IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 171 OF 2018 (IKJ)

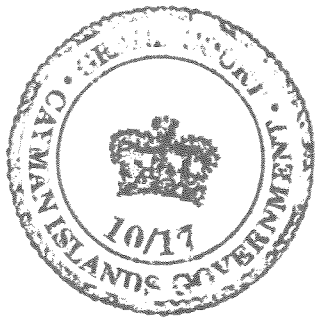
IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND

IN THE MATTER OF ACL ASEAN TOWER HOLDCO LIMITED

IN COURT

Appearances:	Mr Mark Goodman, Campbells, on behalf of the Petitioners
	Mr Tim Baildam, Carey Olsen, on behalf of the Company
	Mr Stephen Leontsinis, Ms Jennifer Colegate and Mr Justin Naidu, Collas Crill, for the Joint Provisional Liquidators
	Ms Katie Pearson and Ms Anna Krendzelekova, Harneys, for Mr El Ard, a creditor and shareholder
	Mr Guy Dilliway-Parry and Mr Lawrence Aiolfi, Priestleys, for Mr Uebach, a creditor
	Ms Sarah Dobbyn and Ms Tetrina Rivers, Sinclairs, for Messrs Kabbani, Al-Ken and Darwish, creditors
Before:	**The Hon. Justice Kawaley**
Heard:	**8 February 2019**
Date of decision:	**8 February 2019**
Draft Reasons Circulated:	**3 March 2019**
Reasons Delivered:	**8 March 2019**



HEADNOTE

Application by shareholder and creditor to further adjourn creditor petition to explore restructuring-weight to be attached to support for adjournment from creditors affiliated with the company-relevance of joint provisional liquidators' report-onus on stakeholders seeking to promote a restructuring after the court has found a creditor is prima facie entitled to a winding-up order to advance a coherent case for restructuring in a timely manner

REASONS FOR DECISION

Background

1. On September 13, 2018, the Petitioners, Alcazar Capital Limited ("Alcazar") and Forest Capital Holdings Limited ("Forest") presented the Petition to wind-up the Company on the grounds of its failure to pay debts totalling US$2,495,900. The Company tendered partial payment of US$367,000 on October 19, 2018 (which the Petitioners accepted) and applied on October 23, 2018 to strike-out the Petition on the grounds that the remaining sum of US$2,168,900 was disputed and the Petition was being presented improperly to pressurize the Company into paying disputed debts.

2. On October 23, 2018, the First Affidavit of Kai Uebach was filed on behalf of the Company and it accepted that further unquantifiable sums were due to the Petitioners and asserted rights of set off. The Second Affidavit of Mr Uebach was sworn on or about November 23, 2018. It exhibited an apparently independent forensic report prepared for the Company by a Dr. Frisanco which analysed the dealings between the parties which gave rise to the Petitioners' claims. The Company admitted that more than US$400,000 was still owed to Alcazar but asserted rights of set-off in an amount of US$750,000. The precise numbers were clarified in the Third Uebach Affidavit sworn on December 3, 2018.

3. The Company's strike-out Summons was listed on the first return date of the Petition, December 11, 2018. My provisional view was, based on the fact that the Petitioners had accepted post-petition payments and the Dr Frisanco Report supported the Company's case that it had set-off rights greater than what was properly due, that the Petitioners were improperly using the winding-up jurisdiction as a debt-collection mechanism. This changed having heard oral argument in the course of which the Company's evidence as to the existence of its set-off rights was seriously undermined and, more importantly still, Mr Smith QC confirmed that the Petitioners now positively sought a winding-up Order and would account to the liquidators for the post-petition payments received. I found that a case for winding-up had been made out.

4. I was concerned that the provisional views that I had expressed at the beginning of the hearing may have unfairly wrong-footed the Company and deprived Mr Golaszewski of the opportunity to take instructions as to what course the Company wished to adopt in the event that its strike-out Summons was dismissed. To eliminate any risk that the value of underlying assets might be unintentionally impaired by the making of a winding–up Order which the Company did not appear to me to expect would be made on the date of the hearing, I decided to adjourn the Petition.

5. I accordingly appointed David Griffin of FTI Consulting (Cayman) Ltd and John Batchelor of FTI Consulting (Hong Kong) Ltd as joint provisional liquidators ("JPLs") with full powers, explicitly charged with reporting to the Court at the next hearing of the Petition on whether or not the best interests of creditors would be served by pursuing a restructuring in provisional liquidation rather than immediately winding-up the Company. The Order appointing the JPLs dated December 11, 2018 (perfected on or about December 21, 2018, embodying the return date fixed the day before) provided, so far as is material for present purposes, as follows:

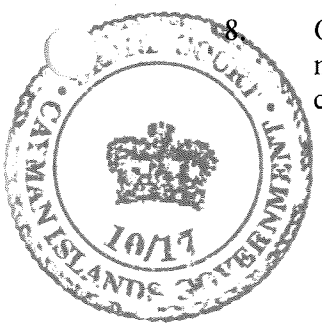
> "*6. The JPLs be directed to prepare and submit a report...to the Court on the conduct of the provisional liquidation and, specifically, the questions of whether or not, in all of the circumstances and in light of their investigations as at the date thereof, the JPLs consider that a Restructuring of the Company deserves further consideration or whether it is appropriate that a winding-up order should be made in respect of the Company.*"

6. On or about December 20, 2018, the adjourned hearing date for the Petition was fixed for February 8, 2019. Clearly, the main task of the Company's management and majority shareholders in the interim, assuming they wished to avoid a winding-up order being made on February 8, 2019, was first and foremost to seek to persuade the JPLs that a restructuring outside of an official liquidation was worth further considering. Instead, on January 24, 2019, the majority shareholder threatened to exercise certain security rights unless a loan he had made was repaid in full.

