMJ)).

31. Mr Allison QC referred me to authorities which established that applications by the company for the appointment of JPL's will normally be subjected to less anxious consideration by the court than will creditors' applications which are opposed by the company itself: see *Re London* (1886) LR 2 Eq 231 and *Re United Medical* (2002) 41 ACSR 623.

32. Mr Lowe QC argued that the court should be anxious about the company's application in the particular circumstances. Moreover the evidence from BOC provided jurisdiction for this court to make the order he seeks, notwithstanding opposition from the company.

33. He submitted that where there is a competing application brought by majority creditors the court should view the company's application with particular scrutiny. In this regard on the company's own evidence no compromise arrangement or restructuring plan had been formulated, nor was one in prospect to be finalised in a short time-frame.

34. In answer to this last point Mr Allison QC referred me to a number of recent cases in the Grand Court where provisional liquidators have been appointed to restructure insolvent Cayman Islands companies in circumstances where no plan or detailed plan had been formulated at the time of the provisional liquidators' appointment: see *Arcapita Investment Holdings Limited* (FSD 45 of 2012), *Trident Microsystems (Far East) Limited* [2012 (1)CILR 424], *Suntech Power Holdings Co., Ltd* (FSD 143 of 2013) and *LDK Solar Co. Ltd* (FSD 14 of 2014).

35. Mr Allison QC also made the following points. The language of subsection 3(b) only requires that the company 'intends' to present a compromise arrangement to its creditors, not that it has done so, or will do so in the immediate future.

36. The rationale for that language he argued is to give effect to the practice which had 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 its attempts to reach a consensual restructuring, or if that should prove not be possible, a scheme of arrangement-see *Re Esal (Commodities) Ltd* [1985] BCLC 450 at page 460 Harman J. The relevant provisions of the Companies Law in Cayman have been in effect since August 2009 and have been applied in several cases where the company in question intends to present a restructuring to its creditors - see for an early example *Fruit of the Loom* (unreported, Smellie CJ, 26 September 2000, Cause No: 823 of 1999). The Chief Justice made it clear in that case that the power to be

exercised is very wide and flexible and can be used as the basis for the rescue of a company where it is just to do so. It is a matter for the court's discretion as to how to exercise it in the appointment of provisional liquidators to benefit those having the financial interests in the company to be rescued.

37. In *Trident* Cresswell J endorsed this approach and decided that JPLs who had been appointed some 5 1/2 months previously should be allowed to continue further (in the exercise of a fresh discretion) not only to support foreign bankruptcy proceedings, but also to explore potential restructuring options where a better outcome for stakeholders would be achieved.

38. Mr Allison QC submitted that whilst the Grand Court is often asked to make 'soft touch' provisional liquidation orders as an act of judicial comity when assisting foreign proceedings, this is not the only jurisdictional basis. There is no restriction in the terms of the Companies Law and there have been a few cases decided recently in which the court has appointed provisional liquidators on the application of the company to pursue a scheme of arrangement in Cayman, as opposed to acting simply in support of a foreign proceeding to implement an effective restructuring. A recent example is *Mongolian Mining Corporation* (unreported, McMillan J, Cause No: FSD 99 of 2016). No foreign proceedings were on foot at the time of the application and, as can be seen by paragraphs 2 and 3 of the Order made in that case, the provisional liquidators were expressly given power to seek recognition in the US. A scheme of arrangement was subsequently proposed and sanctioned by the Grand Court, along with a parallel scheme of arrangement in Hong Kong and recognition of the Cayman scheme in the US under Chapter 15 was obtained.

39. Mr Allison QC further submitted that a creditor's application under section 104(2) of the Companies Law for the appointment of provisional liquidators should only be granted in exceptional circumstances when it is shown that it is necessary to hand over control from the management to JPLs. This requires strong evidence to show that assets are in jeopardy or that there is misconduct or mismanagement which needs to be dealt with, pending the hearing of a winding up petition. He argued that it was an exceptional step to take, something he described as a 'nuclear option'.

40. He argued that there was a clear distinction between that type of extreme case and applications by the company where it was intended to present a compromise or arrangement to creditors, which may only be brought by the company itself.

41. Mr Allison QC submitted that whilst some of the evidence in support of BOC's case and its summons for the appointment of provisional liquidators expressly contemplates a restructuring to maximise stakeholder value, there was no power, on a creditor's, (as opposed to a company's) application, for the court to order a restructuring. To grant BOC's application would be a prelude to an official liquidation of the company, according to Mr Allison QC the 'nuclear option', as it makes the recovery of the company virtually impossible.

42. Mr Allison QC pointed out that in two recent cases, *Mongolian Mining Corporation* (as noted above) and *Abraaj Holdings* (unreported, McMillan J, Cause No: FSD 95 of 2018), the Grand Court appointed provisional liquidators on the application by the company despite the opposition of petitioning creditors.

43. He also submitted that the width of the discretion open to the court is illustrated by the decision of Segal J in *Grand T G Gold Holdings* (unreported, Segal J, 21 August 2016, Cause No: 0084 of 2016 (NAS)) in which the winding up petition was adjourned to allow for the prospect of a restructuring in the best interests of the general body of creditors. The adjournment was for a period of five weeks to allow the company to make progress in advancing a restructuring proposal (see paragraph 6 (f) of the Ruling), even though a petitioning creditor was owed a significant undisputed debt and opposed the adjournment and had a large proportion of the company's creditors supporting its opposition.

44. Mr Allison QC submitted that the course of action proposed by the company in this case provides the creditors with a much higher degree of protection than that afforded in the *Grand T G Gold Holdings* case as it is not a mere adjournment that the company seeks, rather an immediate appointment of provisional liquidators who would have extensive powers to protect the interests of creditors.

45. Mr Lowe QC accepted that he would have to bring his application within the test relating to a creditor's application: section 104(2) of the Companies Law.

46. As to the risk of dissipation ground, Mr Lowe QC relied upon a passage in the judgment of Segal J in *Re Asia Strategic Capital Fund* (unreported, Segal J, 30 April 2015, Cause No: FSD 42 of 2015 (NAS)) in which he said:

> *"On a contributory's petition, as in the present case, it is sufficient if it is shown that the assets of the company… are being, or are likely to be, dissipated to the detriment of the petitioners"*- see paragraph 45.

47. Mr Lowe QC submitted that there is no reason why this approach should be confined to contributory petitions. Furthermore, dissipation need not be in the *Mareva* sense of deliberately 'making away' with the assets but any serious risk that the assets may not continue to be available - see *In re a Company ex parte Nyckeln* [1991] BCLC 539 Harman J.

48. He submitted that there was a real risk of dissipation in relation to cash in accounts not controlled by the banks and the balance of the purchase price for the Brownstone acquisition. There were also claims for repayment of the escrow amounts transferred pursuant to that acquisition and the prospect of claims against current management and third parties to be considered.

49. As to the mismanagement ground, he submitted that one of the principal reasons for provisional liquidation, as explained by the Court of Appeal in *Re Rochdale Drinks* [2013] BCC 419, was the importance of preserving records.

"In cases in which there are real questions as to the integrity of the company's management and as to the quality of its accounting and record-keeping function, it will be an important part of a liquidator's function to ensure that he obtains control of its books and records so that he can engage in all necessary investigations of its transactions. These will or may include investigations of those who have been managing the company with a view to considering the bringing of claims against them; and the consideration of whether any of the company's directors ought to be the subject of a report.... If there is any risk that, pending the hearing of the petition, records may be lost or destroyed, that will also found the basis for the appointment of a provisional liquidator, who will be able immediately to secure them and commence his own enquiries into the affairs of the company and the conduct of its management"- paragraph 101 per Rimer LJ.

50. He relied on Segal J's approach in *Re Asia Strategic Capital Fund* where he said that mismanagement or misconduct *"... connotes culpable behaviour involving a breach of duty or improper behaviour..."* - see paragraph 60. Segal J considered that inaction could constitute mismanagement where it amounted to a breach of duty as opposed to mere 'paralysis'.

The evidence concerning dissipation and misuse of the company's assets an mismanagement

51. Assessment of this evidence is critical to the disposition of BOC's application and of course is also relevant to the company's application.

52. Ms Tan Fan Chu ("Ms Chu") is the Deputy General Manager and Head of Asset Recovery at BOC. In her first affirmation of 29 June 2018 she explains that BOC is a creditor under two facilities made available in the sum of HKD157,486,587.84 and HKD14,988,912.93 respectively. At paragraphs 32 to 60 she explains in some detail why BOC considers that provisional liquidators are necessary to 'hold the ring' in order to prevent dissipation and misuse of the company's assets and mismanagement on the part of the company's directors.

