A new beginning for restructuring in the Cayman Islands

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On 11 November 2022, the Grand Court of the Cayman Islands heard the first petition to appoint restructuring officers under the new Cayman Islands restructuring regime that came into force on 31 August 2022.

In this article, we will provide an overview of the recent hearing and the appointment. As this was the first time the Grand Court of the Cayman Islands (the **Court**) was required to determine a petition to appoint restructuring officers, some useful points were clarified and practical recommendations offered for practitioners seeking to appoint restructuring officers going forward. A written judgment will follow.

Background

On 27 September 2022, two unsecured creditors (**Creditors**) filed a joint creditor winding up petition (**Creditor Petition**) against Oriente Group Limited (**Company**) in the Cayman Islands. They sought to appoint insolvency practitioners to wind up the Company on the basis of insolvency. The Company had failed to satisfy statutory demands served upon it, so there was a statutory presumption of insolvency. The Court listed the Creditor Petition for early December 2022.

On 21 October 2022, the Company issued a fresh petition seeking the appointment of different insolvency practitioners as restructuring officers (**RO Petition**). Restructuring officers were introduced on 31 August 2022 as part of the amendments to Part V of the Companies Act (2022 Revision) (the **Part V Amendments**). [1] The Part V Amendments provide that upon the filing of such a RO Petition there is an automatic worldwide moratorium that "no suit, action or other proceedings … shall be proceeded with or commenced" against the filing company. The Companies Winding Up Rules (**CWR**) contain provisions for obtaining leave to present a winding up petition against a company that has issued a RO Petition but does not expressly deal with the situation where a winding up petition is extant.

On 10 November 2022, the Petitioners then filed a further creditor's winding up petition against the

Company, in Hong Kong, again on insolvency grounds (**HK Petition**).

On 11 November 2022, Justice Kawaley presided over the first hearing of the RO Petition and had to consider whether to appointment the restructuring officers and the effect of the RO Petition upon the Creditor Petition.

No prohibition on presenting a RO Petition post filing a creditor's petition

The Creditors argued it was an abuse of process to file such a RO Petition post the presentation of a creditor's petition and that the statutory moratorium did not apply to creditor petitions issued prior to any RO Petition.

The Judge held that the statutory moratorium applied to extant winding up petitions because of the broad wording of the section (in particular "shall be proceeded with" and "suit, action or other proceedings" and "include any court supervised insolvency or restructuring proceedings against the company"). The HK Petition was not expressly dealt with.

The appointment of restructuring officers

Kawaley J then considered the substance of the RO Petition as the appointment of restructuring officers remains a matter of the Court's discretion.

The Company argued that this was the paradigm example in which the Court should appoint restructuring officers because:

- the Company had already contemplated a restructuring plan but needed breathing space to develop it further
- 46% of unsecured creditors supported the appointment of the restructuring officers and the restructuring plan, and the other unsecured creditors (bar the Creditors which accounted for less than 2% of the total value of the unsecured debt) did not actively oppose the appointment
- the alternative of liquidation would result in the unsecured creditors receiving nothing
- independent insolvency practitioners were ready to be appointed and work with management to progress the development of, and implement, the restructuring plan

The Company argued that failure to deal with the substantive RO Petition would be contrary to the overriding objective as all parties were present and ready to proceed with the application and any adjournment would only lead to destruction of value and additional costs which was not in the creditors' best interests.

The Petitioners raised multiple arguments that Kawaley J should dismiss the RO Petition or adjourn it to be heard concurrently with the Creditor Petition.

Kawaley J noted he was wary of the potential misuse of a RO Petition as an abuse to thwart a creditor's right to wind up a company based on an unpaid debt. However, he was persuaded that was not the case here, as there was evidence of significant creditor support and a reasonably well-advanced restructuring plan with respected insolvency practitioners ready to take the appointment.

Ultimately, Kawaley J determined it was appropriate to appoint the Company's nominees with extensive powers to ultimately seek to implement a restructuring of the Company. A reserved written judgment is to follow.

Advertising

Additionally, Kawaley J raised concern that there was the potential for delay between the filing of a RO Petition at Court and the receipt of a sealed version with a hearing date, which could have significant consequences given the extra-territorial nature of the moratorium. He accordingly indicated a preference that a petitioner should take immediate steps to advertise upon the presentation of the RO Petition and then (in accordance with the CWR) to advertise again upon receipt of the sealed documents. It is unclear whether this will lead to a rule or practice change, but practitioners will probably take care to bring the appointment to the attention of parties to litigation and there may be more direct ways to do that than through additional advertisement.

Commentary

The Cayman Court showed an expected willingness to give effect to the spirit of the new restructuring regime but recognised the need to ensure the probity of the RO Petition and assess the evidence to support the proposed compromise, while ultimately deferring to the creditors as the ultimate arbiters of what is in their best interests. The Part V Amendments do not set a threshold for how developed a compromise proposal needs to be - the Company relied (without real opposition) upon jurisprudence governing the appointment of provisional liquidators to present a compromise, which sets a low threshold for a debtor to meet.

Although the written judgment is eagerly awaited, there are likely to be battles in future RO Petitions in similar circumstances over the bona fides of any proposed compromise and potentially the identity of nominees to oversee the process if there is a conflict between the insolvency practitioners proposed by the creditors and by the company.

It seems likely that those arguments will need to be made on a relatively short timescale, with the Court prepared to appoint the restructuring officers within the (at most) 21-day timescale dictated by the Part V Amendments. Although there are provisions to change the officeholder, the

incumbent will therefore have momentum and creditors may find themselves on the back foot. Indeed, the Judge recognised that the Court would be reluctant to wind up a company (by lifting the moratorium) if restructuring officers are appointed and so incurring time and cost in developing and / or effecting a restructuring plan.

Finally, it is unclear what attitude international courts will take to the extraterritorial effect of the moratorium, particularly given recent developments in the Hong Kong Courts. Kawaley J gave the restructuring officers authority to seek recognition of their appointment abroad and confirmation of that recognition and the development of restructuring officer specific jurisprudence will help to provide further light for restructuring in the Cayman Islands as we continue to navigate troubling global economic circumstances.

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[1] For more information, read our briefing: Cayman Islands welcomes introduction of reforms to restructuring regime

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