7. On January 30, 2019, the JPLs filed their First Report to the Court. The Executive Summary of the Report crucially stated (at page 3):

> "*For the reasons highlighted above and discussed in detail within the remainder of this report, the JPLs no longer consider a restructuring of the Company's financial obligations within the provisional liquidation to be a viable course of action and recommend that the Company be placed into official liquidation at the earliest possibility.*"

8. On February 8, 2019, the adjourned hearing date fixed on December 20, 2018, the majority shareholder and three past or present directors filed Notices of Appearance as creditors opposing the Petition. The majority shareholder (Mr El Ard) on the same date



also filed a Summons formally seeking a further adjournment of the Petition. I refused that application and granted the winding-up Order sought by the Petitioner.

9. I promised to supplement the summary reasons I delivered orally at the conclusion of the hearing with fuller reasons for refusing the adjournment application. These are those reasons.

Summary Reasons for winding-up Order

10. My summary reasons were as follows:

> *"[1] Having heard very interesting and robust argument, I find that this is an appropriate case for a winding-up order to be made. This Court found on 11th December 2018 that the Petitioners had made out a case for winding-up. The Court was somewhat concerned that the Company might not have adequately prepared for that outcome and accordingly appointed provisional liquidators and invited them to advise the Court whether they thought that a restructuring was viable.*
>
> *[2] They have prepared a Report, which was filed on or about the 31st January, 2019, which clearly was some considerable time after the 11th December 2018 hearing. And the primary concern before the Court today is whether or not the Court should, in effect, ignore the recommendations that it sought from independent officers as to whether or not a winding-up order should be made.*
>
> *[3] The adjournment application that has been made, while argued in the most persuasive way possible by a combination of counsel for the Majority Shareholder and various directors at the adjourned hearing today, has simply failed to come up with any sufficiently cogent justification for granting the adjournment sought.*
>
> *[4] The critical question is, where do the best interests of creditors lie? And when one speaks of creditors in the winding-up context, one is talking about unsecured creditors who do not have any other significant interests which might impact on the position they adopt. And in this case the Petitioners are the only real creditors before the Court.*
>
> *[5] Mr El Ard is first and foremost, it seems to me, a shareholder and founder of the Company. And even though it is technically right to say that, as a shareholder, he has no interest in an insolvent company, it is also relevant to note that he has that commercial interest that is likely to colour the position that he adopts in relation to a winding-up petition. But not only that; he is also a creditor with security that was obtained, or purportedly obtained (because there is doubt about its validity), after the Petitioners' Statutory Demands were served and in addition shortly before the hearing of the Petition on 11th December 2018. Not long before the adjourned hearing today took place, Mr El Ard was invited to undertake not to enforce his security and declined to provide that undertaking to the Joint Provisional Liquidators.*

[6] In those circumstances it is impossible for the Court to give any weight to his adjournment request, insofar as that request is advanced as an unsecured creditor. There is no proper basis for the Court to equate his interests with those of the Petitioners.

[7] The only issue which concerned me was whether there was a possibility that Mr El Ard might be able to 'pull a rabbit out of a hat', as it were, and come up with a proposal that might result in the Petitioners agreeing to withdraw their Petition. The possibility of that happening is very cloudy indeed. And a significant factor is not only the somewhat exaggerated public interest argument that Mr Goodman relied upon, but more importantly than that that the Petitioners themselves are adamant that they wish a winding-up order.

[8] In these circumstances, it seems to me where there are no significant competing creditor wishes for the Court to take into account that the Petitioners should be granted their winding-up Order. Those are my summary reasons for granting a winding-up Order."

Governing legal principles

11. It is important to distinguish between what I regard as three distinct principles. Firstly, there is the principle that, as against an insolvent company, an unpaid creditor is entitled as of right to a winding-up order. Secondly, there is the principle that the Court has a broad discretionary power to adjourn the hearing of a petition. And thirdly, there is the principle that as regards a difference between various unsecured creditors, some of whom seek a winding-up order and others who oppose it, the Court will, where appropriate, have regard to the wishes of the majority of creditors.

