IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 169 OF 2020 (ASCJ)

IN THE MATTER OF COMPANIES LAW (2020 REVISION) ("the Companies Law").

AND IN THE MATTER OF SUN CHEONG CREATIVE DEVELOPMENT HOLDINGS LIMITED ("the Company")

Appearances: Marc Kish and Gemma Lardner of Ogier for the Company.

REASONS

Cayman Islands company listed on the Hong Kong Stock Exchange – petitions for winding up filed before Hong Kong Court – application to this Court by the company for appointment of provisional liquidators for "soft touch" restructuring – applicable principles.

1. The Company is incorporated in this jurisdiction and is registered in Hong Kong and listed on the Hong Kong Stock Exchange ("**HKSE**"). It is the holding company of a corporate group (the "**Sun Cheong Group**") which designs, develops, manufactures and sells a large range of plastic household products. The Group's products are manufactured in mainland China ('the PRC") and sold either under the brand name of "clipfresh" or on an "original design manufacturing" basis. The Group distributes its products within Hong Kong and abroad, including Australia, the United Kingdom, the United States, New Zealand and Germany.

2. By its petition filed on 27 July 2020, the Company petitioned for its own winding up ("**the Petition**"). However, by *ex parte* summons filed on the same date, the Company applied for the postponement of the Petition and the appointment of representatives of FTI Consulting (Cayman) Limited and FTI Consulting (Hong Kong) Limited as its joint provisional liquidators, pursuant to section 104(3) of the Companies Law. By this process the Company seeks to be given an opportunity to restructure its assets and liabilities under the supervision of this Court instead of being placed into official liquidation by the High Court of Hong Kong, pursuant to a petition (one of two) already pending before that Court.

3. On 31 July 2020 I acceded to the Company's application. I now provide these reasons not only for the sake of those interested in the Company but also in deference to the Hong Kong Court whose jurisdiction is also engaged.

4. On behalf of the Company, it was submitted that it is undoubtedly in the best interests of the Sun Cheong Group's employees, shareholders and creditors, that the Company be given an opportunity to restructure its assets and liabilities under the supervision of this Court, before the irreversible step of placing it into official liquidation is taken by the Hong Kong Court, in circumstances where:

   a. The Company has a historical record of generating significant revenue and profit prior to 2019;

   b. There is already a "white knight" investor in place who is willing to inject HK $75 million in funding into the Company;

   c. There has been a wholesale change of the board of the Company (the "**Board**"),

providing independence, as well as significant financial and distressed asset expertise at Board level; and

d. An independent financial report has estimated that, on the basis of an immediate winding up, creditors would be unlikely to receive a return of any more than 1 cent on the dollar.

5. It was said to be critical, on the date of hearing, that the JPLs be appointed on an urgent basis in order to avoid the making of a winding up order by the Hong Kong Court, where one (of the two) creditor's petitions was listed to be heard on 3 August 2020. It was said to be obvious that the grant of that petition could damage irrevocably the ability of the Company to restructure its liabilities and preserve value for its stakeholders.

6. Such considerations, critical as they were, could not in and of themselves have been determinative of whether this Court should assume jurisdiction where there may be proper grounds for insolvency proceedings in another jurisdiction. Rather, I acceded to the hearing of the ex parte summons on the basis that where proceedings have been issued in more than one jurisdiction but an appointment has yet to be made, the starting point for the Court (as the case law to be discussed below reveals), should be to consider which jurisdiction is the more appropriate to assume the role of primary insolvency proceeding. All other things being equal, this will generally be assumed to be the place of incorporation of the company, being the place that its investors, service providers and trade creditors would typically associate with, among other things, the company's registered office and the law governing the duties of its board of directors and its Articles of Association. In the present case, I accepted that the starting point would be for the

Company to be wound up by, or reorganised under the supervision of this Court, unless there were compelling reasons justifying the displacement of the Cayman Islands as the primary jurisdiction. It will become apparent below that such countervailing factors as were disclosed were considered.

7. It was also recognised that there have however, been instances where a foreign court has assumed the role of primary insolvency proceeding in respect of Cayman Islands domiciled companies and where this has been acknowledged by this Court, which went on to recognise office holders appointed by the foreign court. The cases show that such instances are typically limited to circumstances where:

   a. there is a particularly strong nexus between the company and the foreign jurisdiction such that the legitimate expectation of interested parties as to the locus of the primary insolvency proceedings, has shifted to that foreign jurisdiction;[1]

   b. the foreign court had already appointed officers seeking to effect a restructuring for the benefit of stakeholders; and

   c. where there were no competing proceedings in the Cayman Islands.

8. It is not the practice of this Court to defer automatically to winding up proceedings begun in a foreign jurisdiction simply because a petition was presented there first in time. Instead this Court will consider, on the case by case basis, whether it is satisfied

[1] Akin to the concept of COMI-shifting where the jurisdiction concerned has enacted legislation pursuant to the UNCITRAL Model Law or, in the common law context, in deference to the principles of "modified universalism" (see further below), where the Court recognises the order of a foreign Court to wind up a Cayman Islands company on the basis of significant connections to the foreign jurisdiction, such as in ***Re China Agrotech Holdings Limited*** 2017 (2) CILR 526 ("***China Agrotech***").

that there is a genuine intention on the part of the company to present a plan of re-organisation in the Cayman Islands, and the merits of the proposal for carrying out such a plan for the benefit of the company's shareholders and creditors worldwide.

9. It was submitted on behalf of the Company and I accepted that it would be far more appropriate in the present case for this Court to make an order appointing the JPLs in Cayman, notwithstanding the impact that order will likely have on the proceedings in Hong Kong. To the extent that any creditors may oppose the appointment of the JPLs, those views can be articulated upon the return date of the Company's summons, once all other proceedings against the Company have been stayed. In the intervening period, I was satisfied that representatives of the firm of FTI Consulting with insolvency practitioners in both jurisdictions, should be appointed to safeguard the assets of the Company for the benefit of creditors.

BACKGROUND

Company Overview

10. As mentioned above, the Sun Cheong Group is involved in the design, manufacture and sale of plastic household products which are sold either under the brand name of "clipfresh" or on an "original design manufacturing" basis.

11. In the affidavit evidence filed in support of the summons and Petition[2], it is explained that as income levels increase and living standards improve, there has been increased demand in developed economies such as the United States, the United Kingdom,

[2] Primarily that contained in the First and Second Affirmations of Chan Sui On Bill ("Mr Bill Chan"), the executive director of the Company.

Australia and Hong Kong for premium household products which are safe, environmentally friendly and aesthetically appealing. Accordingly, until 2019, the Sun Cheong Group was a successful and profitable business, generating annual revenue in excess of HK $300 million (US $38 million) and returning dividends to its shareholders, approximately 30% of whom are members of the public who subscribed for shares through the HKSE.

12. The Company's recent financial difficulties are said to have arisen from an unfortunate confluence of events in 2019 and 2020 which include: [3]

a. The need to relocate the Company's factory twice in 18 months because the first premises were not appropriate for the Company's business, necessitating additional and unforeseen capital expenditure of RMB48.9 million (approximately US $7 million), causing attendant disruptions to production and consequential lost revenue.

b. The trade war between China and the United States, which led to a significant drop in the value of the Australian dollar as against the US dollar (to which the Hong Kong dollar is pegged), meaning that the value of the Company's sales in Australia were significantly diminished and the Company's revenue proportionately reduced. This coincided with stricter lending terms from financiers due to the deterioration of the global economy more broadly. In particular, the reduction of available credit lines from the Company's banks led

[3] Per the First Affirmation of Mr Bill Chan, paragraphs 21 to 22.

to liquidity issues for the Company.

c. The departure of Mr Tong Ying Chiu Eddie ("**Mr Eddie Tong**"), the founder and ex- chairman of the Company and legal representative of the Group's factories in in the PRC, due to health reasons, without any transition period. Mr Eddie Tong's sudden departure, together with the fact that the Company was only in the initial stages of investigating new investment/financing options to enable it to make a proposal to the Group's creditors, ultimately resulted in a winding up order being made against Chase On Development Limited ("**Chase On**"), an indirect, wholly owned subsidiary of the Company.

d. The incidence of the COVID-19 pandemic, which significantly disrupted production and sales in the first six months of 2020.

13. Mr Bill Chan affirms that as a result of these events, the Company is indebted to 11 different bank creditors (the "**Bank Creditors**") in the sum of HK $168 million and has net liabilities of HK $155.2 million. A number of creditors (Nanyang Commercial Bank, Fubon Bank (Hong Kong) Limited, O-Bank Co., Ltd and DBS (Hong Kong) Limited) commenced civil proceedings in the High Court of the Hong Kong Special Administrative Region (the "**Hong Kong Court**") to recover amounts owing to them by the Company in its capacity as guarantor of the debts of Chase On (together, the "**Debt Claims**").

14. There are also the aforementioned two winding up petitions on foot against the Company in the Hong Kong Court (the "**HK Petitions**"):

a. On 13 December 2019, CTBC Bank Co Ltd ("**CTBC**") presented a petition to

wind up the Company for non-payment of HK $44.3 million (the "**CTBC Petition**"). The CTBC Petition was listed for hearing on 3 August 2020 and unless this Court granted the relief sought by the Company and appointed the JPLs, it was highly likely that the Company would have been wound up on that date. It is for this reason to be expanded upon below, that the application was taken on the urgent basis.

b. On 19 January 2020, Orix Asia Limited ("**Orix**") presented a further petition to wind up the Company for non-payment of HK $ 7 million (the "**Orix Petition**"). The Orix Petition was next listed for hearing on 2 September 2020.

15. The evidence in support of the application, elaborated by the First Affidavit of Mr Cheung Wai Lein Jacky (the Counsel from the firm of Loeb & Loeb LLP appointed to the Company ("Mr Jacky Cheung")), is that the Company does not have sufficient assets to satisfy the debts which are the subject of the Debt Claims or the HK Petitions. Both Mr Bill Chan and Mr Jacky Cheung also explain the restructuring proposal.

RESTRUCTURING OPTIONS

Details of Restructuring Proposal

16. The Cachet Group is the proposed "white knight" investor for the Company. The Cachet Group's relationship with the Sun Cheong Group began in April 2019 when an affiliate of Cachet Group, Cachet Multi Strategy Fund SPC ("**Cachet SPC**"), entered into a loan agreement in the sum of HK $150 million with Uni-Pro Ltd ("**the loan agreement**" and "**Uni Pro**"), the majority shareholder of the Company (holding 50.5% of the Company's issued shares).

17. Cachet SPC is an exempted company incorporated with limited liability and registered as a segregated portfolio company under the laws of the Cayman Islands, with registration number OG-315809. It focusses on distressed debt investing through its two segregated portfolios:

    a. Cachet Special Opportunities SP, a hybrid equity/private credit segregated portfolio fund; and

    b. Cachet Deep Value Fund SP, a private credit segregated portfolio fund.

