Cayman Restructuring Update: Decision of the Grand Court on 4th October

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The Grand Court of the Cayman Islands has recently dismissed a petition for the appointment of restructuring officers pursuant to the restructuring regime introduced in the Cayman Islands in August 2022. The case provides helpful clarification of the nature of evidence that is required to be put before the Court to engage its jurisdiction to appoint restructuring officers and will allow companies to be better prepared when seeking to utilise the Cayman Islands restructuring regime with the benefit of the automatic moratorium.

On 23 August 2023, Aubit International (the **Company**) presented a petition (the **Petition**) seeking the appointment of qualified insolvency practitioners as restructuring officers of the Company (**ROs**) pursuant to section 91B of the Companies Act (2023 Revision) (the **Act**).

The Petition was presented on the basis that the Company (a) was unable to pay its debts; and (b) intended to present a compromise or arrangement to its creditors[1]. As to each limb of the section 91B test, the Company submitted:

- It was unable to pay its debts due to, among other reasons, its inability to access US$60.4million in fiat currencies and cryptocurrencies held in the Company's brokerage accounts in Greece; and
- A restructuring would take place in two phases; first, an asset and information gathering phase in order to enable the Company to formulate the terms of a recovery or restructuring plan, followed by a more typical restructuring phase once the exact financial position of the Company and its potential asset recoveries had been ascertained. The Company's evidence suggested that the Company intended to present a consensual restructuring plan once all available assets had been recovered by the ROs.

The appointment of ROs was supported by creditors of the Company.

The legal test

In his judgment, Doyle J reviewed the first decision of the Court considering the restructuring regime in *Re Oriente Group Limited*[2] and earlier judgments relating to the appointment of soft-touch provisional liquidators under the amended section 104(3) of the Act (which the Court described as relevant and persuasive). Following an extensive review of those authorities, Doyle J listed 25 non-exhaustive factors to which the Court may have regard when considering an application for the appointment of ROs: the first of which was to emphasise that the Court's jurisdiction to appoint ROs is only engaged when both the statutory limbs set out in section 91B of the Act are satisfied (and that the burden is on a company to prove the satisfaction of those limbs on a balance of probabilities); and the last of which was to acknowledge that every case must be dealt with on its own facts and circumstances.

Some of the key factors listed by the Court include:

- The Court may use its flexible discretionary power to enable the rescue of a company where it is just to do so, but should ensure that the jurisdiction is not abused by a company which is hopelessly insolvent and continues to trade.
- The Court must consider whether (i) the restructuring is likely to be more beneficial to creditors than a winding up (ii) there is a real prospect of a restructuring being effected for the benefit of the general body of creditors; and (iii) in all the circumstances it is in the best interests of the creditors to try and achieve a restructuring.
- Creditors' views are relevant and important. The Court would normally expect to see evidence of some form of engagement with creditors prior to a petition being presented, with a view to developing the terms of a proposed restructuring.
- The intention to present a restructuring plan must be a realistic, genuine, bona fide held intention on adequate grounds. The Court does not have to be provided with " *the finished, fully-grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long*".
- In some cases the bare genuine bones of a restructuring plan may suffice or at least be persuasive enough to permit the appointment of ROs to report on the viability of a plan, but in some cases in the absence of: (a) meaningful consultation with outside creditors and their support and (b) independent confirmation from third-party professionals of the viability of the potential plan and the benefits of restructuring as opposed to a winding up, the Court may conclude that there is no genuine intention to move forward with a credible plan that has a reasonable chance of success.
- The Court will need to be satisfied that management genuinely require and deserve "breathing space" to finalise a restructuring plan with creditors which has a reasonable chance of success, and that it would be in the best interests of creditors to enable the company to continue as a

going concern.

- Even if the company and all creditors agree to the appointment of ROs, the Court must nevertheless be satisfied that it has jurisdiction to make an order and that making an order would, in its discretion, be a proper exercise of such jurisdiction.
- The petition should contain the information required by the Act, the Companies Winding Up Rules and case law and should clearly specify the grounds of the application.

Decision

Doyle J observed that, while there was inadequate evidence as to the financial position of the Company, its concession that it was unable to pay its debts within the meaning of section 93 of the Act meant the first limb of the statutory test was satisfied.

The Company however failed to satisfy the second limb of the statutory test because there was "*extremely limited information concerning the proposed "restructuring plan*"". While the Court accepted that it was not essential to demonstrate that there was a present restructuring plan or one that was to be implemented in the near future, it was still incumbent on the Court to scrutinise whether there was, on the evidence before it, a *genuine and realistic intention* to present a credible restructuring plan. Having regard to the evidence before him, Doyle J observed that:

- The Company's evidence was devoid of any meaningful detail such that " *it was difficult to come to the conclusion that there was a genuine intention to present, at least in the near future, a meaningful restructuring plan which would have reasonable prospects of success*".
- The two-phase approach referred to above was not a proper use of the restructuring officer regime. On the contrary, it was found to be premature as the Company should have taken steps to recover its assets and documents to ascertain its financial position prior to filing the Petition. His Lordship commented that it appeared that the first phase proposed by the Company was for the purpose of allowing it to then satisfy the Court on the second limb of the test for the appointment of ROs.
- It was improper to use the restructuring regime for the purpose of assisting in forensic investigations, commencing legal proceedings and obtaining assets, documents and information.
- It was also improper to use the statutory moratorium for the purpose of adding credibility and respectability to a company's own management.

The decision highlights that the Court's jurisdiction to appoint restructuring officers is only engaged when the two statutory grounds set out in section 91B have been satisfied, and it is only then that the Court may consider whether in its discretion it is just, fair and appropriate to appoint ROs and,

if so, what functions and powers to give them.

In reaching his decision, Doyle J emphasised the need to guard against potential abuse of the restructuring regime, in particular to ensure the enhancement of international cross-jurisdictional cooperation while simultaneously ensuring that relevant competing interests are duly balanced. Such protection was particularly acute in the context of the worldwide automatic statutory moratorium under section 91G of the Act which is imposed upon the presentation of a petition, and which the Court noted cannot be allowed to run indefinitely.

Notwithstanding that the Petition was dismissed, companies wishing to restructure with the benefit of a statutory moratorium should not be deterred from the use of the restructuring regime. The circumstances of this case were certainly unusual in that the Company presenting the restructuring plan was not fully aware of its own financial position at the time of presenting the Petition. In our view the decision is positive for the jurisdiction as it clarifies for future applicants the evidence required to be filed in support of a petition under the regime and emphasises the commitment of the Cayman Court to work towards international cooperation for the benefit of companies as well as the protection of creditors.

The lessons learnt from the judgment in *Aubit International*, together with the guidance provided by the Court following the appointment of ROs in *Re Oriente Group Limited*, the successful restructuring of Rockley Photonics Holdings Limited and the withdrawal of the RO petition relating to Differ Group Auto Limited provide practitioners, companies and creditors looking to use the RO regime with useful guidance as we see an uptick in restructuring inquiries and activities across the market.

[1] Cayman Islands welcomes introduction of reforms to restructuring regime | Ogier

[2] A new beginning for restructuring in the Cayman Islands | Ogier

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