12. Ms Pearson's legal submissions on behalf of Mr El Ard understandably focussed on the second and third principles as her brief was to seek an adjournment. The relevant statutory provision was correctly identified as the following provisions of section 95 of the Companies Law (2018 Revision):

"*(1) Upon hearing the winding up petition the Court may-*

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an

amount equal to or in excess of those assets or that the company has no assets." [Emphasis added]

13. She also identified a statutory provision which I accept provides indirect support for the rule of practice that the wishes of creditors are taken into account when deciding what order to make under section 95. Section 115 of the Law provides:

> "*(1) The Court shall, as to all matters relating to the winding up, have regard to wishes of the creditors or contributories and for that purpose it may direct reports to be prepared by the official liquidator and meetings of creditors or contributories to be summoned.*"

14. Although section 115(1) strictly applies to how winding-up proceedings are conducted after a winding-up order has been made, it reflects an important underlying theme of insolvency law and helps to explain why it is that the wishes of creditors are relevant to any decision this Court may make about the administration of an insolvent company. Mr El Ard's counsel also helpfully cited passages from Derek French, '*Applications to Wind Up Companies*', 3rd edition (at paragraph 7.698, 7.602), which clarified the interaction between all three principles mentioned in paragraph 11 above:

> "*On a winding-up petition presented by a creditor of a company, the views of other creditors of the company are of considerable importance. A winding-up order on a creditor's petition should be for the benefit of the company's creditors generally and so the court will consider the views of other creditors. A judge who hears a creditor's petition without giving other creditors the opportunity of stating their views will not be in a position properly to exercise [the] discretion to make a winding-up order...*
>
> > *...as between the company and an unpaid admitted creditor, the creditor is entitled to a winding-up order as a matter of course, but as between the petitioning creditor and the other creditors, the majority's opposition to compulsory liquidation may prevail...But the court may discount the views of creditors connected to the company.*"

15. The last sentence of that extract was cited by the Petitioner's counsel in oral argument. But the passages as a whole are consistent with generally recognised rules of practice in relation to winding-up petitions. Ms Pearson also identified what in the context of the present case are subsidiary principles which, putting aside the controversy of their applicability to the present case, accurately stated the potentially relevant points of law and practice:

    (a) it is commonplace for winding-up petitions to be adjourned to facilitate restructurings: *Re Grand T G Gold Holdings Limited*, FSD 84 of 2016

(NSJ), Judgment dated August 22, 2016 (Segal J) (unreported), *Re CW Group Holdings Limited*, FSD 113 and 122 of 2018 (RJP), Judgment dated August 3, 2018 (Parker J) (unreported), *Re Abraaj Holdings*, FSD 95 of 2018 (RMJ), Judgment dated January 4, 2019 (McMillan J) (unreported);

(b) the Court should be less reluctant to adjourn the Petition than to dismiss it, especially where only a short adjournment is sought: *Re Demaglass Holdings Ltd* [2001] 2 BCLC 633 at 640;

(c) the Court may take into account the position of contributories in exceptional circumstances: *In Re HSH Cayman* [2010] 1 CILR 157 at 163;

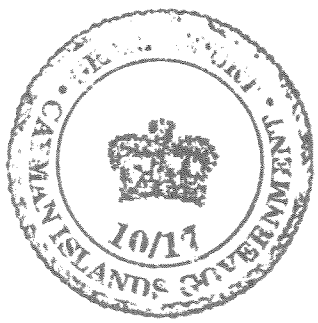
(d) the Court may grant an adjournment over the objections of the petitioner where it is clear that he would benefit from the adjournment: *In re Brighton Hotel Company* (1868) L.R. 6 Eq 339.

16. These authorities will be considered below in the context of explaining why I found it was not appropriate to grant an adjournment in the present case.

17. Mr Goodman's '*Skeleton Argument on behalf of the Petitioners*', prepared two days before the adjourned hearing of the Petition, did not expressly anticipate the adjournment application filed on the day of the hearing. Reliance was placed on *Re Lummus Agricultural Services Ltd* [2001] 1 BCLC137 at 141 g-h where Park J held:

> "*I begin with the basic proposition that, although both s 122 (which uses the word 'may') and s 123 give the court a discretion whether to make a winding-up order, it is well settled that if a creditor with standing to make an application wants to have the company wound up, and if the court is satisfied that the company is unable to pay its debts, a winding-up order will follow unless there some special reasons why it should not. It is sometimes said that in such a case, a petitioning creditor is entitled to a winding-up order 'ex debito justitiae. I therefore start with the assumption that such an order should be made in this case, and the burden of the argument rests on Mr Lightman to show me why it should not.*"

18. However, *Re Lummus* was also a case where creditors associated with the respondent company opposed a winding-up order and Park J brushed this opposition aside. An Affidavit in opposition was filed by a Mr Koshy, a director of the company and a majority shareholder. He deposed that four other creditors opposed a winding-up order. Park J held (at page 143d-e):



"In this case...three of the four opposing creditors are associated companies...The fourth are the auditors, who are in any event creditors only for a small amount....It would be different if they were independent outside creditors, but, given that they are not, I do not think that their opposition to the petition adds anything much to the opposition of Mr Koshy himself...

In all the circumstances of this case, I have concluded that the opposition of the other creditors does not lead me to depart from the normal consequences of a properly presented petition by an undoubted creditor of a clearly insolvent company, namely that a winding-up order should be made."

19. This second passage supported Mr Goodman's oral argument that no weight should as a matter of principle ordinarily be given to the views of parties connected to Company who oppose a winding-up order.

Findings: why it was inappropriate to grant the "short" adjournment sought

Key factual findings

20. The following key findings informed the relevant decision:

(a) the adjournment sought was not short. The Company had already been granted an adjournment on December 11, 2018 for almost two months;

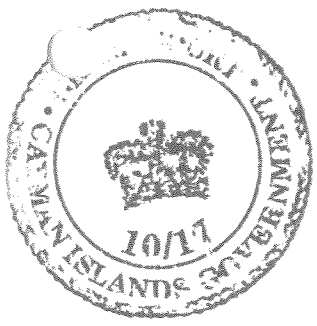
(b) the purpose of the first adjournment was to afford the Company and its management an opportunity to persuade the JPLs that a restructuring might be a viable alternative to a winding-up;

(c) the Company and its management had failed to persuade the JPLs that a restructuring was a potentially viable alternative to a winding-up, deserving of further consideration beyond the February 8, 2019 adjourned hearing of the Petition;

(d) the prime mover behind the Company, Mr El Ard had apparently focussed more on protecting his position as a secured creditor in the prelude to the December 11, 2018 and February 8, 2019 hearings than on seriously considering alternatives to a winding-up;

(e) Mr El Ard had been offered an opportunity to undertake not to enforce his purported security so as to protect the interests of unsecured creditors on an interim basis but had declined the JPLs' request to do so;

(f) the adjournment application was without any justification filed on the day of the adjourned hearing and did not advance any tangible restructuring proposals;



(g) a winding-up Order would not preclude a restructuring of the underlying business in any event;

(h) the JPLs' recommendation in their Report, requested to advise the Court on whether or not a winding-up Order should be made, was that a winding-up Order should be made as soon as possible.

Adjournments require a clear basis for concluding that a restructuring proposal should be pursued

21. It is in my experience unprecedented for a common law court to adjourn a winding-up petition to permit the company's management to initially explore the possibility of an as yet entirely abstract and/or hypothetical restructuring in circumstances where joint provisional liquidators:

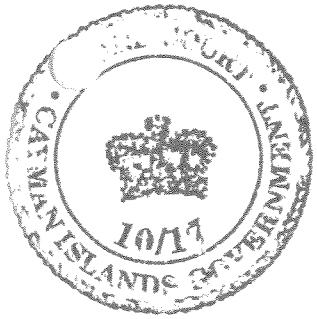
(a) have carried out a preliminary assessment of restructuring prospects; and

(b) have advised the Court that a winding-up order should be made immediately.

22. How has this Court exercised its adjournment discretion in the recent past to facilitate attempts to implement a restructuring? Ms Pearson identified examples of such adjournments but was seemingly reluctant to actually explore the judgments with the Court. This reticence was entirely justified, as the relevant cases provided little more than symbolic support for her client's cause. They do nonetheless serve as helpful illustrations as to how serious restructuring proposals can effectively be pursued.

23. In *Re T G Gold Holding Limited*, the petition was adjourned although the case for a winding-up order was made out. For present purposes, Segal J crucially held (at paragraph 6) as follows:

> "*...(c) the Company has formulated and is seeking to progress the Resumption Proposal and the Second Affirmation of Ms Ma has provided a further explanation of and update on the terms and status of the Resumption Proposal and the Process by which it will be taken forward...*
>
> *(d)... (vi) a significant number of the Company's creditors have confirmed in writing their agreement in principle to capitalise their debt;*
>
> *(vii) a significant number of the Company's creditors have confirmed their support for the Resumption Proposal and that in their view a winding-up would be damaging to the interests of all creditors...They may well constitute a majority of the Company's creditors although many of them may well be connected to the Company as shareholders, directors or advisors;*



(viii) there is some evidence that an immediate winding-up would be viewed unfavourably by the Listing Committee…"

24. In brief, the company in that case at the first hearing of the petition was in the process of developing a tangible restructuring proposal which would convince the relevant Listing Committee to re-list it with support from at least some unconnected creditors.

25. *Re CW Group Holdings Limited* was a case where the company itself presented a petition and sought to appoint provisional liquidators with 'soft touch' powers to pursue a restructuring. One creditor sought to appoint its own preferred liquidators and to displace the management altogether. Its position was supported by two banks, but the contest was not between the competing views of various creditors. Rather, it was a contest between a company-driven provisional liquidation and a creditor-driven liquidation in circumstances where the company had taken the initiative to pursue a court-supervised restructuring. The critical question was whether the creditor could meet the risk of dissipation test required to justify replacing management altogether; because of management's proactive approach, it could not. The Court did not consider it relevant that the restructuring proposal only existed in outline form. Parker J noted:

> "*16. The board has, together with professional advisers retained... already taken steps to engage with the company's creditors to develop the terms of a proposed restructuring.* In that connection, *proceedings have been commenced in Singapore and Hong Kong for the appointment of provisional liquidators and to secure a moratorium on all claims...*
>
> *70. I accept Mr Allison QC's submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators. That much is clear from the language of section 104(3) (b) of the Companies Law and four recent authorities he referred me to: Arcapita, Trident, Suntech and LDK Solar (all noted above).* "

26. In brief, where an insolvent company takes the initiative and seeks to implement a court-supervised restructuring, this Court will accord the company's management a generous margin of appreciation when faced with attempts by creditors to impose a 'full-blown' provisional or official liquidation instead.

27. *Re Abraaj Holdings* primarily concerned the novel question of what costs award should be made when a petition was adjourned on the application of the joint provisional liquidators over the objections of the petitioner. The adjournment order was made further to an earlier adjournment order which was clearly made to enable the joint provisional liquidators to pursue a restructuring. The 'political' landscape in relation the adjournment issue is clearly portrayed in the following passage in McMillan J's judgment:

"*19. There is no doubt that PIFSS's opposition to the proposed adjournment was the expressed view of a minority creditor, and that its position was contrary to the views expressed by the JPLs. Equally, PIFSS failed to establish or even to identify any immediate tangible benefit to be derived from an official liquidation, as distinct from the very wide ranging scope of the provisional arrangements already in place.*"

28. In brief, this was a case where the adjournment granted was positively sought by both the joint provisional liquidators and the majority of creditors in circumstances where active pursuit of a possible restructuring had already been judicially approved.

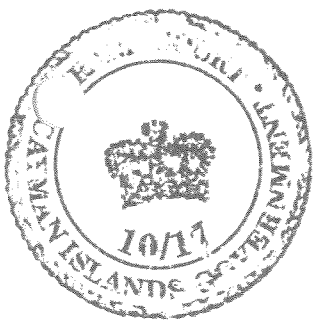
29. All of the cases relied upon as illustrating a more flexible modern approach to adjourning winding-up petitions to explore restructurings only support that proposition in general terms. The cases also illustrate how that broad principle is applied in practice. Invariably there are tangible grounds for an adjournment. Such tangible grounds are likely to consist of either (a) support from the majority of creditors and a Listing Committee, (b) proactive restructuring steps taken by the company's management, and/or (c) support from the majority of creditors as well as the joint provisional liquidators. No such compelling grounds were advanced in support of the adjournment application made by Mr El Ard and supported by the Company and affiliated creditors in the present case.

30. In his Affidavit sworn on February 8, 2019, the same day of the adjourned hearing, he essentially sought an "*opportunity to undertake a thorough review of the documents* [to] *properly assess the financial position of the Company*" (paragraph 22). It beggared belief that if he was a "*key stakeholder in the Group*" (paragraph 24), that his first opportunity to investigate the Company's financial position was when he was "formally" notified of the appointment of the JPLs in late December, 2018 and that Mr El Ard could not in any event have investigated the restructuring option before the JPLs completed their Report.

31. In fact Mr El Ard and the Company's management had the following opportunities to turn their minds to these important matters:

(1) on or about August 1, 2018 when the Petitioners' Statutory Demands were served. The JPLs' Report was not challenged insofar as it stated that, *inter alia*, the majority shareholder on or about August 20, 2018 became a secured creditor of the Company in connection with a Convertible Loan Agreement;

(2) on or about September 13, 2018 when the Petition was presented. It was common ground that part payment of the Petition debts was tendered on behalf of the Company on October 19, 2018. By the later date at least, any "key stakeholder" in the Group at the top of which the Company sat would presumably be aware of the present Petition;



(3) on or about December 8, 2018. The JPLs' Report was not challenged insofar as it stated that on December 8, 2018, Mr El Ard entered into a Mortgage Agreement with Golden Tower pursuant to which he purportedly acquired a security interest over this subsidiary's equipment including the valuable cell phone towers;

(4) on or about December 11, 2018 when the Petition was first heard. At that hearing the Company's strike-out Summons was dismissed, the JPLs were appointed and the Petition was adjourned for the explicit purpose of the JPLs advising the Court as to whether a restructuring outside of liquidation was possible. If the Company wished to pursue a restructuring rather than a winding-up, one would expect its management to consult urgently with its "key stakeholder" who was apparently its main financier as well. If one assumes that matters were on hold until the December 11, 2018 Order was sealed on December 21, 2018, those internal consultations should have begun by that date at the latest;

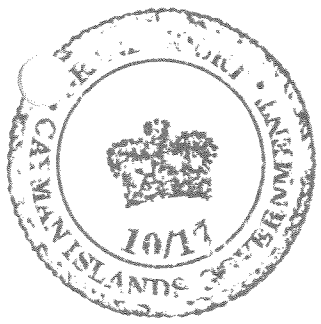
(5) on January 4, 2019 when the JPLs requested the Company's management to consummate a protocol with Golden Tower to preserve the Company's indirect interest in that subsidiary. Golden Tower's Board apparently declined to enter into the protocol at a meeting held on or about January 24, 2019. On that same date Mr El Ard's attorneys notified the JPLs that he was withdrawing his funding commitment under the Convertible Loan Agreement and would exercise his rights against the Company and its subsidiaries unless he was paid US$1.4 million plus interest and costs by February 1, 2019.

32. In these circumstances, there was no rational basis for affording the Company and Mr El Ard an opportunity to begin their own investigations into a restructuring proposal at the end of the period fixed by the Court for the JPLs to carry out that very investigation.

Even a short adjournment requires a rational basis

33. In my judgment it is self-evident that although the Court may in general terms be willing to grant a shorter adjournment than a longer one, a rational basis for the adjournment must nonetheless be advanced. In *Re Demaglass Holdings Ltd.* [2001] 2 BCLC 633 at 640 d-e, Neuberger J (as he then was) stated the general principle as follows:

> "*It nonetheless seems to me that the court should be less reluctant to adjourn the hearing of a winding-up petition than it would be to dismiss the petition, in each case over the wishes of the petitioner, especially where the adjournment is for a relatively short period.*



Adjourning as opposed to dismissing is a much less significant interference with, or denial of, a petitioner's claim in a particular case. The longer the adjournment sought, the closer the case becomes to the more familiar type of case."

34. In *Demaglass,* the receivers sought a 10 week adjournment with a view to being able to maximize the value of the sale of certain secured assets. The adjournment sought was granted, but not as an instinctive knee-jerk judicial reaction to a short adjournment request. Neuberger J (at pages 642 f-I, 644 d-f) held in salient part as follows:

"*Mr Adamyk refers to the closing words in the judgment of Cozens-Hardy LJ in Crigglestone at [1906] 2 Ch 339:*

> *'Speaking for myself, I attach great importance to a winding-up order in the case of a company which has issued debentures of this kind, giving a floating charge on all the property of the company. Anything more unsatisfactory than leaving the company in the hands of the debenture-holders alone I cannot imagine."*

Despite that strongly expressed view, I have come to the conclusion that I should adjourn the petition in the present case.

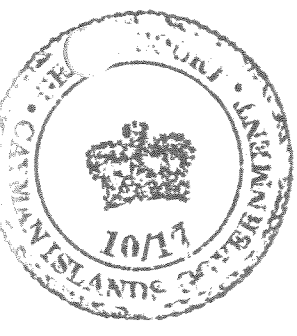
> *(a) The majority of the unsecured creditors support this course, especially if one allows for the fact that this conclusion means (i) that the secured creditors may not be fully secured; (ii) those preferred creditors, who are owed a lot by the standards of the unsecured creditors generally, who have expressed a view support the application to adjourn; and (iii) the supporters of the petition were in some cases misled, albeit not with any improper intent.*
>
> *(b) There are substantial grounds for adjourning the petition, namely, those set out in paragraph 7 of Mr Wolstenholme's third witness statement. Having read what he says and also having read the slightly unclear evidence of Mr Shaw in this connection, I regard it as definitely more likely than not that, if I adjourn the hearing of the petition for 10 weeks, the sale of millions of items of glass stock will achieve a significantly higher price than fire sale, which is the likely outcome if I make a winding up order now...*

(e) The observations of Cozens-Hardy LJ were made at a time when there were no licensed insolvency practitioners, and, I suspect, at a time when the extent of the duty of administrative receivers to the company concerned was a matter of uncertainty. Furthermore, it was at a time when the so called rescue culture, as referred to in Lightman & Moss, did not exist. It is noteworthy that the grounds upon which Mr Trower rests his case for arguing that there should be adjournment of the petition today are the sort of grounds which would be put before the court when seeking an administration order, something which was wholly unknown at the time that Cozens-Hardy LJ made his observations.

In the present case, the receivers are licensed insolvency practitioners who have a duty to the company when exercising their power of sale over the company's assets, and, if they were in any doubt about their activities being monitored and being liable to be challenged, any such doubts would have been put to rest by this application..."

35. No correspondingly cogent grounds for granting the adjournment were advanced in the present case. Mr El Ard did no more than request an opportunity to consider a restructuring proposal (or settlement offer) as if he had had no previous opportunity to do so. The connected creditors who supported him added only the apparently enticing but ultimately lightweight submission that it was unclear how the Petitioners' commercial position could be further prejudiced as long as the JPLs remained in office. That submission implied that the Court should, if in doubt about what potentially prejudicial actions might be taken during an adjournment by Mr El Ard as a disputed secured creditor, 'take a chance' rather than selecting a more precautionary option. Nonetheless, the combined weight of four separate counsel contending for a 'harmless' short adjournment very nearly achieved what one presumes was the intended forensic impact. I ultimately steeled myself against the temptation of allowing myself to be swept away on an optimistic tide that logic suggested was more illusory than real.

36. Although the JPLs did not positively oppose the adjournment application, their Report (which this Court requested to provide independent advice as to what should happen at the adjourned hearing of the Petition) unambiguously supported making the winding-up Order. The words "*the JPLs...recommend that that the Company be placed into official liquidation at the earliest possibility*", viewed in the light of all the material before the Court, provided a very clear and cogent foundation for granting the Order the Petitioners sought.



37. There was another somewhat subliminal legal policy reason for granting the adjournment, which underpins the critique of the unjustified last minute adjournment application. The law in this area, as much as in any other, must so far as is practicable be certain and predictable so that parties to winding-up proceedings can be given meaningful advice about how to conduct their cases. The cases referred to in argument demonstrate that this Court routinely grants adjournments in aid of restructuring proceedings where it is clear that before the petition is first heard serious attention has been given to at least an outline restructuring 'idea'. Unless management has demonstrated a serious commitment to protecting the interests of unsecured creditors and formulating at least the broad outlines of a credible plan, it will be improbable that an adjournment application made by the company will be granted over the wishes of the petitioning creditor.

38. Where the Court finds that a winding-up order is appropriate, has a nagging doubt as to whether or not the best interests of creditors have been properly assessed and appoints JPLs to assist the Court to determine this question, the Company and its stakeholders have only one rational avenue to pursue: persuade the JPLs that a restructuring may offer more to the creditors than a winding-up. This does not mean that the JPLs' views will be the final word. But the starting point for an adjournment application should in such circumstances be an ability to demonstrate that apparently reasonable proposals have been made to the JPLs which merit further consideration. Here, Mr El Ard appears to have donned his secured creditor clothes first, and only belatedly (and thus unconvincingly) changed into his "key stakeholder" and potential deal-broker garb at the very last minute.

39. In my judgment winding-up courts should generally be leery about last minute adjournment applications made by insolvent companies and/or related parties and which are framed as requests to investigate for the first time matters which ought to have been investigated long ago. The present adjournment application was supported by evidence and presented in a coherent and well-researched manner, raised issues which required more careful evaluation and was an application which I came close to acceding to. Properly analysed, however, it was in substance not significantly more meritorious than the application made in *Re Harlequin Hotels and Resorts Limited.*, FSD 121 of 2018 (IKJ), Judgment dated September 13, 2018 (unreported), where an application by the company at the first hearing of the petition to adjourn to investigate whether or not the debt was disputed was refused. After outlining the usual practice for making such applications, I observed:

> "*23. This well-worn practice does not just flow from the fact that CWR Order 3 rule 9 requires affidavits by respondent companies opposing the petition to be filed in advance of the hearing. That statutory procedural requirement itself derives from the substantive legal principle that a petitioner who makes out a prima facie case for winding-up is prima facie entitled to an order. It is for the respondent company to persuade the Court that an order ought not to be made.*

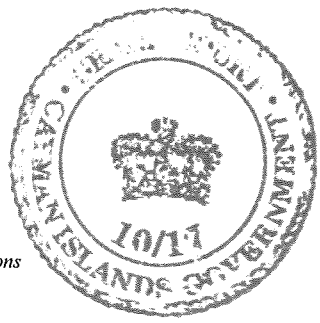
40. I ultimately made the following findings in my reasons for decision in that case:

> *"26. The Company instructed counsel to make an oral application for an adjournment unsupported by a shred of evidence, based on a plea for an opportunity to take legal advice and file evidence in opposition to the Petition. This was the most insubstantial and unconvincing way imaginable of advancing an application to adjourn the Petition in all the circumstances of the present case. The Company was served with a Statutory Demand on April 3, 2018 and the Company has been in touch with lawyers and has threatened to vigorously contest any petition which was presented several months ago. In the course of the hearing I likened Ms McClymont's brave last-ditch battle to defend the Company to 'Custer's last stand'. The adjournment application was plainly hopeless and could only be refused."*

41. In the present case the Company was served with Statutory Demands on August 1, 2018, and has had even longer to consider how it could convincingly oppose a winding-up order than the respondent in *Re Harlequin Hotels and Resorts Limited* (where the winding-up order was made at the first hearing of the petition on September 11, 2018, just over 5 months after the Statutory Demands were served). In the final analysis by the date of the adjourned hearing the clear impression was that the real reason why the Company had not instructed its lawyers to make a fall-back application for an adjournment if its strike-out Summons was dismissed was not simply over-optimism about the prospects of what appeared to be a strong application.

42. In fact Mr El Ard's focus on the eve of the December 11, 2018 hearing was seemingly on fortifying his security position and building a wall between the valuable Golden Tower subsidiary and the Company which it was doubtless hoped any liquidators who might be appointed would be unable to breach.

43. Whatever the actual reasons may have been for the Company and its stakeholders failing to consider the restructuring potentialities earlier than they did, as to which I reached no concluded view, I found no rational basis for affording them a further opportunity to investigate the option for the first time on February 8, 2019. This was an option which could have been initially explored six months earlier on August 1, 2018 when the Statutory Demands were served. And it was also an option which should have been vigorously pursued as a matter of urgency when the Petition was adjourned for this specific purpose on December 11, 2018.



There were no exceptional circumstances justifying taking shareholder interests into account

44. Jones J in *Re HSH Cayman* [2010] 1 CILR 157 at 163 approved the following observations of Slade J in *In re Camburn Petroleum Products Ltd.* [1980] 1 W.L.R. 86 at 93-94:

> "*While I recognise that it would have the right...to pay regard to the wishes of contributories, in deciding whether or not to make a winding-up order on a creditor's petition, or to adjourn the hearing, in my judgment it can, and should, ordinarily attach little weight to the wishes of contributories, in comparison with the weight it attaches to the wishes of any creditor, who proves both that he is unpaid and that the company is 'unable to pay its debts'.*"

45. In that case this Court deferred to the wishes of the creditors rather than those of the shareholders and ordered that the company should be wound-up. In this case no or no discernible case was advanced for preferring the views of shareholders over those of creditors.

It was not clear that the Petitioners would benefit from an adjournment

46. The most attractive submission advanced on behalf of Mr El Ard was set out in his Skeleton Argument as follows:

> "*23. The short adjournment sought in the present case is undoubtedly in the creditors', including the Petitioners', interests since Mr El Ard intends to use the time to formulate a meaningful restructuring proposal which would likely provide better returns to the creditors.*"

47. The core commercial function of a restructuring in relation to an insolvent company is to generate a higher return to creditors than is possible in a traditional liquidation. Mr El Ard had engaged with the JPLs to some extent in exploring how much a liquidation return analysis might cost. The JPLs' main substantive response to this enquiry was to point out in their Report that a restructuring within an official liquidation was always possible. This was to my mind a valid response as this was not the classic case of a listed company where it was obvious that the listing status of the company was the most valuable assets and that this value would be destroyed if a winding-up order was made.

48. The main point which troubled me was whether or not the Petitioners, in light of Alcazar's past history with the Company, might be influenced by personal animus which coloured the objectivity of their stance before the Court. Ms Dobbyn rightly pointed out that even the Petitioners were not entirely unconnected from the Company. This was a point which I raised with Mr Goodman in the course of argument. I was ultimately persuaded that it was not sufficiently clear that the Petitioners' best interests

would be served by an adjournment to justify the unusual finding that the Court was better placed than the commercial players themselves to determine what their best interests were.

49. I expressed this concern in my Summary Reasons in a somewhat different way; I said that I was troubled by the possibility that Mr El Ard might "*pull a rabbit out of the hat*" if the adjournment was granted. But in substance my real concern was that the Petitioners' judgment as to the prospects of that happening might be flawed. Ordinarily, of course, commercial litigants are best placed to judge where their best commercial interests lie. As Jones J stated in *In re HSH Cayman* [2010] (1) CILR 157 at 167: "*It is not for me to tell the lenders what is or is not in their commercial interest.*"[1]

50. Ms Pearson managed to find an authority over 150 years old to demonstrate that an insolvency court can grant an adjournment based on its own view that this is where the petitioner's best interests lie. *In re Brighton Hotel Company* (1868) L.R. 6 Eq 339 was a case where the petitioner was both a debenture holder and a shareholder who sought a winding-up order *ex debito justitiae* against a company which was admittedly cash flow insolvent. The petition debt fell due in April, and the relevant adjournment application was being made in July. The company supported by all other shareholders sought a second adjournment of one month, during which time a shareholders meeting would be convened and it might be decided to pay all debenture holders in full. Several shareholders had signed subscription agreements with a view to raising the capital necessary to pay the company's debts, and another petition had been adjourned by consent[2]. The petitioner was the only one of several debenture holders seeking a winding-up order.

51. Against that distinctive background, Sir Richard Malins, Vice-Chancellor, held as follows (at 342-343):

> "*I have no person asking me to wind up this company except the Petitioner. I have every shareholder except the Petitioner objecting to the winding-up, and the company say they are making arrangements which will probably put them as to finances in a sound position...and I think they will be able to take steps which will enable them to carry on this large concern with, at all events, some degree of success. Now the question before me is not whether I shall make an order to wind up this company ultimately, but whether I should exercise the very large discretion reposed in me ,,,of giving this company an opportunity, by ordering this Petition to stand over for a month, of considering how they will raise money to meet their difficulties....I have no doubt that I am imperatively called upon to give them that opportunity, and that there never was a case more absolutely calling for the exercise of the discretion of the Court than this. Although it is true this gentleman's debenture fell due in April, and no doubt he ought to have had his money, yet I do not think the money is of very great importance to him, and it is not on account of that that he presses for an order. If I made an order for the immediate winding up of the company that would not*

[1] Approving the observations of Vinelott J to like effect in *Re Falcon R.J. Devs. Ltd.* [1987] BCLC 437.at 448.
[2] It appears that the other petitioner submitted that if a winding-up order was made, the order should be made on his earlier petition.

give him his £250. Therefore regarding the interest of every one, except this Petitioner, I feel bound to give the time asked for, and I am equally clear that it is to the interest of this Petitioner himself that I should give the time asked for."

52. This case is in general terms remarkable for demonstrating that what might be called a 'restructuring adjournment order' was made so long ago. After granting the adjournment, the Vice-Chancellor granted ex parte injunctions staying pending proceedings against the company (see page 343). However, more narrowly, the decision also demonstrates how compelling the case for an adjournment must be to justify the unusual conclusion that it is "*clear that it is to the interest of this Petitioner himself*" that the winding-up order he seeks ought to be temporarily refused. One factual commonality between *In re Brighton Hotel Company* and the present case is that in both cases there was no possibility of the winding-up order yielding prompt payment in full of the Petition debt. In my judgment, however, the distinguishing features are far more important in terms of principle and practicality:

(a) the petitioner in *In re Brighton Hotel Company* was the only creditor in a discrete class (debenture holders) who sought an immediate winding-up order;

(b) the court was able to assess the best interests of the petitioner not based on the court's independent view of those interests, but by reference to the stance adopted by others with similar commercial interests;

(c) the petitioner was clearly a very minor minority debenture holder, with a claim of £250 out of total denture debt of £58,824 (see page 342);

(d) the petitioner was also a shareholder, and all other shareholders supported the adjournment;

(e) the petitioner's solitary stance in his capacity as creditor seemed on its face to be somewhat idiosyncratic and/or quixotic;

(f) there was tangible evidence that the company would likely succeed in addressing its liquidity problems, which further diluted the weight to be given to a single unpaid creditor's right to a winding-up order..

53. The facts of the present case are in any event a world away from those of *In re Brighton Hotel Company* and fall far short of circumstances justifying the unusual finding that the Petitioners are not the best judges of where their commercial interests lie. The most decisive factor in that regard is the simple but pivotal point that the Petitioners' position is supported by the Report of the JPLs. After all, the JPLs were appointed on December 11, 2018 to assist the Court to form a reliable independent view of where the best interests of creditors generally lay. Their advice was sought in circumstances where:

(a) I was explicitly concerned to ensure that the Company had a fair chance to consider the restructuring option, as the December 11, 2018 hearing took an unexpected course; and

(b) since it was common ground that Alcazar had fallen out with the Company, I was implicitly not altogether comfortable with assuming that the Petitioners' view of where the best interests of the general body of creditors lay should prevail.

Conclusion

54. For these reasons I granted an Order winding-up the Company and refused the application formally moved by the Majority Shareholder for a further adjournment of the Petition.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT