In The Supreme Court of Bermuda

COMMERCIAL COURT
COMPANIES (WINDING UP)
2016: Nos. 271 and 272

IN THE MATTER OF C & J ENERGY SERVICES LTD. No. 42239

AND IN THE MATTER OF C & J CORPORATE SERVICES (BERMUDA) LTD. No. 50205

AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

(in Court)[1]

Parallel restructuring proceedings for Bermuda affiliated companies-Bermuda provisional liquidation and Chapter 11 proceedings in US -US COMI-application by joint provisional liquidators for recognition order in relation to US plan confirmation order-application for winding-up order and accelerated liquidation process-jurisdiction to dispense with statutory meetings-Companies Act 1981 and Companies (Winding Up) Rules 1981

Date of Decision: February 24, 2017
Date of Judgment: February 28, 2017

John Wasty, Appleby (Bermuda) Limited, for the Petitioners, ("C & J Energy" and "C & J Corporate", together "the Companies")

Background

1. On July 21, 2016, the Companies petitioned for their own winding-up at the instance of decisions made by their respective boards of directors. C & J Energy was the

[1] The present judgment was circulated to counsel without a hearing.

ultimate parent company of the Group and C & J Corporate was its wholly owned subsidiary. The Group's operations are in the oilfields services sector. The purpose of the Bermuda filings were to enable the Companies to take part in a Group restructuring of debt obligations estimated at $1.38 billion in which the main proceedings would be Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of Texas, Houston ("USBC") with Canadian affiliates commencing ancillary proceedings under the Canadian Companies Creditors Arrangement Act ("CCAA") in Alberta, Canada. The Petitions sought the following main relief, praying:

> "*(i) that upon the first return date, this petition be adjourned for an initial period of 6 months;*
>
> *(ii) that at such time as the Petition is listed for hearing, if so moved by the Petitioner, the Petitioner be wound up by the Court under the provisions of the Companies Act;*
>
> *(iii) that Matthew Clingerman and Grant Lyon, both of Krys Global, be appointed Joint Provisional Liquidators of the Petitioner*…"

2. The USBC filings were made on July 20, 2016. The Companies applied by Ex Parte Summonses issued on July 21, 2016 for the appointment of the joint provisional liquidators named in the Petitions ("the JPLs"). Following a hearing on July 22, 2016, the JPLs were appointed by this Court. The Petitions were first heard in open court on August 25, 2016 when they were adjourned, without opposition, to February 24, 2017.

3. On December 16, 2016, the USBC confirmed a Second Amended Joint Plan of Reorganization ("the Joint Plan") which extinguished the Companies' debt. On February 22, 2017, the Companies issued a joint Summons seeking an Order that:

   (1) the Joint Plan be recognised;

   (2) claims against the Companies by creditors and shareholders subject to the Joint Plan be permanently stayed;

   (3) the Companies be wound-up;

   (4) the JPLs be appointed as joint liquidators of the Companies;

   (5) the requirements for, *inter alia*, convening the first meetings of creditors and contributories under sections 171, 168, 181 and 185 be dispensed with.

4. That Summons was issued returnable for February 24, 2017 and was heard together with the adjourned Petitions. On that date, again without opposition, I granted the relief sought by the Summons, recognising the Joint Plan, staying claims against the Companies, winding-up the Companies, appointing the JPLs as (permanent) Joint Liquidators and authorising an accelerated liquidation process.

5. The February 24, 2017 hearing was interposed into the trial of an unrelated matter which made it logistically impossible for me to give reasons for my decision despite the helpfully full written submissions which were placed before the Court. I now give reasons for the most important aspects of the Order made. While this Court had recently considered the jurisdiction to recognise a Chapter 11 plan, the jurisdiction to authorize an accelerated winding-up procedure had only previously been analysed by reference to reasoning in a Privy Council decision which had more recently been held to be wrong. In deciding to seek to clarify the law in this area, I considered that the following remarks of Deemster Doyle (in *Isle of Man Financial Authority-v-Louis and Others*, CHP 2016/73, Judgment dated February 23, 2017) applied with equal force to the Bermudian courts:

> "*120. The Isle of Man is a compact jurisdiction with a limited number of full-time judges sitting at first instance and a limited number of judges sitting at appellate level. It is important that those local judges offer as much guidance as they reasonably and properly can and in that way develop Manx jurisprudence and assist litigants, lawyers and members of the community in an understanding of the relevant Manx law and procedure…*"

The Joint Plan

6. For present purposes, it suffices to describe the Joint Plan as a 'debt-for-equity swap' in which creditors agreed to extinguish their debt in the various debtors in return for equity in a reorganised new entity. The JPLs prepared a Report dated February 21, 2017 which summarised the voting in favour the Joint Plan as follows:

   (a) C & J Energy:

   - Unsecured Convenience Class: 100% in value and number,
   - General Unsecured Claims: 99.98% in value, 98.40% in number,
   - Equity Interests: 99.96 in value, 96.06 in number;

(b) C & J Corporate:

- Unsecured Convenience Class: 100% in value and number,
- General Unsecured Claims: 100% in value and number.

7. The Report stated that the liquidation return analysis filed with the USBC projected a return to unsecured creditors of 1.39-1.94 cents on the dollar. The first amended plan filed by the Debtors projected a return to creditors 14-16 cents on the dollar. The estimated return to creditors under the Joint Plan is in the range of 56.7-57.5 cents on the dollar.

8. These liquidation analysis figures spoke volumes. It was unsurprising that, despite advertisement of the present proceedings and the USBC proceedings several months ago, there was no dissenting creditor before the Court. Of those who participated in the voting on the Joint Plan, only a minute percentage in value (0.02%) and in number (1. 6%) of C & J Energy's creditors had dissented.

9. To my mind it was almost inconceivable that any dissenting creditor of the Companies (being a creditor arguably not bound by the Joint Plan) could have mounted a credible challenge to the merits of this commercial outcome. However for Bermuda law purposes in the context of an unopposed application for recognition of the Joint Plan followed by a winding-up order, the most significant aspect of the USBC Confirmation Order was its effect under US law of extinguishing all debt and equity claims against the Companies. This may be illustrated by one brief extract from the terms of the Joint Plan (at page 26):

> "*On the Effective Date, except to the extent otherwise provided in the Plan, all notes, instruments, certificates, and other documents evidencing Claims or Interests, including credit agreements and indentures, shall be cancelled and the obligations of the Debtors… thereunder or in any way related thereto shall be deemed to be satisfied in full, cancelled, discharged and of no force and effect…*"

10. To the extent that the Companies were seeking to implement an accelerated Bermuda winding-up by way of modification of the general statutory regime through this Court's recognition of the Joint Plan, I have always looked for evidence that the Joint Plan expressly or by necessary implication seeks to achieve this effect. If the statutory regime was being modified through a local scheme of arrangement, any such modifications to the statutory regime would almost invariably be explicitly addressed. On proper analysis however, for the reasons set out below, the statutory regime need

not be modified as it is sufficiently pliable to accommodate circumstances where a 'full-blown' winding-up has become redundant. In my judgment it is nevertheless preferable for any intention to modify the usual operation of local statutory winding-up regime to be set out in a Chapter 11 plan in express terms. In the present case, Mr Wasty referred the Court to the following provisions of clause 2(c) of the 'Description of Restructuring Transactions' annexed to the Joint Plan as EXHIBIT M:

> "*(xii)…Each of C& J Energy* [and] *C& J Corporate Services…liquidate in accordance with Bermuda law. For the avoidance of doubt, the holders of equity interests in C & J Energy are not entitled to receive any further distributions from C & J Energy.*"

11. The avoidance of doubt provision only mentioned (a) equity interests and (b) C & J Energy (perhaps because it was being reconstituted as 'Reorganized C & J Energy'). Counsel fairly submitted that this admittedly brief reference to the Bermuda liquidation process read with the Joint Plan as a whole sufficed to demonstrate an implied agreement to waive the right to participate in the proposed Bermuda windings-up. This in turn justified this Court in directing that a 'short-form' winding-up could take place.

12. I was bound to accept that since a central feature of the Joint Plan was to extinguish all debt and equity claims against the Debtors (including the Companies) it really was as 'plain as a pikestaff' that the liquidation contemplated in Bermuda was an abbreviated one.

The Confirmation Order

13. This Court was in substance being asked to recognise both the Joint Plan and the Confirmation Order which gave legal birth to the Joint Plan. The following findings of Judge David R. Jones were particularly pertinent:

> "*29…the provisions of the Plan constitute a good faith compromise of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that all holders of Claims or Interests may have with respect to any Allowed Claim or Interest or any distribution to be made on account of such Allowed Claim or Interest. Such compromise and settlement is fair, equitable, and reasonable and in the best interests of the Debtors and their Estates.*
>
> *35. Creditors have overwhelmingly voted in favour of the Plan, including the Debtor Release. The Plan…was negotiated before and after the Petition Debt*

by sophisticated parties represented by able counsel and financial advisors, including the Supporting Creditors and the Creditors' Committee…"

Legal principles governing recognition of USBC Confirmation Order and/or the Joint Plan and the granting of supplementary relief

14. Doubts understandably exist about the jurisdiction of this Court to recognise and assist foreign insolvency courts by implementing a foreign restructuring in relation to a Bermudian company without implementing a parallel scheme of arrangement under Bermudian law. A Bermuda scheme is to my mind the safest means of avoiding dissenting creditors attempting an 'end run' on a foreign proceeding where they can successfully argue that they are not bound by the foreign court's orders. These doubts arise from a majority of the Judicial Committee of the Privy Council recently deciding in *Singularis Holdings Ltd-v-PricewaterhouseCoopers* [2015] A.C. 1675 (affirming the UK Supreme Court's earlier decision in *Rubin-v-Eurofinance SA* [2013] 1 A.C. 236), that its own previous decision in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 A.C. 508 was wrongly decided. In *Cambridge Gas*, the Judicial Committee held that the Manx Court could recognise and enforce a Chapter 11 plan involving an Isle of Man company over the objections of a shareholder of the Manx company. This conclusion was reached despite the crucial facts that (a) the dissenting shareholder had not submitted to the personal jurisdiction of the US Court, and (b) the Manx shares transferred by the plan were located in the Isle of Man, beyond the *in rem* jurisdiction of the US court.

15. Mr Wasty rightly submitted that no such impediments existed in the present case because the legal and factual matrix were (save for the absence of a dissenting party before the Court in the present case and the retrospective nature of the recognition sought) analogous to those in *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com (18 August 2016). In that case, I held as follows:

> "*24…the crucial legal reasoning of Lord Collins on the topic of present concern in Rubin, which I have always found compelling, was that if a plan is confirmed by the US Bankruptcy Court which purports to transfer shares in a foreign company which has not itself submitted to the personal jurisdiction of the US Court,* [traditional] *English conflict of law rules do not justify recognition of the confirmation order where:*
>
> *(1) the US Court lacks personal jurisdiction over the shareholders who rights are being extinguished and/or 'confiscated'; and*

(2) the US Court lacks in rem jurisdiction to transfer title to the shares themselves, being shares which are located in another forum and the title to which is accordingly governed by another lex situs[2].

25. In Singularis, Lord Collins himself described the majority decision in Rubin on this issue more concisely as follows:

> *'[93]… The majority of the UK Supreme Court decided in Rubin v Eurofinance that Cambridge Gas was wrongly decided on the ground that the New York court did not have jurisdiction over title to shares in a Manx company.'*

26. Accepting entirely the principles upon which Mr Duncan relied, it was impossible to see how they supported the contention that this Court had no jurisdiction to make the Recognition Order in circumstances where:

(a) the Equity Committee represents shareholders who have submitted to the jurisdiction of the Texas Court and has been appointed not to challenge the jurisdiction of that Court, but rather to fully participate on the merits in the Chapter 11 proceedings;

(b) the Company in relation to which the Equity Committee hold shares is itself a party to the US restructuring proceedings; and

(c) accordingly the Texas Court unarguably had personal jurisdiction over both the Company and the relevant objecting shareholders, it being in these circumstances irrelevant that, absent such personal jurisdiction, no in rem jurisdiction over shares located in Bermuda could be said to exist…

35.The stay aspect of the Recognition Order was clearly intended to be supplemental to the primary aspect: by granting the Order this Court was signifying that any confirmation order made in Houston should not be subject to re-litigation in Hamilton. Having appointing the PL and approving in principle the pursuit of the US restructuring on the basis that the Texas Court would be the primary restructuring court, it would make no sense to leave open the possibility for parties involved in the US proceedings to re-litigate issues before this Court. Any such re-litigation would be a manifest abuse of process."

[2] Although the analysis is framed with reference to a US Chapter 11 plan, the reasoning would appear to apply with equal force to a Bermudian company which is in provisional liquidation and subject to a foreign scheme of arrangement.

16. The legal position may be summarised as follows. This Court may recognise and enforce (by way of a stay of proceedings or otherwise in accordance with local law) a foreign restructuring order extinguishing claims against an insolvent Bermudian company. It may only properly do so as against parties who have submitted to the personal jurisdiction of the foreign court and/or as regards property which (by reason of its *situs)* is subject to the *in rem* jurisdiction of the foreign court. The Court has the common law power to assist a foreign insolvency court as much as it can unless there are good reasons for not doing so. In the present case, this Court at the outset blessed the Companies' decision to commence provisional liquidation proceedings in aid of a restructuring primarily to be implemented by the USBC in Houston.

Merits of application for a Recognition and Stay Order

17. The First Affidavit of Matthew Clingerman deposed that the JPLs' appointment was advertised in the Royal Gazette and notified to interested parties through the USBC Disclosure Statement process. He further stated "*no interested party, creditor or contributory contacted or otherwise approached the JPLs in respect of the Bermuda proceedings*". In her Fourth Affidavit, Danielle Hunter who was, inter alia, Executive Vice-President, General Counsel and Chief Risk Officer of C& J Energy deposed that to the best of her knowledge and belief "*the Petitioners have no liabilities (any such liabilities having been fully and finally satisfied, compromised, settled, released and discharged pursuant to the Plan)*".

18. This evidence, combined with the proof of overwhelming voting creditor support for the Joint Plan, satisfied me that that there were strong grounds for granting the Recognition Order sought. Moreover the carefully crafted terms on which the Recognition and Stay Order was sought fell neatly within the parameters of the governing legal test. Recognition was sought not for all purposes, but only by way of a stay of proceedings against the Companies by parties whose rights had been abrogated by the Joint Plan. I granted an Order that:

> "*1. Recognition of the Second Amended Joint Plan of Reorganisation (as modified) (Second Amended Joint Plan) of the Petitioners (amongst others) as confirmed by the US Bankruptcy Court for the Southern District of Texas Houston Division on 16 December 2016 is granted by this Court by permanently staying all claims of creditors and shareholders that were discharged, cancelled, exchanged or otherwise affected by Second Amended Joint Plan that have been or may be brought in Bermuda against the Petitioners.*"

19. On its face, the Recognition Order only bound parties who were properly subject to the jurisdiction of the Confirmation Order in full compliance with the governing principles of private international law most clearly articulated in the cross-border common law cooperation context in *Rubin-v-Eurofinance SA* [2013] 1 A.C. 236.

Legal basis for accelerating the liquidation by dispensing with the usual statutory requirements

20. It followed that the case for a winding-up order was a compelling one. The case for dispensing with the usual statutory requirements was equally compelling. But I acceded to the application largely on pragmatic grounds informed by this Court's longstanding past practice. No serious attempt has been made to clarify the precise legal basis for dispensing with the usual statutory requirements in the post-*Singularis* era. *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com (18 August 2016) did not fully treat with this issue.

21. The usual post winding-up order requirements under the Companies Act 1981 include:

    - Section 168: preparation of a statement of affairs, unless the Court otherwise orders;

    - Sections 171, 181: the provisional liquidator remains provisional only and summons the first meetings of creditors and contributories to decide whether an application should be made to court to appoint permanent liquidators;

    - Section 185: the Court settles a list of contributories after a winding-up order unless it decides to dispense with same.

22. Granting a dispensation pursuant to the express powers conferred by sections 168 and 185 was legally unproblematic. The position as regards the first statutory meetings and the appointment of permanent liquidators was somewhat different. There is no express statutory power conferred on the Court to dispense with the requirements of sections 171 and 181. It is well recognised that most insolvency statutory provisions can be modified by a scheme of arrangement under section 99 of the Act. Mr Wasty referred the Court to *Re Loral Space & Communication Ltd.* [2007] Bda LR 26 where I held, following *Cambridge Gas*, that since the creditors could have agreed an expedited liquidation through a scheme, the same result could be achieved by way of recognising the US plan. This was because Lord Hoffman had only recently opined (on behalf of the Privy Council) in *Cambridge Gas* [2007] 1 AC 508 at 518 as follows:

"*22. At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.*" [Emphasis added]

23. This broad, flexible, pragmatic yet somewhat incomplete common law jurisdictional framing has since been discredited by a more austere and theoretically rigorous legal analysis: *Singularis Holdings Ltd-v-PricewaterhouseCoopers* [2015] A.C. 1675 (see Lord Sumption at paragraph 18; Lord Collins at paragraphs 38, 70-93). Lord Collins, before surgically separating my own first instance reasoning from its tender *Cambridge Gas* embrace, opined as follows:

> *"93…The question whether there was any lawful basis for applying the legislation on an 'as if' basis, or of dispensing with the statutory procedure, did not therefore arise in Rubin v Eurofinance SA. But for the reasons I have given, in my judgment there can be no doubt that, unless Manx law allowed the relaxation of the statutory procedures for the approval of schemes of arrangement, the judiciary was not entitled to apply those procedures by analogy at common law*."

24. It is no longer legally possible for this Court to justify modifying mandatory statutory provisions on the basis of giving local effect to a restructuring plan as if a scheme of arrangement had been implemented when the local statute has not been properly engaged, even if it potentially applies. The power to dispense with the statutory requirements must be capable of being read into the statute by necessary implication if it is not expressly stated there. Otherwise, one must identify either (a) a freestanding common law power which mirrors the non-applicable statutory provisions where common law assistance is sought, or (b) where a local parallel winding-up proceeding has been commenced, it is necessary to find a statutory basis in the winding-up code which potentially validates the proposed short-circuited approach.

25. Having drunk from the intoxicating and liberating common law cooperation *Cambridge Gas* chalice, it does admittedly require measured analysis to justify the conclusion that the usual requirements for concluding a liquidation under sections

171 and 181 can, by necessary implication, be dispensed with so as to permit provisional liquidators to bring a wholly administrative liquidation process to a speedy conclusion. And the conscious thought processes which prompted me to grant the relief sought by the JPLs on February 24, 2017 were, admittedly, more informed by commercial pragmatism of a *Cambridge Gas* variety than the conceptual clarity of *Singularis*. In the final analysis, however, the application of both approaches in the present context takes one to the same legal destination.

26. In terms of commercial rationale, Mr Wasty relied upon the following passages in *Re Loral Space & Communication Ltd.*[2007] Bda LR 26 which he rightly submitted applied with equal force to the present case:

> *"9. Since the affairs of the Company have been wound-up, and the JPLs have been in office for many years, the most cost-effective means of concluding the winding-up is obviously to allow the JPLs to assume permanent office and bring these proceedings to an orderly end. The Official Receiver would be given a burden without being required to satisfy any corresponding public need for oversight on his part. As Mr. Mussenden validly pointed out, as a practical matter the Official Receiver would most likely appoint the JPLs as his agents if he was required to assume office.*
>
> *10. The only likely practical and commercial result from concluding that the JPLs could not be appointed appears to be that (a) the Official Receiver will be burdened with additional administrative responsibilities distracting him from other necessary public duties and (b) additional costs will be incurred because the JPLs as the Official Receiver's agents would have to additionally liaise with him over and above the limited functions it is contemplated they will carry out under the Plan."*

27. Astutely steering clear of the legal minefield of justifying modifying the usual liquidation regime by reference to applying the scheme of arrangement provisions by analogy, the Petitioners' counsel made the following submission which I instinctively accepted as essentially sound:

> "40. *It is respectfully submitted that it would be just and equitable, and within the Court's general jurisdiction to recognise the effect of foreign insolvency proceedings and to manage the process of the court in relation to the cases before it, to dispense with the requirements of sections 171(b), 168, 181 and 185 of the Companies Act in circumstances where such provisions cannot be complied with as there are no reasonably foreseeable creditors and no contributories with economic interests.*"

Dispensing with the first statutory meetings

28. Sections 171 and 181 have two dimensions to them. The first and most important element is the duty conferred on the provisional liquidator to convene the first meetings of creditors and contributories (shareholders) for those meetings to decide whether an application should be made to this Court to appoint a (permanent) liquidator with or without a committee of inspection. The default position is that the Official Receiver becomes the liquidator if no other liquidator is appointed by the Court. The second dimension to these provisions is the Court's power to appoint the permanent liquidator. The first dimension alone will now be addressed. Section 171 provides as follows:

> "***Appointment of liquidators***
> *171. The following provisions with respect to liquidators shall have effect on a winding-up order being made—*
>
> *(a) if the Court has appointed no other provisional liquidator prior to the winding-up order being made the Official Receiver shall become the provisional liquidator and he or the provisional liquidator appointed by the Court shall continue to act as provisional liquidator until another person becomes liquidator and is capable of acting as such;*
>
> *(b) the provisional liquidator shall summon separate meetings of the creditors and contributories of the company for the purpose of determining whether or not an application is to be made to the Court for appointing a liquidator in the place of the provisional liquidator;*
>
> *(c) the Court may make any appointment and order required to give effect to any such determination and, if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matter aforesaid, the Court shall decide the difference and make such order thereon as it thinks fit;*
>
> *(d) in a case where a liquidator is not appointed by the Court, the Official Receiver shall be the liquidator of the company;*
>
> *(e) the Official Receiver shall be the liquidator during any vacancy;*
>
> *(f) a liquidator shall be described when a person other than the Official Receiver is liquidator, by the style of 'the liquidator', and, where the Official Receiver is liquidator, by the style of 'the Official Receiver and liquidator', of the particular company in respect of which he is appointed and not by his individual name.*"

29. Section 181 provides:

> "*181.(1)When a winding-up order has been made by the Court, it shall be the business of the separate meetings of the creditors and contributories summoned for the purpose of determining whether or not an application should be made to the Court for appointing a liquidator in place of the Official Receiver to determine further whether or not an application is to be made to the Court for the appointment of a committee of inspection to act with the liquidator and who are to be members of the committee if appointed.*
>
> *(2)The Court may make any appointment and order required to give effect to any such determination, and if there is a difference between the determinations of the meetings of the creditors and contributories in respect of the matters aforesaid the Court shall decide the difference and make such order thereon as the Court may think fit.*"

30. Neither section 171 nor 181 expressly contemplates what happens if no meetings effectively take place. Section 181 is drafted in terms which assume that the requisite meetings do take place. Section 171(a) provides that when a provisional liquidator other than the Official Receiver is appointed before the winding-up order, that provisional liquidator shall continue in office "*until another person becomes liquidator and is capable of acting as such*". Section 171(d) provides that where the Court does not appoint a liquidator, "*the Official Receiver shall be the liquidator of the company*". This suggests that (a) (clearly) a provisional liquidator may remain in office and (if necessary) perform substantive functions until another liquidator is actually available to replace him, and (b) (less clearly) that the Official Receive becomes the liquidator by default if the Court neither appoints another permanent liquidator nor continues the appointment of the (private) provisional liquidator.

31. It has never been doubted that where it is impossible to convene one of the first meetings (typically the contributories meeting) because (a) it was inquorate, and (b) there is no prospect of the meeting being effectively reconvened, the Court can proceed to make the appointment of a 'permanent' liquidator. This approach has to my mind usually been rationalized on the grounds that the contributories no longer have any economic interest in the company, but it also demonstrates that it has always been understood that strict compliance with the procedural aspects of first meeting statutory requirements is not required. After all, rule 85 of the Companies (Winding Up) Rules 1982 provides:

> "***First meetings of creditors and contributories***
> *85 (1) Unless the Court otherwise directs, the meetings of creditors and contributories under section 171 of the Act (hereinafter referred to as the first meetings of creditors and contributories) shall be held within one month or if a special manager has been appointed then within six weeks after the date of the winding-up order. The dates*

of such meetings shall be fixed by the Official Receiver[3] *who shall give notice [Forms 64 and 65] of the time, date and place of the meeting to the creditors and contributories.*"

32. The Court routinely extends the one month period for convening the first meetings when making a winding-up order as it is usually too short. However, the time may also be abridged under rule 157, which provides as follows:

> ***"Enlargement or abridgement of time***
> *157 The Court may, in any case in which it shall see fit, extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.*

33. Section 171 itself clearly only contemplates the first meetings taking place after a winding-up order is made. However, if it was only practicable (as here) for the first meetings be dispensed with altogether, the Rules are sufficiently flexible and governed by substance rather than form to permit a departure from the usual procedural requirements of the Act. The power to extend time confers an unfettered discretion on this Court which in my judgment is sufficiently ample to encompass not simply extending the time for convening the meetings to a date certain but, by necessary implication and for good cause, also to encompass extending the time for convening the meetings indefinitely by dispensing with the need to hold the meetings at all.

34. Rule 158 provides:

> "***Formal defect not to invalidate proceedings***
> *158 (1) No proceedings under the Act or the rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.*
>
> *(2) No defect or irregularity in the appointment or election of the Official Receiver, liquidator or member of a committee of inspection shall vitiate any act done by him in good faith.*" [Emphasis added]

35. Rule 158 is of particular pertinence to the present application in terms of elucidating the flexibility of the statutory winding-up scheme. This is because the JPLs

[3] Or the provisional liquidator, where one has been appointed.

acknowledged through their evidence that there was a theoretical possibility that an unidentified creditor might subsequently emerge after the expedited dissolution of the Companies requiring an application to be made to set the dissolution aside. They came to Court with a life vest in the form of an indemnity to protect them against the unlikely event of having to incur such costs.

36. Section 260 of the Act permits an application to set aside a company's dissolution under section 200 following a winding-up by the Court within two years of the dissolution. So the statutory scheme itself confers jurisdiction on this Court to reopen the liquidation and, if necessary, convene one or both of the first statutory meetings, should the need be demonstrated within the prescribed limitation period. This makes the prospect that dispensing with the first meetings has caused a "*substantial injustice… which cannot be remedied by any order of the court*" an even more improbable one.

37. There is, on reflection, a sound legal basis in the Rules for this Court typically approaching insolvency proceedings in a pragmatic commercial results-driven manner in general case management terms. In the context of the present case, rules 85 as read with rules 157-158 of the Rules empowered the Court to dispense with the first meetings altogether in circumstances where all known liabilities to creditors and contributories had already been extinguished through the Chapter 11 process.

Appointing the JPLs as permanent Joint Liquidators

38. Articulating a technical legal basis for appointing the JPLs as permanent liquidators is less straightforward that explaining the substantive practical grounds for so doing. This issue was not addressed as a discrete one in the Petitioners' Submissions. This was doubtless because in *Re Loral Space & Communication Ltd.*[2007] Bda LR 26, without any real analysis of my ability to do so, I acceded to a similar application to appoint joint provisional liquidators as 'permanent' joint liquidators for the purposes of an equally abbreviated winding-up. I did so upon the following legal basis which is no longer valid. I assumed that statute needed to be modified to appoint permanent liquidators without convening statutory meetings but found that the governing insolvency rules could be modified without implementing a local scheme of arrangement but proceeding *as if* section 99 had been engaged because it potentially could have been deployed.

39. The statutory scheme as a whole only clearly contemplates that, as a general rule, an application to dissolve the company under section 200 will be made by the permanent liquidator who has been appointed after a winding-up order has been made, the first meetings have been convened and the affairs of the company have been fully wound-up. However, in my judgment when the reality is that the affairs of the company have been fully wound-up before a winding-up order is made, the usual requirements are

wholly procedural in nature and all the law requires is substantial compliance with them.

40. Appointing the JPLs as joint liquidators for the purpose of an accelerated winding-up in circumstances where the Companies were simply shell companies constitutes substantial compliance with the statutory regime. The former creditors and contributories had implicitly but unambiguously waived their rights to a normal liquidation by approving the Joint Plan. Section 173(5) ("*the acts of a liquidator shall be valid notwithstanding any defect which may be afterwards found in his appointment or qualifications*") suggests that the appointment of liquidators is intended by Parliament to be approached in a practical rather than a technical and formal manner.

41. Sections 171 and 181 cannot easily be read as expressly authorizing the Court to appoint permanent liquidators other than the Official Receiver when neither of the first meetings has taken place. On the other hand, section 171(a) expressly contemplates that where a provisional liquidator has been appointed before the winding-up order, the provisional liquidator shall remain in office until another liquidator is appointed. It also clearly contemplates that when a winding-up order is made, if no other provisional liquidator has been appointed, the Official Receiver becomes provisional liquidator at that point by operation of law. In contrast, section 171(d), dealing with the more fluid post-statutory meetings period, does not explicitly or implicitly provide that the Official Receiver becomes permanent liquidator by operation of law at any clearly identifiable point in time. Section 171(d) merely provides:

> "*(d) in a case where a liquidator is not appointed by the Court, the Official Receiver shall be the liquidator of the company;…*"

42. In practice, where first statutory meetings are convened, a report is made to the Court by the provisional liquidator and an order is made appointing either the nominee of the first meetings or some other private liquidator or the Official Receiver as liquidator. The statutory scheme simply does not expressly contemplate the present situation where the affairs of the company have been completely wound-up prior to the winding-up order so (a) it is impossible and unnecessary to convene the first meetings and (b) there is no need for the Official Receiver to step into the breach to wind-up the companies at all. Judicial notice may be taken of the fact that the Official Receiver would not welcome being required to become involved in a purely administrative liquidation closing exercise when there is no public interest engaged and no genuine vacuum to be filled in relation to the management of an active liquidation: *Re Loral Space & Communication Ltd.*[2007] Bda LR 26 (at paragraphs 9-10).

43. Nothing of substance in my judgment turned on whether the JPLs were authorized to summarily conclude the winding-up wearing provisional liquidator hats or permanent liquidator hats. They were clearly legally entitled to remain in office as provisional liquidators until another liquidator was appointed in any event. Any defect in their nomenclature for the brief period required to apply for the Companies' dissolution would be cured by section 173(5). Their main task was to apply for the Companies' dissolution under a statutory provision which is primarily designed to be deployed in circumstances which clearly applied to the present case: the Companies' affairs had been "*fully wound up*". The term "*liquidator*" in section 200(1) of the Act, when that section is read with section 171(a), can in any event fairly be read as including a provisional liquidator where, for good cause, the Court has declined to appoint any other person as liquidator and the Official Receiver has understandably not sought to act either. Section 200 provides:

> "*(1) When the affairs of a company have been completely wound up, the Court, if the liquidator makes an application in that behalf, shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.*"

44. The genius of the statutory winding-up scheme derived from the Companies Act 1948 (UK) is that it is sufficiently pliable to respond to so many of the infinite variety of practical problems which arise in the course of a liquidation. Perhaps the most generous jurisdiction conferred on the Court by the Act arises under the following two provisions:

(1) **section 175(1)-(2):** confers a wide array of powers on a liquidator (which it is accepted includes a provisional liquidator). The section then provides:

> "*(3)The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers*";

(2) **section 176:** imposes controls on the exercise of liquidators' powers. Section 176(3) provides:

> *"(3) The liquidator may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the winding up.*"

45. At the beginning of the present winding-up proceedings this Court approved the appointment of the JPLs to oversee the compromise of all liabilities owed by the Companies through the Joint Plan. The Joint Plan was ultimately confirmed by the USBC on terms which made an accelerated winding-up of the Companies herein the only rational outcome. Against this background, the statute being silent as to how the liquidation was to be brought to an efficient end, this Court in my judgment possessed the jurisdictional competence under section 175(3) and/or section 176(3) to authorise the JPLs to serve as permanent liquidators for the specific and limited purpose of applying for the Companies to be dissolved.

Summary

46. The decision to appoint the JPLs as Joint Liquidators to facilitate an accelerated liquidation was, at the end of the day, a workmanlike first instance decision made at the end of an unopposed hearing in circumstances where no other interested parties appeared to exist. The theoretical underpinnings for this aspect of the decision may well benefit from further refinement in the future in light of fuller argument.

47. However in general terms there can be little room for doubt that this Court is empowered under the Companies Act 1981 as read with the Companies (Winding-Up) Rules 1982 to short circuit the formal winding-up process where engaging the usual machinery will serve no useful commercial or public purpose. Such was quite obviously the case here. All known debt and equity interests had apparently been extinguished in the foreign 'main' proceedings which the present proceedings were commenced to support and assist. The Companies' affairs had been fully wound-up by the time the winding-up order was sought.

Conclusion

48. For the above reasons, on February 24, 2017 I made an Order winding-up the Companies and granted a stay of proceedings against them by way of recognition of the Joint Plan. The Joint Plan fully wound-up the Petitioners' affairs. I accordingly also appointed the JPLs as permanent liquidators to conduct an accelerated Bermudian liquidation under the Companies Act.

Dated this 2nd day of March 2017 _____

IAN RC KAWALEY CJ