18. Cachet Asset Management Limited ("**Cachet Asset Management**") is a Hong Kong Securities and Futures Investment Commission-licensed wealth and fund management specialist in Greater China, and is the Investment Manager of Cachet SPC.

19. Uni-Pro's obligations under the loan agreement were secured by:

    a. Guarantees provided by Mr Eddie Tong (the Company's ex-chairman), Ms Sylvia Ng (an ex-director and Mr Eddie Tong's wife) and Mr Ivan Chan, all of whom were directors of the Company at the time; and

    b. a debenture dated 16 January 2020 incorporating fixed and floating charges over all the undertaking, property, assets, goodwill, rights and revenues of Uni-Pro, including but not limited to its shares in the Company.

20. Following Uni-Pro's default under the loan agreement, on 3 June and 8 June 2020, Cachet SPC appointed Mr Cheung Hok Hin Alan of Wing United CPA Limited ("**Mr Alan Cheung**" or "**Receiver**") as a receiver over the shares in the Company held by

Uni-Pro and Mr Ivan Chan respectively, comprising 68.31% of the total issued share capital of the Company.

21. If the Company were wound up, Cachet SPC would not be able to recover all of the monies owed under the Uni-Pro loan.

22. However, the Cachet Group believes that the Company's new management (which includes Mr Bill Chan, its executive director) will be able to salvage the Sun Cheong Group provided that JPLs are given an opportunity to work alongside them. As such, on 12 June 2020, the Cachet Group provided immediate bridging finance to the Company in the sum of HK$10,000,000 in order to enable the Company to investigate and, if appropriate, implement a restructuring of the Company.

23. On 26 June 2020, Cachet Group appointed FTI Consulting (Hong Kong) Limited as an independent financial advisor to advise Cachet Group in relation to the merits of a potential investment in the Company and its subsidiaries. Cachet Group instructed FTI to prepare a report for the benefit of both Cachet Group and the Bank Creditors. A copy of the Independent Financial Advisor Report (the "**FTI Report**") was provided on 14 July 2020.

24. The restructuring proposal in the FTI Report (the "**Proposed Restructuring**") provides for a capital and debt restructuring whereby Cachet Group will subscribe for shares in the Company in the amount of HK $75 million and the proceeds of the share subscription will be allocated as follows:

    a. HK $60 million for a creditors' settlement to be distributed by way of scheme

of arrangement;

b. HK $10 million for working capital; and

c. HK $5 million for payment of professional fees and expenses.

25. An important aspect of the Proposed Restructuring is that once the scheme of arrangement has become effective, it is intended that the Company will transfer to the scheme administrator all rights in any cause of action or claim against former management, auditors and advisors to a special purpose vehicle to be established by the scheme administrator. This means that the creditors have the prospect of receiving a pro rata distribution of the settlement amount of HK$60 million, plus any proceeds of the investigations and claims pursued by the scheme administrator. In contrast, in an official liquidation scenario, there is likely to be very little cash available for distribution to creditors at all and little to no funding to support investigations or pursuit of claims.

26. The Proposed Restructuring would also be closely supervised and scrutinised by this Court pursuant to the provisions governing schemes of arrangement under section 86 of the Companies Law.

Viability of Restructuring Proposal

27. This must be considered recognising that antithetically in an official liquidation there is, as is usually the case, only one option available to the liquidators: a forced sale of assets, potentially at distressed values. Accordingly, I was urged to accept that in the event that the Company is wound up:

a. The assets of the Sun Cheong Group (primarily plant and equipment) have very little re-sale value as they are unique to the Sun Cheong Group's business. The

Report estimates that their sale value is unlikely to exceed 10% of their book value and notes that they are, in any event, subject to a first ranking charge in favour of KM Plastic, which is the seller, so there are unlikely to be any proceeds of sale returned to the unsecured creditors.

b. Although the Company's "listing status" may have value of up to HK $150 million, recent transactions have demonstrated a decreasing trend in price that is further worsened by the COVID-19 environment. Further, in order to extract value from the Company's "listing status", one of the key determinants of the value to be derived is whether there is a white knight investor available to provide sufficient resources and capital in order for the Company to maintain its operations.

c. Other valuable contractual rights will be lost, including rights of use in relation to the Sun Cheong Group factories in the PRC.

d. Preferential payments will need to be made to the PRC Government in respect of taxes and to employees in respect of severance and other entitlements, which would rank ahead of any payments to the general body of creditors and potentially extinguish any funds available for distribution (but would not necessarily need to be paid in a restructuring scenario).

28. Additionally, the shareholders of the Company, 30% of whom are public investors, would receive nothing at all in an official liquidation.

29. Conversely, as explained in paragraphs 16 to 22 above, pursuing the Proposed Restructuring by way of scheme of arrangement under the supervision of the JPLs and

this Court provides creditors with a realistic prospect of a return of approximately 30% of their debt (the Proposed Restructuring contemplates distributing HK $60 million among creditors whose current liabilities as at 31 December 2020 amounted to HK $195.5 million). It is estimated that the restructuring could be completed in as little as 17 weeks, which is likely far quicker than an official liquidation would provide a return to creditors (if such a return was even available). It also provides for HK $10 million of working capital to be injected into the Company to get it back on its feet for the long term benefit of shareholders (and creditors, should any elect a debt for equity swap, for example) and leaves open the prospect of further returns to creditors if the scheme administrator makes any recoveries from claims against third parties.

30. While the Company has struggled in recent months, there are a number of business lines which management of the Company has identified as being potential sources of revenue, provided that the Company is provided with working capital and a pathway to discharge its liabilities, as contemplated by the Proposed Restructuring. In particular:

    a. The Company has been developing a master cook-shop business since 2018 which is an online platform for kitchen and household products. It was suspended in late 2019/early 2020 due to a change in management but the Company considers launching this platform now would benefit from the change in customer shopping preferences as a result of the COVID-19 pandemic.

    b. The Company is currently finalising the relevant agreement with customers for a medical equipment manufacturing business. This business line would also benefit from the recent COVID-19 pandemic which has increased demand for

medical equipment, substantial parts of which are made from plastic.

c. The Company's staple business of plastic manufacturing remains in demand with stable profit margins.

d. The Company has obtained distribution rights in Hong Kong for *Quantum PPF*, which is described as a famous brand of energy efficient coated glass for buildings and vehicles.

e. There is already a "white knight" investor lined up to provide the funding proposed under the Proposed Restructuring and confirmation from independent financial advisors (and the proposed JPLs) that the Proposed Restructuring is realistic and commercially viable.

31. Having regard to all the foregoing and in particular the circumstances which led to the Company's insolvency and its prospects for recovery, I regarded it as plain that the appointment of JPLs to facilitate a restructuring is in the best interests of the Company's stakeholders.

APPOINTMENT OF JOINT PROVISIONAL LIQUIDATORS

32. Section 104(3) of the Companies Law provides that the Court may appoint joint provisional liquidators after the presentation of a winding up petition[4] on the application of the Company where a two-limbed test is satisfied:

a. The Company is or is likely to become insolvent; and

[4] The Company is authorised by article 162(2) of its Amended and Restated Articles of Association to present a petition for the Company to be wound up: Mr Chan's 1st Affirmation, page 55. See also Section 94(2) of the Companies Law and ***China Shanshui Cement Group*** [2015] (2) CILR 255 which establishes and explains that a company may resolve to present a petition for winding up only if authorised by its articles.

b. The Company intends to present a compromise or arrangement to its creditors.

33. The Court's power to adjourn a winding up petition in order to facilitate such a restructuring is derived from section 95(3) of the Companies Law which enables the Court upon hearing the winding up petition to adjourn the hearing conditionally or unconditionally.

Discretionary Power

34. Given the pendency of the HK Petitions, it became of crucial importance that by virtue of section 97 of the Companies Law, when a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings shall be proceeded with or commenced against a company except with the leave of the Court and subject to such terms as the Court may impose.

35. Under sections 104(3) and 95(3) of the Companies Law, the Court has a broad and flexible discretion. The breadth and flexibility of this discretion was first described by this Court in ***In the Matter of the Fruit of the Loom*** (Unreported, 26 September 2000but noted at 2000 CILR Note 7) ("***Fruit of the Loom***"). The breadth of the Court's discretionary power under section 104(3) to facilitate the rescue of a company was described as follows:

> *"The discretionary power vested in the Court by section 99 [as it then was] of the Companies Law is* ***very wide****. As the orders already made herein recognise, the power admits of a discretion which the Court will be prepared to use to appoint provisional liquidators as the basis for the rescue of a company. This is subject to the Court being satisfied that such appointment would be for the benefit of those having the financial interest in the company to be rescued This Court must be satisfied that the order would be for the general benefit of creditors and subject to creditors' prior interests, the benefit of shareholders.*

> *In the absence of jurisdiction given by specific statutory powers in the Courts for the making of administration orders over the affairs of companies, it is apt that the* ***flexible discretionary power*** *given in section 99 for the appointment of provisional liquidators be used to enable the rescue of a company where it is just to do so in the sense described above*" (emphasis added).

36. This discretion was affirmed more recently by Parker J in ***CW Group Holdings Limited*** (unreported, 3 August 2018) at [36] ("***CW Group Holdings***") and by Kawaley J in ***ACL Asean Towers Holdco Limited*** (Unreported, 8 March 2019) ("***ACL Asean***") at [11].

37. As to how the Court's broad discretion is to be exercised, there is no prescriptive list of factors to be taken into consideration. However, matters to which the Court may have regard include:

    a. The express wishes of creditors (though the Court should be cautious not to "*count up the claims of supporting and opposing creditors*" per Segal J in ***Grand T G Gold Holdings Limited*** (Unreported 21 August 2016) ("***Grand T G Gold***") at [6(f)iv)]);

    b. Whether the refinancing is likely to be more beneficial than a winding up order; (***Fruit of the Loom*** at p 9-10)

    c. That there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of the creditors; (***Re Fruit of the Loom*** (*ibid*));and

    d. The considered views of the board as to the best way forward. (***CW Group Holdings*** at [72].

38. In this case, while the Petitioner and the Company are one and the same and the application for the appointment of JPLs is being made *ex parte,* the effect of the Court's order will be to stay the HK Petitions (by virtue of section 97 of the Companies Law), thereby necessitating an adjournment of those proceedings for the period of the provisional liquidation. In those circumstances, in deference to the Hong Kong Court's expectation of comity and to the principles of modified universalism which seek to maximise enterprise value for the sake of all stakeholders[5], I regarded it as important that this Court considered the general principles outlined above on which it will exercise its discretion to adjourn a winding up petition of an admittedly insolvent company.

39. I recognised that three creditors in particular, CTBC, Orix and American Express Travel Related Services Company, Inc. ("**AMEX**") are likely to oppose any order in the Cayman Islands which would have the effect of requiring an adjournment of the HK Petitions (CTBC and Orix being the petitioners themselves and AMEX having previously expressed opposition to an adjournment of one of the HK Petitions).[6] However, according to Mr Bill Chan in his First Affirmation:

    a. No other creditors have expressed support for the immediate winding up orders sought by the HK Petitions;

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[5] Defined by Lord Hoffman ***In Re HIH Casualty and General Insurance*** [2008] 1 WLR 852 at [30] as requiring that the *"[local] courts should, so far as consistent with justice and [local] public policy, co-operate with the courts in the country of the principal liquidation to ensure that all of the company's assets are distributed to its creditors under a single system of distribution*". The principle was reaffirmed by Lord Sumpton on behalf of the Privy Council in ***Singularis*** [2014] UK PC 36 at [23]. "…The principle of modified universalism is a principle of the common law. It is founded on the public interest of the courts exercising insolvency jurisdiction in the case of the company's incorporation to conduct an orderless winding up of its affairs on a world-wide basis, notwithstanding the territorial limits of their jurisdiction…" And all as discussed by Segal J in ***Re China Agrotech***.

[6] See the letter from K & L Gates on behalf of AMEX to the Company on 14 July 2020, indicating that it is unwilling to accept any proposal which does not provide a full repayment of its debt: Mr Bill Chan's Second Affirmation, page 386.

b. Letters of support for the Company's application for the appointment of JPLs have been provided by two creditors, as well as the Receiver appointed by Cachet SPC and Cachet Group itself (in its capacity as creditor of the Company and prospective "white knight" investor); and

c. A number of Bank Creditors actively engaged with FTI in relation to the Restructuring Proposal, in the course of a creditor meeting held on 22 July 2020. Based on the feedback provided, a revised timeline was put to Bank Creditors following the meeting to which no one had objected as at the date of Mr Bill Chan's First Affirmation.

40. That being the wider context, I accepted that the Court should be cautious not to abrogate the rights of the majority of the Company's creditors who may be better served by exploring a restructuring than an immediate winding up order.

41. As explained above, there is also independent evidence before the Court that the refinancing is likely to be more beneficial than a winding up order and that there is a real prospect of such a refinancing being effected. There is no better evidence of this than the willingness of Cachet Group, an experienced distressed debt investor, to invest HK $75 million in the Proposed Restructuring.

42. Finally, the resolution of the Board to seek the appointment of the JPLs confirms that it is the considered view of the Board that a restructuring is in the best interests of the Sun Cheong Group.

43. For all of the reasons set out above, I was satisfied that the broad discretion under section 104(3) should be exercised in favour of the relief sought by the Company.

The Company is or is likely to become insolvent

44. But what of the strict requirements of the two-limbed test of section 104(3) itself as set out above at [32]? The Company has acknowledged in its evidence (per Mr Bill Chan) that it is cash flow insolvent. The meaning and purpose of this first-limb of the test "is or is likely to become insolvent", are therefore satisfied. As was recently reaffirmed by this Court, it would be unjust to a company's creditors to impose on them the regime of a "soft touch" provisional liquidation, if the company is able to pay its debts as they fall due but only for the purpose of allowing the company to improve and perhaps expand its business. See ***In Re OneTradex Ltd (in provisional liquidation)*** FSD 166 of 2019 (ASCJ) written judgment delivered 1 October 2020 (Unreported) at [7] applying dictum of Vinelott J from ***In Re Primarkes*** [1989] BCLC 734.

45. In circumstances where a creditor has submitted a winding up petition in respect of an undisputed debt (as two creditors have in the HK Petitions), the primary approach of the Court will be that the creditor is entitled to a winding up order *ex debito justiciae* (as of right), unless special reasons can be shown that the relief should not be granted. This principle was explained by Park J in ***Re Lummus Agricultural Services Ltd*** [2001] 1 BCLC 137 at 141(g-h):

> *"I begin with the basic proposition that, although both s122 (which uses the word 'may') and s 123 give the Court a discretion 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 are 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 justiciae'. 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".

46. However, it is now broadly accepted in the Cayman Islands that an intention on the part of the Company to present a compromise or arrangement under section 104(3) can be sufficient justification to depart from this principle. In particular:

a. In ***ACL Asean***, Kawaley J observed (at [26] that "*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.*"

b. In ***Grand TG Gold***, Segal J accepted that the Company was insolvent but nevertheless concluded (at [6(f)]) that "*While I accept the seriousness of and take fully into account these concerns, I consider that on balance the most appropriate course, having regard to the interest of all the Company's creditors as a whole and all the circumstances, is to adjourn the petition for a suitable period that is long enough to allow the Company to make and demonstrate substantial progress in advancing the Resumption Proposal but short enough to permit a further review of the position by the Court to ensure that the position of creditors is being protected and to review whether a winding up order should be made.*"

c. In ***CW Group Holdings***, Parker J accepted that the Company was insolvent but concluded (at [76 to 77] that "*To allow the company to continue as a going*

concern and to give the board and its advisers the best possible opportunity to secure a favourable restructuring is in my view in the best interests of the body of general creditors as a whole. By contrast the winding up of the company and the commencement of official liquidation is likely to have an adverse impact on the business: on contractual and other relationships; future trading prospects; market reputation and position, and regulatory relationships, all of which would adversely affect the value of the Company."

d. In ***Re Abraaj Holdings*** (Unreported, 4 January 2019), McMillan J pointed to the fact that the creditor opposing an adjournment "*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*"

The rights of the HK Petitioners are of course to be determined by the Hong Kong Court in accordance with Hong Kong law in relation to the HK Petitions. However, the foregoing principles reflect how their rights would be viewed had they petitioned in the Cayman Islands. And so, notwithstanding the HK Petitioners' rights to a winding up order *ex debito justiciae*, I was satisfied that compelling reasons have been demonstrated for this Court to exercise its discretion to make an order in these proceedings which would have the effect of adjourning the HK Petitions in this instance.

Intention to present a compromise or arrangement

47. As to this, the second limb of the section 104(3) test, the Company has made clear its intention to present a compromise or arrangement, which is sufficient to satisfy this second limb. Importantly, in that respect, the language of section 104(3) does not impose a requirement on the Company to already have a pre-formulated restructuring plan. Nor does it require the Company to provide evidence of the viability of its restructuring plan.

48. The requirements of this limb of the test were considered by Parker J in ***CW Group Holdings*** where he specifically considered the language that the Company "*intends*" to present a compromise or arrangement to its creditors. Parker J accepted (at [70] that "*it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the Company.*" The rationale for this approach was described by him as follows in terms which must now be regarded as settled principle in Cayman Islands law (at [36]:

> "*The rationale for that language is to give effect to the practice which has developed of appointing provisional liquidators to provide companies with some 'breathing space' before the actions of creditors, acting in their own interests, might interfere with attempts to reach a consensual restructuring or if that should prove not to be possible, a scheme of arrangement – see* ***Esal (Commodities) Ltd*** *[1985] BCLC 450 at page 460 Harman J.*"

49. Where the Court is in any doubt as to the viability of such a restructuring plan, it is also well accepted that it can appoint JPLs for the purpose of preparing a report on the prospects of success of a restructuring plan.[7]

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[7] ***ACL Asean*** and ***Grand TG Gold*** (both above); and ***Enka Insaat Ve Sanayi AS, Capital City Investment BV v Mass Energy Group***

50. In this case, where there is no reason to doubt the viability of the proposed restructuring, the principles are a fortiori applicable in favour of the Company's application. Here the Company comes to the Court with a detailed restructuring plan, a "white knight" investor in place, and confirmation from independent financial advisors that the proposed restructuring is both viable and in the best interests of creditors. While the terms of the Proposed Restructuring remain to be agreed with creditors, this will take place within the framework of a scheme of arrangement to be promoted under section 86 of the Companies Law.

51. Accordingly, I accepted that both limbs of the test under section 104(3) have been satisfied and that it is appropriate in all the circumstances that the Court exercises its broad discretion to adjourn the Petition (which would also have the effect of prompting the adjournment of the HK Petitions) and appoint the JPLs to facilitate the restructuring of the Company for the benefit of all stakeholders, by way of scheme of arrangement under section 86 of the Companies Law, or otherwise. Having regard to the pendency of the HK Petitions, the appointment of the JPLs was granted on the urgent basis and I turn below to expand upon the reasoning in that regard.

URGENCY AND COMITY

52. I should express more fully, my thinking for the taking of this application on the ex parte basis. It became critical that the JPLs were appointed to the Company before Monday 3 August 2020, being the date on which it was likely that a winding up order may be made

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Holdings Ltd and others, (FSD 188 of 2020 (ASCJ). (Unreported 4 May 2020).

in the Hong Kong Court in respect of the Company on the CTBC Petition, the effect of which would be to limit the options available to the Company in pursuing its intended plan of reorganisation. If such an order were to be made by the Hong Kong Court, it was likely to become more difficult to promote a scheme of arrangement under section 86 of the Companies Law (and/or a parallel scheme of arrangement in Hong Kong) as, among other things:

a. Any provisional liquidators appointed in the Cayman Islands may have difficulty obtaining recognition in Hong Kong in circumstances where other insolvency practitioners will have been appointed there as official liquidators; and

b. There was likely to be significant duplication of efforts and costs between the Hong Kong official liquidators and the Cayman JPLs.

53. As already discussed, the Company submitted and I accepted that any insolvency proceedings, including any restructuring or scheme of arrangement, should be supervised by the Grand Court of the Cayman Islands as the court of the place of incorporation of the Company. This was in light also of the circumstances where the Cayman Islands is an advanced and reputable international financial centre which frequently deals with international disputes involving Cayman Islands companies[8] and shareholders in and creditors of a Cayman Islands company may have a "*reasonable*

[8] ***Daiwa Capital Markets Europe Limited v Mr Maan Abdul Wahed Al Sanea*** (Unreported, 19 August 2019)

expectation that the courts here are competent and able to resolve any complex dispute that may arise in an efficient and just manner."[9]

54. I also had in mind that the common law jurisdiction to recognise and assist foreign insolvency officeholders appointed in the country of incorporation of a company is well established in Hong Kong. As explained by Mr Jacky Cheung: "*There is an established line of case authority that the HK Court will provide recognition and assistance to offshore joint provisional liquidators in aid of offshore court proceedings*" and there are numerous examples of the Hong Kong Court recognising Cayman appointed restructuring provisional liquidators in Hong Kong (and adjourning petitions in Hong Kong to facilitate this); see for instance: ***China Oil Gangran Energy Group Holdings Limited (in Provisional Liquidation)*** [2020] HKCFI 825 and ***Moody Technology Holdings Limited (in Provisional Liquidation)*** [2020] 4 HKC 78.

55. On the other hand, while the Grand Court will also grant reciprocal recognition and assistance of foreign insolvency officeholders appointed in the country of incorporation, the jurisdiction of the Grand Court to recognise and grant assistance to liquidators of Cayman Islands incorporated companies appointed by the courts of another country is more limited. In the instances where the Grand Court has recognised insolvency practitioners appointed to Cayman Islands companies by foreign courts, the Court has identified the following relevant considerations having regard to one or other of the categories of circumstances identified at [7] above:

[9] Per Smellie CJ in ***KTH Capital Management Limited v China One Financial Limited & Others*** [2004-5] CILR 213 **[AB/18]**.

a. Whether parallel proceedings will only serve to incur additional costs and unnecessary delay. In ***Re China Agrotech*** above the Court recognised Hong Kong liquidators of a Cayman Islands company as having authority to act on behalf of the company for the purpose of presenting a petition for a scheme of arrangement in the Cayman Islands as part of a corporate restructuring, which involved a parallel scheme in Hong Kong.

b. Whether reputational, regulatory or policy reasons militate in favour of a Cayman Islands proceeding (***China Agrotech***).

c. The breadth of powers available in each jurisdiction. It is worth nothing that "soft touch" provisional liquidation is not available under Hong Kong Law.[10] In ***Changgang Dunxin Enterprise Company Limited*** (Unreported, 1 March 2018) , Mangatal J recognised the appointment of JPLs over a Cayman Islands company by the Courts of Hong Kong for the purpose of applying on behalf of the company for the same individuals to then be appointed as JPLs of the company in the Cayman Islands. It was proposed that the JPLs would then seek recognition of their appointment in Hong Kong and, if recognised, that they would be discharged as JPLs in Hong Kong and would conduct parallel restructuring proceedings in the Cayman Islands and Hong Kong in their capacity as Cayman Islands JPLs of the company. A relevant factor in seeking the application was the broader powers to effect a corporate restructure

[10] Cheung 1st Affirmation, paragraph 29 and ***Re Legend International Resorts Ltd*** [2006] 3 HKC 565

available to JPLs in the Cayman Islands. Mangatal J held that it was appropriate to grant the Hong Kong JPLs recognition for the purpose of making an application to the Grand Court for the winding up of the Company and to seek the Hong Kong JPLs' appointment as JPLs of the company in the Cayman Islands.

d. Whether comparable relief has been sought in the foreign jurisdiction. In the Bermudian decision of ***In re Dickson Group Holdings Ltd*** 2008 BDA LR 34 ("***Re Dickson***"), Kawaley J (as he then was) approved the entry by the Company into a scheme of arrangement sanctioned by the Courts of Hong Kong (impliedly recognising the Hong Kong appointees), pursuant to which its creditors would receive part-payment of the debts owed to them, and the Company could then be returned to trading in the hands of new investors.

e. Whether the foreign petitioner is seeking to wind up the Company or avoid the need for a winding up; see ***Re Dickson***.

f. The locus of the Company's business.

56. Thus, it appears from the cases that the Grand Court has considered the purpose of the appointment on each occasion that it has been asked to recognise insolvency practitioners appointed to a Cayman Islands domiciled company by a foreign court. Where the purpose has been to facilitate a restructuring or otherwise avoid the need to wind up the company, the cases show that the Court will be more willing to grant recognition as being in the best interests of the company's stakeholders. Conversely, the Grand Court will be slow to give primacy to pure winding-up proceedings brought overseas in respect of a

Cayman Islands company where it is satisfied that there is an intention on the part of the company to present a plan of reorganisation for the benefit of its creditors.

57. In this case, both HK Petitions seek orders that the Company be wound up. The Company successfully argued that if such an order were made in Hong Kong, there would be important public policy grounds on which the Grand Court should be disinclined to recognise such an appointment, particularly where the Company itself and a number of creditors wish to explore the possibility of pursuing a restructuring by way of a Cayman Islands scheme of arrangement.[11]

58. Moreover, while the Company is listed on the HKSE, is registered as a foreign company in Hong Kong and has submitted to the jurisdiction of the Hong Kong courts, 87.5% of the Company's business is outside of Hong Kong. Accordingly, it was accepted that any insolvency proceedings should be commenced in and supervised by the Grand Court of the Cayman Islands.

59. As the purpose of appointing the JPLs in the Cayman Islands is to enable them to effect a restructuring scheme, it is appropriate that an application to give effect to the scheme would be made pursuant to section 86 of the Companies Law. Enabling this Court to supervise both the winding-up proceedings in respect of the Company as well as the planned Scheme of Arrangement is likely to avoid unnecessary duplication of costs and delays in resolving the Company's situation.

[11] See letters of support from Mr Kit Wong, Mr Benjamin Lau, Mr Alan Cheung and Cachet Group: Mr Bill Chan's 1st Affirmation, pages 398 to 402.

A FULL AND FRANK DISCLOSURE

60. On an *ex parte* application such as this, the applicant has a duty of full and frank disclosure, which requires the applicant to identify all defences that may be available to the respondent(s). I therefore note that the Company raised the following five issues (A-E) for my consideration.

A. Reliability of Financial Information

61. While FTI undertook extensive analysis of the Sun Cheong Group's cash flows and financial records, procured valuations of its assets and met with management to understand the Group's structure and business operations, they were not able to undertake an analysis of certain aspects of the Group's finances, such as its trade receivables and payables, due to the Company's lack of access to certain financial records. As such, their findings as to assets and liabilities may need to be revised when this information becomes available.

B. Departure of Mr Eddie Tong and Investigations of Previous Board

62. There have been significant changes to the Board over the last 6 months which may give rise to concerns on the part of creditors or shareholders as to the viability of any restructuring. In particular as Mr Jacky Cheung and Mr Bill Chan explain:

a. The sudden departure of Mr Eddie Tong and his wife as executive directors in December 2019 and shortly thereafter the resignations of Mr Ivan Chan, Mr Wei Un and Ms Jiselle Chan as executive directors in June 2020;

b. The resignation of five non-executive directors between August 2019 and 10

June 2020; and

c. The identification by former executive directors of transactions between the Company and Chase On which may require investigation by the liquidators of Chase On.

63. However, the Company's position is that these changes in fact reflect the Company's focus on taking the necessary steps to address the serious challenges faced by the Company. I was urged to accept that the Company's new management is actively working on a debt restructuring plan in the interests of all creditors. Further, that the timeline of the steps taken since Cachet Group's decision to act as white knight, as outlined in the Company's letter to the Court sent prior to the hearing on 24 June 2020, reinforces the new Board's commitment to advancing the interests of creditors and shareholders.

C. HK Petitions

64. The HK Petitions have been on foot for over 6 months and Mr Justice Harris of the Hong Kong Court expressed the view at the hearing of the CTBC Petition that the Court would not be willing to adjourn the CTBC Petition again when it came back before him on 3 August 2020 in the absence of a concrete settlement agreement between CTBC and the Company. No such settlement has been reached.

65. In those circumstances, CTBC (and AMEX, who also supported the making of a winding up order) may argue that the Company has had sufficient time to consider, present and negotiate restructuring terms. However, given the demonstrated efforts of the Company to progress the Restructuring Proposal as quickly as possible once a "white

knight" was identified and having regard to the potentially significant benefits to creditors and other stakeholders of a restructuring over an immediate winding up order, in my view the balance of convenience lies in favour of urging further adjournment of the Hong Kong Petitions.

D. Listing Status

66. While the "listing status" of a Company registered on the HKSE has historically been worth up to HK $150 million (see paragraph 27(b) above), there has been a decreasing trend in price in more recent transactions (which has been worsened by the COVID-19 pandemic) and it remains difficult to extract value from the listing status due to the tightening of rules. The evidence reveals that the sale process can also be time consuming and expensive. As such, the potential sale of the listing is by no means a guaranteed source of revenue for the Company in a provisional liquidation scenario.

67. Having said that, in the event that a winding up order is made, it would be much more difficult to sell the listing for the reasons explained at paragraph 27(b) above.

E. Independence of Proposed JPLs

68. In the course of preparing the FTI Report, members of the firm met and worked with management of the Company and as such, some creditors may be concerned about the independence of the nominated JPLs. However, the test for independence of an insolvency practitioner in the Cayman Islands as set out in section 6(2) of the Insolvency Practitioner Regulations is whether the insolvency practitioner or his firm has acted in relation to the company as its auditor within 3 years of the appointment. The test is an objective one which was set out in ***Hadar Fund Ltd*** [2013] (2) CILR Note 4 and cited

more recently by me ***In the Matter of Alpha Re Limited (in Voluntary Liquidation)*** (Unreported , 23 February 2018) at [74] as follows:

> "*The independence of insolvency practitioners from any particular company, as required by the Insolvency Practitioners' Regulations 2008, reg. 6(1) depends upon the existence (or non-existence) of professional or economic relations with that company which, in the opinion of the court, precludes the appearance of complete impartiality. It is not sufficient that the practitioners be honest and capable. When determining whether a particular professional or economic relationship leads to a conclusion about whether an insolvency practitioner can be properly regarded as independent, the court must identify the relationship and determine whether it is capable of impairing the appearance of independence and, if so, whether it is sufficiently material to the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominated practitioner in question*" (emphasis added).

69. In this instance, FTI was engaged to prepare the FTI Report by the Cachet Group and not the Company and purported to do so for the benefit for the Cachet Group and the Bank Creditors, not the Company. As such, the Company submitted that there is no basis on which the relationship between FTI and the Company is capable of impairing the appearance of independence.

70. Moreover, similar objections were raised in relation to a nominee in ***CW Group Holdings*** at [67] where Parker J observed that "*it makes sense to appoint as a provisional liquidator a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy*" and emphasised that "[o]*nce appointed, the joint provisional liquidators would act as officers of the court and in the best interests of all of the company's creditors and stakeholders, irrespective*

of who sought the appointment. I have no doubt that those proposed by the Company would do so in this case". I accepted that those same principles would also apply here.

71. FTI have separately been appointed as joint official liquidators ("**JOLs**") of the Company's wholly-owned subsidiary Chase On in Hong Kong. The Company does not consider that FTI's appointment as JOLs of Chase On constitutes a relationship with the Company so as to impair the appearance of independence such that a fair minded stake holder would reasonably object to their appointment as JPLs. Rather, the Company submitted and I accepted that, in the attendant circumstances, this is a further reason that FTI should be appointed as the JPLs. As Parker J held in ***CW Group Holdings Limited*** at [67] : "*It makes sense to use entities from the same group to allow for better coordination and communication between* [in that case] *Singapore and Hong Kong which is likely to be of value to the company as they further engage with creditors to seek to propose and implement a restructuring.*"

72. I accepted that, to the extent that any conflict may arise in the future, if for example the Company identifies potential claims against Chase On, this can be dealt with at the appropriate time (by appointment of a conflict liquidator or otherwise).

Hon Anthony Smellie
Chief Justice

20 October 2020