In The Supreme Court of Bermuda

COMMERCIAL COURT
CIVIL JURISDICTION

2016: No. 482
2016: No. 486

IN THE MATTER OF OPUS OFFSHORE LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

JUDGMENT

(In Court)

Applications for winding up order on creditors' petitions – which of two competing petitions should have priority – whether, in absence of company, person appearing on winding up petition has standing to dispute petition debt – whether petition debt disputed in good faith and on substantial grounds – who should be appointed provisional liquidators where there are competing nominations

Date of hearing: 23rd December 2016, 20th January 2017
Date of judgment: 17th February 2017

2016 No: 482

Mr Christian Luthi and Ms Stephanie Hanson, Conyers Dill and Pearman Limited, for Songa Offshore SE, the Petitioner

Mr Steven White, Cox Hallett Wilkinson Limited, for Mr Lau Chiat Siang, a supporting creditor

Ms Cratonia Thompson, ASW Law Limited, for Mr Vernon Westerhout, a supporting creditor, and Raise Zone Holdings Ltd, a supporting contributory (20th January 2017 hearing only)

Mr Kevin Taylor and Ms Nicole Tovey, Taylors, for TH Investments Pte Ltd and 9 other supporting creditors (20th January 2017 hearing only)

Mr John Wasty, Appleby Bermuda Limited, for Honghua Holdings Limited, a supporting creditor (20th January 2017 hearing only)

Mr Alex Potts, Sedgwick Chudleigh Ltd, for Reignwood International Investment (Group) Limited, an opposing creditor and contributory

Opus Offshore Limited did not appear and was not represented

2016 No 486

Mr Alex Potts, Sedgwick Chudleigh Ltd, for Reignwood International Investment (Group) Limited, the Petitioner

Opus Offshore Limited did not appear and was not represented

Introduction

1. This is a judgment on the hearing of two creditors' winding up petitions brought in relation to Opus Offshore Limited ("Opus" or "the Company") and two summonses for the appointment of provisional liquidators of Opus.

2. The Petitioning Creditor in 2016 No: 482 is a company called Songa Offshore SE ("Songa"). The Petition was filed on 16th December 2016 ("the Songa Petition"). The Petitioning Creditor in 2016 No: 486 is a company

called Reignwood International Investment (Group) Limited ("Reignwood"). The Petition was filed on 20th December 2016 ("the Reignwood Petition").

3. Everyone who appeared on either Petition agreed that Opus should be wound up. However they disagreed as to which Petition the Court should proceed upon, and who should be appointed as provisional liquidators.

4. Their disagreement raises the related questions: (i) who, for purposes of the hearing of a winding up petition, counts as a creditor; and (ii) whether on the hearing of a winding up petition a person appearing on the petition other than the company has standing to object to the petition debt.

Statutory scheme

5. The statutory scheme for winding up a company is contained in the Companies Act 1981 ("the Act") and the Companies (Winding-Up) Rules 1982 ("the Rules"). In this judgment, unless the context indicates otherwise, all references to numbered sections are references to sections of the Act and all references to numbered rules are references to the Rules.

6. Section 163(1) provides that an application to the Court for the winding up of a company shall be by petition, which may be presented *inter alia* by any creditor or creditors, including any contingent or prospective creditor or creditors.

7. Rule 17 provides that every petition shall be in a form prescribed by the Rules with such variations as circumstances may require.

8. Rule 21 provides that every petition shall be verified by affidavit.

9. Rule 25 provides that every person who intends to appear on the hearing of a petition shall give to the petitioner notice of his intention in accordance with certain prescribed formalities. If the person is a creditor, he is required to

state the amount by which he claims to be indebted to the company. A person who has failed to comply with the rule shall not be allowed to appear on the hearing of the petition without special leave of the court.

10. Section 161 sets out the circumstances in which a company may be wound up by the Court.

11. Section 161(e) provides that a company may be wound up by the Court if it is unable to pay its debts.

12. Section 162 (a) provides that a company shall be deemed to be unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company, by leaving it at the registered office of the company, a demand requiring the company to pay the sum so due and the company has for three weeks thereafter "*neglected*" to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

13. Neglecting to pay a debt on demand means omitting to pay without reasonable excuse. Thus where a debt is *bona fide* disputed by the debtor then the debtor has not neglected to pay and the case falls outside the wording of the statute. See In re London and Paris Banking Corporation (1874-75) LR 19 Eq 444 *per* Sir George Jessel MR at 446.

14. Section 162 (c) provides that further or alternatively a company shall be deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and that in determining whether a company is unable to pay its debts the Court shall take into account its contingent and prospective liabilities.

15. A contingent liability is a liability which will only become due in an event which may or may not occur; and a prospective liability is a liability which will certainly become due in the future, whether on some date which has been already determined or on some date determinable by reference to future

events. See Stonegate Securities Ltd v Gregory [1980] 1 Ch 576 *per* Buckley LJ at 579 E.

16. The legal theory underpinning the presentation of a creditor's winding up petition on the grounds that a company is unable to pay its debts was summarised by Buckley LJ in Stonegate Securities v Gregory at 579 F to 580 C:

> "*Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in paragraph (c) of section 224 (1).*[1] *If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed.*
> *Ungoed-Thomas J. put the matter thus in Mann v. Goldstein [1968] 1 W.L.R. 1091, 1098-1099:*
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> > *'For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court.'*
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> *I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason*

[1] Section 224(1) of the 1948 Companies Act in the United Kingdom was in the same terms as section 163(1)(c) of the Companies Act 1981 in Bermuda, namely: "*the court shall not give a hearing to a winding-up petition presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the court*".

that the petitioner is not a creditor of the company within the meaning of section 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings."

17. The requirement that the debt should be disputed on substantial grounds has been explained in various ways in various cases. There is a helpful overview in Re Alloy Aircraft; Al-Ayed v Mitchell and Alloy Aircraft Co Ltd [2005] Bda LR 79 SC *per* Kawaley J (as he then was) at 2 – 3. I take it to mean that the objection must be properly arguable, such that had the company issued a writ it would likely not have succeeded on an application for summary judgment.

18. Buckley LJ does not expressly address the question whether the Court is obliged to entertain objections to the petition debt from persons appearing on the petition other than the company. This issue is most likely to arise where the company does not appear on the petition or appears but takes no active part in the proceedings, although it might also arise where it is alleged that the company has entered into a collusive agreement with a creditor to strip the company of its assets to the prejudice of its genuine creditors.

19. In Trade and Commerce Bank v Island Point Properties and another, 13th August 2010 unreported, the Court of Appeal of the British Virgin Islands ("BVI") considered the question and, resolving conflicting decisions of Bannister J at first instance, concluded that such persons did have a right to object to the petition debt. See the judgment of the Court, given by George-Creque JA, at paras 10 – 12. The company did not appear on the petition. However the Court appears to have held that the right to object to a petition debt is necessarily implicit in the right to object to the petition irrespective of whether the company also objects.

20. In my judgment, the right to object to the petition debt is not a logically necessary consequence of the right to object to a petition. However I agree that on a practical level the right to object to a creditor's petition would often

be ineffective without the right to object to the petition debt. I therefore propose to follow the BVI decision, although I am not sure that it will necessarily prove the last word on the issue.

21. For purposes of the hearing of a winding up petition, then, a petitioning creditor is a person who has filed a petition verified by affidavit asserting the facts necessary to establish: (i) that the company is indebted to him; and (ii) that it is unable to pay its debts on one of the grounds specified in section 162 of the Act, provided that neither the company nor any other person appearing on the petition disputes the debt in good faith and on substantial grounds.

22. The rules as to standing are less stringent for a person who is not a petitioner but is merely appearing on the petition. It is sufficient that there is a *prima facie* case that they are a creditor or contributory, even if their claim to be so is disputed. Eg in Trade and Commerce Bank the Court of Appeal held at para 9 that a person who was *prima facie* a contributory had a right to appear on the petition and object to the petition debt even though the petitioner disputed that he was in fact a contributory. However the view of a creditor whose debt is disputed in good faith and on substantial grounds is likely to carry less weight than the views of one whose debt is not thus disputed.

23. Section 161(g) provides that a company may be wound up by the Court if the Court is of the opinion that it is just and equitable that the company should be wound up.

24. It will be just and equitable to wind up a company if there has been a failure of substratum, ie the business which the company was incorporated to carry on. See In re Suburban Hotel (1866-67) LR 2 Ch App 737 *per* Lord Cairns at 750.

Opus

25. Opus was incorporated in Bermuda on 18th September 2012 as an exempt company. The authorised share capital of the Company is US $500,000.00 divided into 500,000 voting common shares with a par value of US $1.00 each, all of which are issued and fully paid.