53. These allegations include: that there has been a failure to disclose information which the company agreed to provide to BOC and other creditors at the second bank meeting on 14 June 2018; the company's refusal to appoint PwC as an independent financial adviser (in exchange for which the creditors had agreed to provide the standstill requested by the company); the company's failure to identify (or if it did, to take any action upon identifying) that a significant percentage of the company's trade debtors have been struck off and/or dissolved such that the recoverability of their receivables was questionable if not impossible (this may have artificially inflated the

balance sheet and only two instances of this have so far been discovered by RSM instructed by the company); questionable links and connections between a number of the trade debtors who appear to be related (such that the debts are significantly more concentrated than they appear); unexplained and unjustified entry into an acquisition agreement with Brownstone pursuant to which the company's wholly owned indirect subsidiary has agreed to pay a substantial sum (of which over half has already been paid to an escrow account) for a German company which BOC suspects is connected to members of the company's management and which appears to have been significantly overvalued.

54. Four out of five of the Hong Kong creditor banks, of which BOC is one, have lost confidence in the management of the company and consider that it is in the best interests of the company and its creditors to transfer control to independent court-appointed JPLs.

55. Contrary to the company's contention of the value of the current management continuing to be involved with regard to key relationships with creditors, suppliers and other stakeholders, it is these very relationships that the banks say is what requires urgent investigation and protective steps.

56. Mr Wong deals with these allegations in his evidence and refutes the case that there has been any misconduct or mismanagement by the directors or that there is any risk as to dissipation and/or misuse of company assets.

57. In her second affirmation Ms Chu maintains that a 'light touch' joint provisional liquidation as proposed by the company with a very limited scope of powers for the JPLs is not appropriate in circumstances where there are good reasons to suspect that the management of the company should be subjected to independent investigation. She makes further allegations concerning the legitimacy of the stated value of trade receivables and the Brownstone acquisition at paragraphs 20 to 34.

58. Mr Wong deals with these further allegations in his third affirmation. He dismisses them as further attempts by BOC to suggest mismanagement where there is none with a view to furthering its own application. He says it seeks to cast doubt on the actions of management by creating issues where there are none and by creating spurious connections between management and third parties which are nothing more than usual business relationships. It is these relationships he says that will support the appointment of JPLs on a 'soft touch' basis. He explains and refutes in some detail (at sections C, D and E) matters raised in the allegations made by Ms Chu.

59. He fairly accepts however that creditors of the company should be provided with explanations for their concerns and states that the company is committed to working with RSM and, going forward, Kalo to not only formulate a restructuring plan for the company but to ensure that there is an independent investigation of the matters raised - see paragraph 39 of his third affirmation.

60. It is not possible for the court to resolve the many, varied and complex factual questions raised in the evidence submitted by BOC and explained and answered by the company at this stage. Having carefully reviewed this written evidence there are clearly genuinely held concerns about a number of issues concerning the management of the company where investigation may well be required regarding the events that have led to the financial distress at the company.

61. The court however has to be satisfied at this stage that the relief sought in BOC's application is *necessary (*my emphasis*)* in order to prevent the dissipation or misuse of assets and mismanagement or misconduct by the directors within the meaning of section 104(2) of the Companies Law.

62. I am not so satisfied. It is a heavy burden that BOC seeks to discharge and there is no clear or strong evidence submitted to persuade me of the necessity. In particular what seems to me to be the central issues concerning the Brownstone transaction and the situation relating to the delay in the recoverability of aged receivables are satisfactorily dealt with by Mr Wong in his evidence.

63. I am not persuaded that the evidence shows that it is necessary to put in place JPLs with powers to oust existing management and take action to protect the assets of the company pending the determination of the winding up petitions and review the historic conduct of management, as BOC seeks to do.

64. Having reviewed the evidence in its totality I am not persuaded that there is a likely dissipation of assets applying the tests in *Re Asia Strategic Capital Fund* and *Nyckeln.* Nor do I find any risk that records will be lost or destroyed as was the case in *Re Rochdale Drinks.* Nor do I find strong evidence of mismanagement (applying the test adopted by Segal J in *Re Asia Strategic Capital Fund)* of 'culpable behaviour involving a breach of duty' or 'improper behaviour'.

