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.

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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."