26. Opus is the holding company for the Opus Group of companies. Their principal business activity, as described in the Reignwood Petition, is the provision of offshore drilling, engineering and project management services to the oil and gas industry, and the construction of mid/deep water drill ships and semi-submersibles, either directly or through investment in subsidiary entities.

27. Opus did not appear in relation to either Petition.

The Songa Petition

28. Songa is an international midwater drilling contractor with experience in the management of offshore drilling rigs.

29. Songa seeks a winding up order in respect of Opus on the grounds that it is unable to pay its debts. This is because the Company has failed to pay a statutory demand which was served on the Company on 24th November 2016 for monies said to be due and owing under a guarantee in the sum of US $34.2 million. Opus granted the guarantee to Songa to secure a credit facility which Songa extended to one of Opus' subsidiaries. Opus did not respond to the statutory demand.

30. The debt claimed by Songa is partially secured by a charge over an oil rig owned by another company in the Opus Group. However Songa estimates that due to a downturn in the oil rig business the value of the oil rig would be in the region of US $2 million. Mr Iverson has justified this estimate in some detail and in terms which appear to me, on the face of it at least, convincing.

31. Further or alternatively, Songa seeks a winding up order on just and equitable grounds on the ground that there has been a failure of Opus' substratum.

32. Opus has neglected to pay the sum claimed by Songa in the statutory demand or to secure or compound for it to Songa's reasonable satisfaction and it has not disputed Songa's claim.

33. Thirteen persons have filed notices of intention to appear on the Songa Petition as supporting creditors. The total amount claimed by Songa and those claiming to be supporting creditors is $95,714,540.

34. Reignwood has filed a notice of intention to appear on the Songa Petition in order to oppose it. Reignwood is a Hong Kong company that is part of an international conglomerate with offices in Thailand, Hong Kong and Beijing known as the Reignwood Group. Reignwood is a registered shareholder and contributory of Opus, holding 129,914,100 shares in the Company. These represent a shareholding of some 70 per cent.

35. Alex Potts, who appeared for Reignwood, submits that his client disputed the petition debt in good faith and on substantial grounds for the following reasons:

    (1) The Guarantee and the Credit Facility relied upon by Songa are not governed by Bermuda law (but by English law), and they are subject to English arbitration agreements and/or English jurisdiction agreements. Reignwood (and/or the Company's Liquidators in due course) should be entitled to have an opportunity to take independent English law advice as to the validity and enforceability of the Guarantee and the Credit Facility, and to address the issue of whether any dispute(s) relating to those documents need to be determined in some other forum.

    (2) Songa, on its own evidence, claims to be a secured creditor of the Company. Reignwood intends to submit that the value of that security needs to be taken into account by the Court and/or the Company's

Liquidators in due course, but that it is incapable of being established without further investigation and expert valuation evidence. The reason that it needs to be taken into account is that it is *possible* that Songa's claim to be a creditor will be substantially reduced, or potentially extinguished altogether, by the value of the security.

(3) Reignwood intends to submit that the transactions between Songa and the Company require *further independent investigation* by the Company's Liquidators in due course, and that there is a reasonable basis for believing that, once those independent investigations are completed, the Company will have cross-claims and/or rights of set-off against Songa which may outweigh or eliminate the value of Songa's alleged claim against the Company. This is dealt with by Mr Cheng in his affirmations.

(4) Reignwood intends to submit that Songa's Petition has been presented for a collateral purpose (with a view to securing the appointment of Liquidators "of its own choice").

36. In my judgment, to dispute a debt in the context of a winding up petition is to assert that it is not in fact due. Reignwood does not dispute the petition debt: it merely asserts that Songa's claim requires further investigation, and speculates that such investigation might lead to a finding that all or part of the claim should be disallowed. Then again, it might not. This is not sufficient basis to defeat Songa's claim to be a creditor for purposes of the presentation of a winding up petition and the making of a winding up order. The appropriate forum for the investigation of Reignwood's allegations is the liquidation and the appropriate investigators will be the liquidators. In the circumstances it is unnecessary to address further the details of Mr Potts' objections.

37. In so finding, I bear in mind that Songa seeks a winding up order for the benefit of the class of unsecured creditors as a whole (notwithstanding that

its debt is partially secured) of which Reignwood claims to form a part, and that it is common ground that the Company should be wound up.

The Reignwood Petition

38. Reignwood too seeks a winding up order in respect of Opus on the grounds that the Company is unable to pay its debts and on just and equitable grounds.

39. Reignwood alleges that the Company has failed to pay a "letter of demand" which was served on 8th December 2016 and which demanded payment within three days of monies said to be due and owing under loan agreements dated 1st April 2015 and 15th November 2015 in the sum of US $55,931,917.78.

40. The loan agreements upon which the statutory demand was based each contained a clause stating that the loan was provided without a fixed tenure of time and should be repaid by the Company within three months of the receipt of a written payment request issued by Reignwood to the Company.

41. The Reignwood Petition was presented before the statutory three weeks had elapsed from the date on which the "letter of demand" was served, let alone the three months specified in the loan agreements. Indeed those three months will not expire until 7th March 2017. The Reignwood Petition therefore provides no basis to wind up Opus on the ground of an unsatisfied statutory demand.

42. However, the US $55,931,917.78 can be taken into account as a contingent or prospective liability. The Company's unaudited consolidated balance sheet showed that, for the period ended 31st August 2016, its total current assets were valued in the sum of US $19,976,093.53 and its total liabilities at US $434,347,166.45. The gap between assets and liabilities had increased since 31st December 2015.

43. Taking into account the Company's prospective and contingent liabilities, Reignwood submits that on the face of the balance sheet Opus is plainly insolvent in that it is unable to pay its debts, including the US $55,931,917.78, as and when they fall due. There is no reasonable likelihood that it will be able to do so in the foreseeable future. Reignwood, however, reserves the position it may take in the liquidation as to whether the debts shown in the balance sheet are in fact due.

44. Reignwood also seeks to wind up the Company on just and equitable grounds, both by reason of the matters aforesaid and because of a failure of substratum. As the Petition aptly puts it, the state of the Company's insolvency means that it is no longer in a position to perform its principal activity and business, and there is no reasonable hope of the Company achieving its objective of trading at a profit.

45. If in due course the claim for US $55,931,917.78 is admitted as a proof of debt, Reignwood will be the largest creditor of Opus although on the strength of that claim alone it will not be a majority creditor.

46. Reignwood has a potential claim against Opus for a further $90 million, although this is not the subject of its Petition. If in due course this claim were to be admitted as a proof of debt, Reignwood would be the majority creditor.

47. Neither Songa nor any other creditor has filed a notice of intention to appear on the Reignwood Petition or put forward any grounds for disputing the petition debt.

48. Opus has not disputed the petition debt although, as noted above, the debt has not yet fallen due.

Decision on winding up petitions

49. Having considered the evidence adduced in favour of both Petitions, I am satisfied that Opus should be wound up as:

(1) The Company has neglected to pay the sum demanded by Songa or to secure or compound for it to Songa's reasonable satisfaction;

(2) It has been proved to the satisfaction of the Court that, taking into account the contingent and prospective liabilities of the Company, Opus is unable to pay its debts; and

(3) The Court is of the opinion that it is just and equitable that Opus should be wound up.

50. Where two or more winding up petitions are heard together and the Court decides to make a winding up order it is possible for the order to be made on all the petitions. However the general rule is that the Court gives priority to the petition presented first. See French, Applications to Wind Up Companies, Second Edition[2] at para 4.7.2. I see no reason to depart from this practice.

51. In particular, I see no merit in Reignwood's allegation that the Songa Petition was presented for a collateral purpose such that the Court ought not to make a winding up order upon it. The Petition was presented with the intention of winding up the Company on grounds which are in my judgment well founded. No other winding up petition had been presented at the time. Naturally, Songa, like Reignwood, nominated provisional liquidators. Petitioning creditors generally do. That does not undermine the *bona fides* of the Petition.

52. I therefore propose to make a winding up order on the Songa Petition and dismiss the Reignwood Petition. For the avoidance of doubt, this does not

[2] There is now a Third Edition.

involve a finding that the petition debt is in fact due and owing. That will be a matter for the liquidators. Nothing in this judgment is intended to pre-empt their decision whether or not to admit Songa's proof of debt.

53. My decision to make a winding up order on the Songa Petition is without prejudice to my decision as to whom to appoint as provisional liquidators. That is a question to be considered on its own, independent, merits.

Appointment of provisional liquidators

54. By a summons dated 16th December 2016, Songa sought the appointment of Cosimo Borrelli of Borrelli Walsh Pte Limited, who is based in Southeast Asia, and John McKenna of Finance and Risk Services Limited, who is based in Bermuda (together, "Messrs Borrelli and McKenna"), as joint provisional liquidators of Opus.

55. In an affidavit dated 19th December 2016 in support of the application, Bjørnar Iversen ("Mr Iversen"), CEO of Songa, expressed concern that Reignwood and Opus intend to avoid the Company's liabilities to Songa by transferring the Company's assets to a new entity which would trade in Opus' stead.

56. Songa sought the appointment of provisional liquidators as a matter of urgency prior to the hearing of its Petition so as to ensure that the Company's assets were preserved for the benefit of the unsecured creditors.

57. By a cross-summons dated 22nd December 2016, Reignwood sought instead the appointment of Rachelle Frisby of Deloitte's Financial Advisory Group in Bermuda and Andrew Grimmett and Lim Loo Khoon of Deloitte's Restructuring Services Group in Singapore and Southeast Asia (collectively, "Deloitte") as joint provisional liquidators of the Company.

58. In an affirmation dated 22nd December 2016 filed in support of the application, Cheng Siu Ming ("Mr Cheng"), a Vice President of Reignwood,

stated that as Opus was insolvent it was right that joint provisional liquidators should be appointed by the Court a soon as possible, so that the Company's affairs, assets and liabilities could be properly supervised and administered pending the final hearing of Reignwood's Petition.

59. However, Mr Cheng stated that he had no reason to believe that the Company's affairs or assets faced an urgent risk of dissipation or mismanagement and rejected the allegations against Reignwood made by Mr Iverson. He set out in some detail his reasons for objecting to the appointment of Messrs Borrelli and McKenna and proposing instead the appointment of Deloitte.

60. Mr Cheng's underlying objection was that there was a real risk, or at least the appearance of one, that Messrs Borrelli and McKenna had been or would become prejudiced against Reignwood by Mr Iverson's allegations of impropriety.

61. Both summonses came on for hearing on 23rd December 2016. After hearing argument I adjourned them to the substantive hearing of both Petitions as I wanted to obtain more accurate information about the wishes of the various persons claiming to be creditors as to who should be appointed as provisional liquidators.

62. I was not satisfied that there was any need to appoint provisional liquidators prior to the hearing of the Petitions as in my judgment Songa had failed to provide cogent evidence that there was a real and urgent risk that otherwise Opus would dissipate its assets. Mr Iverson's evidence on this issue was heavily dependent on unattributed hearsay. This finding is without prejudice to anything which the liquidators may or may not find should they investigate Mr Iverson's allegations further.

63. Any purported disposition by Opus of its assets subsequent to the 23rd December 2016 hearing would in any event be void. Section 166(1) provides that, in a winding up by the Court, any disposition of the property

of the company made after the commencement of the winding-up shall, unless the Court orders otherwise, be void.

64. Section 167(2), read in conjunction with section 167(1), provides that the winding up of a company shall be deemed to commence at the time of the presentation of the winding up petition.[3] Presentation took place when the Petitions were filed at the Registry. See rule 18.

65. At the hearing of the Petitions I heard further argument as to who should be appointed as provisional liquidators. I also had the benefit of hearing, through their counsel, the views of a number of persons appearing in support of the Songa Petition and the assistance of further evidence from both Petitioners.

66. I reserved judgment on the summonses and adjourned the Petitions until 17th February 2017.

Applicable principles

67. The principles applicable to the appointment of a liquidator were helpfully identified by HH Judge Maddocks in Fielding v Seery [2004] BCC 315 Ch D at para 33. As summarised in Stanley International Betting Ltd v Stanleybet UK Investments Ltd [2011] BCC 691 Ch D by Stuart Isaacs QC, sitting as a Deputy High Court Judge, they include:

> "*(1) The test in relation to the appointment of a liquidator is whether it will be conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation.*
>
> *(2) Although the majority vote of the creditors will in the normal course prevail, creditors holding the majority vote do not have an absolute right to the choice of liquidator.*

[3] That is, except where before the presentation of the petition the company has passed a resolution for voluntary winding up, in which case the winding up will be deemed to have commenced at the time of the passing of the resolution.

(3) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. He should in particular not be the nominee of a person against whom the company has hostile or conflicting claims or whose conduct in relation to the affairs of the company is under investigation.

(4) By contrast, it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator."

68. Fielding v Seery concerned an application to remove a liquidator appointed by the creditors in a creditors' voluntary liquidation and to replace him with an independent liquidator appointed by the court. However I accept the submission of Christian Luthi, who appeared for Songa, that *mutatis mutandis* the principles are applicable to a compulsory winding up by the Court. They were approved by Lewison J in Re Power Builders (Surrey) Ltd Power v Petrus Estates Ltd [2010] BCC 11 Ch D, another case about a creditors' voluntary liquidation, and have been applied by analogy in a line of cases concerning the appointment of administrators, including the above-mentioned Stanley International Betting Ltd case.