Decision

65. The view I have come to on the evidence has the consequence that there is no basis for the appointment of a provisional liquidator under section 104(2) of the Companies Law and I therefore reject the application by BOC.

66. As to the company's application, notwithstanding the assertions made by Mr Lowe QC that the RSM entities are not independent (as can be seen from the roles played at meetings with the banks) I disagree.

67. It makes sense to use entities from the same group to allow for better coordination and communication between Singapore and Hong Kong which is likely to be of value to the company as they further engage with creditors and seek to propose and

implement a restructuring. Following the approach of Hoffmann J in *Re Maxwell Communications Corp plc* [1992] BCC 372 it also seems to me that it makes sense to choose a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy.

68. As is well known, if and when appointed, as officeholders, provisional liquidators are independent persons operating under the direction of the court - see *BCCI SA* [1992] BCC 83. In that case the Vice Chancellor considered applications by three separate groups of depositors for the appointment of provisional liquidators in addition to partners from another firm (Deloitte) already appointed by the court. This was rejected as unnecessary. Similarly I reject the submission made by Mr Lowe QC (if I rejected his client's application), that a nominee from PwC should be appointed to serve alongside the JPLs proposed by the company. This too in my view is, in the circumstances, unnecessary.

69. Once appointed the joint provisional liquidators would act as officers of the court and in the best interests of all of the company's creditors and stakeholders, irrespective of who sought the appointment. I have no doubt that those proposed by the company would do so in this case.

70. I accept Mr Allison QC's submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the company. That much is clear from the language of section 104(3) (b) of the Companies law and the four recent authorities he referred me to: *Arcapita, Trident, Suntech* and *LDK Solar* (all as noted above).

71. Of course weight, whilst not determinative, must be given to the opposition to the company's application by the Hong Kong and Singapore creditor banks and I have given anxious consideration to the company's application in the light of the objections put forward by BOC.

72. However, the court is prepared to accept the considered views of the board of the company, having taken advice, as to the best way forward which involves appointing

73. provisional liquidators to provide the necessary breathing space from the actions of creditors where there is a prospect of promoting a restructuring. There would of course be protection from action by unsecured creditors due to the statutory stay under section 97 (1) of the Companies Law.

74. There has already been some engagement with creditors with a view to developing the terms of a proposed restructuring. The board wishes to work with restructuring professionals, who, as I say, would importantly also be independent officers of this court, to pursue a proposed restructuring which would be likely to involve parallel schemes of arrangement in due course. I agree that in that way the business would continue to be managed, preserving relationships with existing creditors, suppliers

and other stakeholders with minimal disruption. The preservation of the company's listing status on the Hong Kong stock exchange is also a critical factor to be achieved.

75. This seems to me to be the best way to proceed where core assets of the company consist of receivables which may be recovered if the company properly services its customers and completes existing commitments.

76. To allow the company to continue as a going concern and to give the board and its advisers the best possible opportunity to secure a favourable restructuring is in my view in the best interests of the body of general creditors as a whole.

77. By contrast the winding up of the company and commencement of official liquidation is likely to have an adverse impact on the business: on contractual and other relationships; future trading prospects; market reputation and position, and regulatory relationships, all of which would adversely affect the value of the company.

78. The board of the company, with professional advice, has warned of a materially worse outcome (due to insolvent liquidations) for all creditors of the group as a whole and all stakeholders in the company and the group. The court accepts that conclusion and is satisfied that the appointment of the proposed JPLs under section 104(3) of the Companies Law is justified on the facts of this case.

79. The proposed draft appointment order allows the board to retain all powers of management, which I consider to be appropriate in order that the board may continue to manage the business and at the same time work with the JPLs to formulate and implement a restructuring.

80. However, powers are also given to the JPLs to protect the interests of all creditors. That will involve independent oversight of the board, a monitoring role and reporting duties to this court. Any creditor is given the right to apply at any time to vary or discharge the order on notice to the JPLs, and the JPLs and the board or any creditor may apply for directions in relation to, without limitation, any matter concerning the company or the conduct of the provisional liquidation or the JPLs.

THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT