

The Cayman Grand Court's approach to appointing provisional liquidators

Insights - 16/05/2024

On 31 August 2022, the Cayman Islands restructuring officer regime came into force.^[1] The regime was introduced to provide increased flexibility to implement a restructuring of Cayman Islands insolvent companies, including by providing the breathing space of an automatic moratorium that operates from the date of presentation of the restructuring petition.

Before the introduction of the restructuring officer regime,^[2] the appointment of provisional liquidators on a 'light touch' basis was the only form of court-supervised restructuring available in the Cayman Islands which had the benefit of a statutory moratorium.^[3] The restructuring officer regime was designed to improve upon this process and avoid some of the obstacles to its use, including: (a) the requirement that a winding up petition be presented prior to the appointment of provisional liquidators,^[4] which carries adverse reputational consequences; and (b) the lack of any moratorium until the date of the order appointing the provisional liquidator.^[5]

Prior to 31 August 2022, under section 104(3) of the Companies Act, the Cayman Court had the power to appoint light touch provisional liquidators following the presentation of a winding up petition if the company:

- is or is likely to become unable to pay its debts; and
- intends to present a compromise or arrangement to its creditors.

This test is now the relevant test for the appointment of a restructuring officer under section 91B.

As part of the reforms, the above wording was removed from section 104(3) which was amended to include a broader test:

"An application for the appointment of a provisional liquidator may be made under subsection

(1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so."

Following the introduction of the restructuring officer regime, it was not clear the circumstances in which the Court would consider it appropriate to appoint a provisional liquidator under section 104(3); particularly where section 104(2) of the Companies Act itself separately dealt with the appointment of provisional liquidators for the purposes of protecting the company and its assets from misuse.

The recent decision of the Grand Court of the Cayman Islands in *Re Kingkey Financial International (Holdings) Limited*^[6] (*Kingkey*) is the first time that the Court has provided guidance on this question and has confirmed that there are certain situations where, given the particular circumstances of the insolvent company in question, it would be more appropriate for the Court to use the light touch provisional liquidation process to effect a court-supervised restructuring.

Facts

Kingkey involved a Hong Kong Stock Exchange listed company (the **Company**) which had suffered financially as a result of recent economic conditions. The Company identified an investor from which it could raise funds by way of a share subscription. The board approved the share issue despite the dissent of one of the Company's executive directors and shareholders, Mr Chen, who opposed the share issue on the basis that other options were available including funding provided by him. Before the share issue could be completed, Mr Chen sought injunctions from the Hong Kong Court preventing the share issue which ultimately led to the share subscription agreement lapsing.

Around the same time, the board received a number of anonymous complaints about Mr Chen, including that he had engaged in market manipulation or insider trading. Before the board could act on these allegations, Mr Chen requisitioned the board to convene an EGM to remove all directors except him. A rival requisition was put forward proposing to remove Mr Chen.

The board of the Company formed a special committee comprised of only the independent non-executive directors. The committee concluded that the Company was insolvent and that provisional liquidators should be appointed so that the Company could be put into the hands of neutral and independent third parties. The committee's view was that a restructuring officer petition was not appropriate as the present management would remain in control.

Decision

Asif J found that it was implicit from the wording of section 91B of the Companies Act that there is a built-in presumption that the company's board of directors will retain at least some powers

and functions to continue to control the company.^[7] This is consistent with the purpose of the restructuring officer regime which is a 'debtor-in-possession' styled regime that allows the restructuring officers to develop a compromise or arrangement between the company and its creditors for court approval whilst, in the meantime, allowing the directors to continue the day-to-day operation of the company.

Asif J found that although the former language of section 104(3) was arguably more prescriptive than the current broader language, under the present facts, the evidence demonstrated that Company was unable to pay its debts and it intended to present a compromise or arrangement.^[8] Therefore, Asif J held that the Company fell within the pre-August 2022 wording of section 104(3) and he therefore declined the invitation to consider whether the new wording of section 104(3) expands the circumstances in which the Court will be willing to appoint provisional liquidators.

Asif J concluded that provisional liquidators should be appointed and considered the following matters relevant in forming his ultimate conclusion:

- The Company was in a perilous financial position, was facing imminent risk of insolvency and would be unable to continue as a going concern in the absence of a successful restructuring. As such, Asif J inferred that a successful restructuring would provide a better outcome for creditors and members than allowing the Company to be the subject of insolvency proceedings.^[9]
- The Company was not required to present a detailed restructuring plan, and despite no such detailed plan being presented, it was clear that the Company intended to present a plan with the input of provisional liquidators.^[10]
- The fact that the application for appointment of provisional liquidators was at the Company's own initiative should be given some weight.^[11]
- There were ongoing disagreements between management as to the steps to be taken to address the Company's financial position as well as there being disputes between Mr Chen and the other board members regarding, amongst other things, unresolved allegations about Mr Chen's conduct.^[12] Accordingly, it was expedient for independent management, in the form of the provisional liquidators, to manage the current situation and provide stability to the Company.
- It could be inferred that there was no active opposition to the appointment of the provisional liquidators given that none of the creditors nor Mr Chen appeared at the hearing, and the application was unopposed, despite notice being published.^[13]

Conclusion

The Court in *Kingkey* has confirmed that the appointment of light touch provisional liquidators under section 104(3) of the Companies Act remains an important remedy in the Cayman Court's toolkit. The Court provided helpful guidance on one of the circumstances where the appointment of provisional liquidators will be preferable to restructuring officers, namely where the company is unable to function due to ongoing disputes amongst its management meaning that the debtor-in-possession model of the restructuring officer regime, under which existing management maintains control, is inappropriate.

However, given the broad wording of section 104(3) following the August 2022 amendments, it remains to be seen in what other circumstances the Cayman Court will consider it appropriate to appoint provisional liquidators instead of restructuring officers.

Footnotes

[1] Companies Act (2023 Revision), sections 91A-91J. See Ogier, [Cayman Islands welcomes introduction of reforms to restructuring regime](#) (Insight, 15 August 2022).

[2] There have only been a limited number of restructuring petitions determined by the Cayman Court to date, with mixed success: see Ogier, [Cayman Restructuring Update: Decision of the Grand Court on 4th October](#) (Insight, 11 October 2023).

[3] See Ogier, [Recent trends: provisional liquidation in the Cayman Islands](#) (Insight, 3 June 2021).

[4] Companies Act, section 104(1).

[5] Companies Act, section 97(1).

[6] (Unreported, Asif J, 19 April 2024).

[7] For example, section 91B(5) provides: "*where the Court makes an order under subsection (3) (a), the Court shall set out in the order – (b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; (c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions*": *Kingkey* at [34]-[35].

[8] *Kingkey* at [40].

[9] *Kingkey* at [41]-[42].

[10] *Kingkey* at [43]-[45] citing *Re CW Group Holdings* (Unreported, Parker J, 3 August 2018) at [70].

[11] *Kingkey* at [46]-[48] citing *Re CW Group Holdings* at [31], [72].

[12] *Kingkey* at [49].

[13] *Kingkey* at [51].

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