69. The administrator cases include Med-Gourmet Restaurants Ltd v Ostuni Investments Ltd [2013] BCC 47 Ch D. At para 14, Lewison J added an important gloss to what is meant by: "*conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation*":

"*There is a public interest in office-holders charged with the administration of an insolvent estate not only acting but being seen to be acting in the best interest of the creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated. This is a reflection of a more general principle that justice must not only be done but must be seen to be done. The importance of the principle is reflected, amongst other ways, in the fact that applications for recusal are almost always made not on the ground of actual bias but on the ground of appearance of bias.*"

70. In my judgment the public interest in the liquidators being seen to be acting in the best interests of the creditors generally includes the liquidators being seen to act in the best interests of all those wishing to prove in the

liquidation, irrespective of whether their proofs are admitted. It is important that all those concerned should have confidence in the adjudicative process.

71. The need to avoid the appearance of bias was emphasised by Ward CJ (as he then was) in Re Akai Holdings Limited [2001] Bda LR 31 SC, who stated at page 16 that in exercising its statutory powers a liquidator is to operate in favour of all the creditors and all the contributories: "*It is required to act impartially and to appear to do so*". In Re West Australian Gem Explorers Pty Ltd (1994) 13 ACSR 104 at 106 Burchett J warned against the possibility that a liquidator might have unconscious bias.

72. In Re Hadar Fund Ltd (in voluntary liquidation) [2013 (2) CILR Note 4] in the Grand Court of the Cayman Islands, Jones J expatiated upon the factors which the Court will take into account when considering the independence of potential appointees:

> "*17. ... Whether or not a firm of insolvency practitioners can be regarded as independent as regards any particular company in liquidation depends upon the existence or non-existence of professional or economic relationships which are regarded by the Court as creating a situation in which the appearance of complete impartiality is compromised. Appearances matter. The fact that Messrs Walker and Stokoe [the proposed liquidators] are honest, capable professionals who have been appointed as official liquidators on many occasions and whose actions and judgment calls have been sanctioned by this Court on a regular basis is besides the point. It is not good enough to say that these particular individuals can be relied upon to perform their duties properly.*
>
> *18. Whether or not any particular kind of professional or economic relationships will lead to the conclusion that an insolvency practitioner can or cannot be properly regarded as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of ways. The Court must first identify the relationship and determine whether it is capable of impairing the appearance of independence. If the answer is yes, the Court must then consider whether its existence is sufficiently material in the factual circumstances of the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominee in question.*"

73. In Re UP Energy Development Group Limited – in provisional liquidation (for restructuring purposes) [2016] SC (Bda) 89 Com, Kawaley CJ stated at

para 11 that the efficiency of any restructuring within a provisional liquidation depended in large part upon good will and collegiality reigning across the joint provisional liquidator and management restructuring teams. He implied that it was therefore important, insofar as reasonably practicable, that the provisional liquidators were acceptable to the management team. However in my judgment this consideration would carry less weight in a case, such as the present, where no restructuring is proposed.

74. When considering the wishes of the creditors, there is authority that the wishes of those who had ownership or control of the company should be given less weight than those who did not. The two cases cited to me on this topic were both concerned with whether to order the compulsory winding up of a company which was already in voluntary liquidation. However in my judgment the principle is of more general application as it is an expression of the underlying principle that the liquidation process, including the appointment of a liquidator, must be both independent and seen to be so. This principle is applicable whether the liquidator is appointed by a meeting of the creditors or appointed by the Court.

75. In Re Palmer Marine Surveys Ltd [1986] BCLC 106 Ch D the person who controlled the company also controlled sufficient votes at the creditors' meeting in the voluntary liquidation to secure the appointment of the liquidator of his choice. A creditor brought a petition, supported by the majority of the creditors, seeking the compulsory winding up of the company by the court. In exercising his discretion in favour of a compulsory order, which would involve a different liquidator, Hoffmann J (as he then was) held that he could properly take into account the possible or probable motives of the creditors in either supporting or opposing that course:

> "*Thus creditors who are also shareholders or connected with the former management may have less weight given to their views than those who have no interest except in their capacity as creditors.*"

76. In Re Southard & Co Ltd [1979] 1 WLR 546 Ch D the application for a compulsory winding up order was brought by the parent company of the company in voluntary liquidation and supported by another company in the same group. It was opposed by seven creditors whose debts amounted to a small proportion only of the indebtedness of the unsecured petitioning and supporting creditors. Brightman J (as he then was) dismissed the petition. One of the factors which he took into account at 552 (2) was the relationship of the company in liquidation to the petitioning and supporting creditors:

"*The petition is presented and supported only by creditors who belong to the same group of companies as the company in liquidation. Their wishes do not carry with me a weight commensurate with the size of the alleged indebtedness. The company is a subsidiary of the petitioning creditor. The petitioning creditor is prima facie morally responsible for the insolvency and large indebtedness of the company, unless and until the contrary is shown. The supporting creditor is a member of the same group. The insolvency of the company and its considerable indebtedness could be the result of mismanagement or lack of control by its parent company, which is the petitioning creditor. Certainly, in the absence of evidence to the contrary, I must assume that the petitioning creditor had it in its power to control the activities of the company which is now bankrupt. I therefore take the view that the size of the indebtedness of the company to the petitioning creditor and the supporting creditor, all of which have operated under the same aegis, ought not to carry decisive weight.*"

77. Where a company is insolvent, the opposition of the contributories to a winding up petition, or, by parity of reasoning, to the choice of provisional liquidator, will carry less weight than the wishes of the creditors. I was referred to a passage from McPherson, The Law of Company Liquidation, Third Edition (Australia) 1987, which put the point succinctly at page 71:

"*The significance of opposition to winding up varies in direct proportion to the relative importance of the opposing interest involved. Where the company is insolvent the foremost consideration naturally is the interests of the creditors, and these prevail over the interests of other persons likely to be affected by the winding up, such as the company and shareholders*."

78. The authorities cited in the footnotes to this passage included Re New York Exchange Ltd (1888) 39 Ch D 415, in which Kay J, who was upheld on

appeal, refused to make a compulsory winding up order in respect of a company that was already in voluntary liquidation. The judge stated at 417 – 418:

"*The duty of the Court in all these cases is to act judicially – to look at all the facts, and to see what really is for the benefit of the creditors. They are the body whose interests I regard, and I do not at all consider the interests of anyone else.*"

79. In Parkinson v Morkaya [2008] NSWSC 1183 in the New South Wales Supreme Court, Brereton J, applying Barclay v Barclay, an unreported decision of the same Court, held at para 9 of his judgment that in the case of competition between potential appointees, where there is nothing to distinguish them, the rule was that the person nominated by the applicant be appointed. However, in the present case the degree to which either Petitioner owned or controlled the Company; the wishes of persons appearing on the Songa Petition; and any reasonable apprehension of bias with respect to Songa's nominations would be relevant distinguishing factors.

Discussion

80. I am satisfied that both sets of potential provisional liquidators are sufficiently competent and experienced for the position. The point is really beyond argument. Messrs Borrelli and McKenna are well known to the Court and Deloitte, one of the "big four" accountancy firms, is of international repute. I am not persuaded that the appointment of one set of provisional liquidators rather than another would bring significant benefits in costs or efficiency.

81. I am further satisfied that for purposes of the hearing of their respective Petitions both Songa and Reignwood are to be regarded as creditors of Opus.

82. Songa is to be regarded as a creditor of Opus because it has served an unsatisfied statutory demand upon the Company which has led to a finding

that for purposes of considering whether to make a winding up order the Company is unable to pay its debts and which has not been disputed in good faith and on substantial grounds.

83. Reignwood is to be regarded as a prospective or contingent creditor of Opus because it has brought a Petition alleging a prospective or contingent debt which has not been disputed by the Company or anyone else.

84. As to the persons who appear in support of the Songa Petition, their claims are based on loans which they made to Opus which were subsequently converted into shares in the Company. The lenders were assigned put options, so they could require the Company to buy back its shares. They have now sought to exercise those options.

85. Opus' attorneys in Singapore wrote a letter to some of the lenders on 9th December 2016 disputing the debt on the grounds that as the Company was unable to pay its liabilities as they become due it was prohibited by section 42A from purchasing its shares and could not be held liable in damages for failing to do so. The letter was exhibited by Mr Cheng. These objections would apply equally to all the claims based on the put options.

86. I express no view on the merits of Opus' defence to the claims based on the put options. I also appreciate that the lenders regard themselves as creditors of the Company. But the fact that Opus, although not appearing on the Songa Petition, has previously objected to the claims in apparent good faith, and on grounds which appear to me substantial in the sense of being properly arguable, means that at this stage those appearing in support of the Songa Petition are to be regarded as persons wishing to prove in the liquidation rather than as creditors. Whereas I shall take their wishes as to who should be appointed as provisional liquidators into account, these will carry less weight than they would if their claims had not been disputed by the Company.

87. As to ownership and control of Opus, Mr Potts makes the point that all the persons appearing in support of the Songa Petition are shareholders of the

Company and that several of them were also members of its management team. Songa, while not a shareholder or manager of Opus, was involved in a joint venture with the Company whereby Songa and Opus each received a 50 per cent shareholding in a subsidiary company which was to provide management services to two oil rigs which Songa had sold to two subsidiaries of Opus. Thus, Mr Potts submits, Songa was not independent of the Company in the same sense as a trade creditor would be.

88. However the fact remains that Reignwood was the majority shareholder of Opus with a 70 per cent shareholding and that until recently at least a majority of the directors of Opus were, or were affiliated to, senior figures in Reignwood. Its Register of Directors and Officers ("the Register") shows that as of 24th October 2016 its three directors were Dr Chanchai Ruayrungruang, the Chairman and founder of the Reignwood Group; Woraphanit Ruayrungruang, his daughter; and Liu Shao Hua ("Mr Liu"). On or before 5th December 2016 these directors resigned and were replaced with a single "caretaker" director, Mr Wenli Liu.

89. Mr Liu was a member of the Company's three person management team. The Register gives Mr Liu's address as a room in the Reignwood Center in Beijing, and minutes of meetings of the joint venture between Songa and Opus dated respectively 10th August 2016 and 7th – 9th September 2016, at which Mr Liu was present, describe his position as "Reignwood" and "EVP", which I take to be an acronym for Executive Vice President.[4] However Mr Cheng states that the minutes were in error and that Mr Liu attended the meetings as a representative of Opus and the Opus Group. He further states that Mr Liu was neither a part of nor related to the Reignwood Group. I am unable to resolve that question on the papers. However I am satisfied that in the circumstances there is at least *prima facie* evidence that Mr Liu was a senior figure in the Reignwood Group.

[4] By parity of reasoning with the explicit use in the minutes of "SVP" as an acronym for "Senior Vice President".

90. In those circumstance, subject to the question of bias, Reignwood's preference as to who should be appointed provisional liquidators should in my judgment carry less weight than that of Songa, which did not own or control the Company. The fact that, Reignwood apart, all the persons appearing on the Songa Petition agree with Songa's preference lends that preference further weight.

91. That leaves the question of bias. Mr Luthi submitted that, in winding up proceedings generally, introductory discussions between the proposed provisional liquidators and the petitioning creditor were necessary before their appointment. While acknowledging that this often gave rise to perceptions of bias, he submitted that in the present case any such perceptions were unfounded.

92. Mr Potts did not submit that Messrs Borrelli and McKenna were or would in fact become biased against Reignwood, but rather that in the eyes of his client the evidence set out in Mr Iverson's affidavit gave rise to a reasonable apprehension of bias. In particular, after outlining his concerns that Reignwood was party to a plan to strip Opus of its assets, Mr Iverson had stated on affidavit:

> "*I also understand through my discussions with the proposed provisional liquidators and my knowledge of the industry that it is not uncommon for debtor companies to take such steps.*"

93. I am satisfied that neither that passage nor any other evidence before the Court gives rise to a reasonable apprehension that Messrs Borrelli and McKenna are or may become biased against Reignwood. Indeed I regard the passage as a flimsy basis for such an allegation.

94. The choice of provisional liquidators is a matter for the Court's discretion. I am satisfied that in all the circumstances, and for the reasons given above, the appropriate appointees are Messrs Borrelli and McKenna. I believe that they are most likely to command the confidence of a majority of those who will seek to prove in the liquidation. There can be no reasonable

apprehension that they will be biased. Their appointment has the support of the petitioning creditor and all those who appeared on the Songa Petition apart from Reignwood. But as both the majority shareholder and, at least until recently, the source of the Company's directors, the wishes of Reignwood on this matter carry less weight than those of Songa. Its concerns about their appointment are in my judgment without reasonable foundation.

95. I propose to dismiss both summonses for the appointment of provisional liquidators and to make the appointment as part of the winding up order on the Songa Petition.

96. I shall hear the parties as to the costs of the summonses and the Petitions and as to the terms of the winding up order.

DATED this 17th day of February, 2017

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Hellman J