HCMP 367/2020
[2020] HKCFI 825

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 367 OF 2020

IN THE MATTER of China Oil Gangran Energy Group Holdings Limited (In Provisional Liquidation in the Cayman Islands)

and

IN THE MATTER of the inherent jurisdiction of the Court

BY

THE JOINT AND SEVERAL PROVISIONAL LIQUIDATORS OF CHINA OIL GANGRAN ENERGY GROUP HOLDINGS LIMITED (IN PROVISIONAL LIQUIDATION IN THE CAYMAN ISLANDS) — Applicants

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Before: Hon Harris J in Chambers

Date of written submission by the Applicants: 17 April 2020

Date of Decision: 5 May 2020

Date of Reasons for Decision: 21 May 2020

R E A S O N S F O R D E C I S I O N

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1. China Oil Gangran Energy Group Holdings Limited is incorporated in the Cayman Islands. It is listed on the Growth Enterprise Market of the Hong Kong Stock Exchange. On 22 October 2019 a petition was presented by the Company in the Financial Services Division of the Grand Court of the Cayman Islands ("**Cayman court**"). On the same day the Company issued a summons in the Cayman court for the appointment of provisional liquidators to conduct a soft-touch provisional liquidation with a view to pursuing a debt restructuring. On 5 November 2019 Yen Ching Wai David and So Kit Yee Anita of Ernst & Young Transactions Limited, Hong Kong, and Keiran William Hutchison of Ernst & Young Ltd, in the Cayman Islands, were appointed as soft-touch provisional liquidators by the Cayman court. The Cayman provisional liquidators have obtained a letter of request dated 28 November 2019 from Mr Justice Parker of the Cayman court seeking recognition of their appointment in Hong Kong and providing assistance to them to facilitate the provisional liquidators progressing a restructuring, which will involve the provisional liquidators liaising with the Hong Kong Stock Exchange.

2. One creditor of the Company, A. Plus Financial Press Limited ("**Petitioner**") has presented a winding-up petition in Hong Kong against the Company. The court has adjourned the hearing of the Petition to 24 August 2020 in order to facilitate the Company's on-going restructuring efforts. The Petitioner is aware of the provisional liquidators' intention to make this application and has no objection to it.

3. The court has previously made similar orders. The general principles which apply to applications for recognition have most recently been considered by me in *Re CEFC Shanghai International Group Ltd* [1].

[1] [2020] 1 HKLRD 676.

Providing assistance in the form of an order recognising foreign provisional liquidators' right to pursue a restructuring is discussed and approved in *Re Z-Obee Holdings Ltd* [2] and *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [3]. There is a recent and extensive discussion of the justification for providing such assistance given the limitations that exist to similar powers being granted to provisional liquidators appointed by the Hong Kong court (as a consequence of the Court of Appeal's 2006 decision in *Re Legend International Resorts Ltd* [4]), in the decision of DHCJ William Wong SC in *Re Joint Provisional Liquidators of Moody Technology Holdings Ltd* [5]. It is not necessary to repeat what is explained in these two decisions. However, Mr Ho has helpfully brought to my attention recent decisions from other jurisdictions, which are consistent with the Hong Kong court's approach.

4. The first is *Re Olinda Star Ltd* [6] in which the US Bankruptcy Court recognised a British Virgin Islands ("**BVI**") soft-touch provisional liquidation as a foreign main proceeding under *Chapter 15* of the *US Bankruptcy Code* ("**Code**"). Olinda is incorporated in the BVI. The BVI has a similar insolvency regime to that of Hong Kong. It has an equivalent provision to *s193* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32 ("**Ordinance**"). However, the BVI courts interpret their equivalent provision as permitting the appointment of provisional liquidators for the purposes of restructuring a company's debt and avoiding a liquidation. Section 1501 of the *Code* explains the purpose of *Chapter 15*, namely, to incorporate the *Model Law*

2 [2018] 1 HKLRD 165.
3 [2019] HKCFI 805.
4 [2006] 2 HKLRD 192. The extent of the restriction on provisional liquidators being empowered to formulate and implement a restructuring is considered in detail in *Re China Solar Energy Holdings Ltd (No 2)* [2018] 2 HKLRD 338.
5 [2020] HKCFI 416.
6 Bankr. SDNY, 3 April 2020, Judge Glenn.

on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency. As I understand it, recognition of foreign proceedings or office holders pursuant to *Chapter 15* necessarily means that US Bankruptcy Court treats the foreign proceedings as constituting insolvency proceedings. For present purposes, the relevant passages of Judge Glenn's judgment are as follows [7]:

> "Olinda has engaged in a 'soft-touch' provisional liquidation, with a view to implementing the successful reorganization of Olinda… In a 'soft-touch' BVI provisional liquidation the directors typically retain day-to-day control of the company, but the provisional liquidators are kept apprised of the actions taken by directors in the ordinary course of business… However, corporate authority to pursue a course of action that is outside the ordinary course of business (such as proposing entry into a scheme of arrangement to creditors) rests with the provisional liquidators...
>
> The core powers conferred on the JPLs by the BVI Court are to oversee the exercise of power of the sole director outside the ordinary course of business, and ultimately implement the restructuring… More specifically, the JPLs have the authority to do all acts and execute, in the name of and on behalf of Olinda, all deeds, receipts and other documents, and for those purposes, use the company seal of Olinda when necessary…
>
> [T]he Court finds that the Foreign Representative satisfies each of the requirements of section 1517(a) and grants recognition to the BVI Proceeding as a foreign main proceeding."

5. The *Olinda* decision thus stands for the proposition that, assessed by reference to relevant US legal principles, soft-touch provisional liquidation is an insolvency proceeding.

6. The second authority is *Representation of Lydian International Limited* [8] in which the Royal Court of Jersey recognised at common law Canadian debtor-in-possession proceedings coupled with the

7 Page 7 of the judgment.
8 [2020] JRC 049 (17 March 2020).

appointment of a monitor in respect of a Jersey-incorporated company, even though Jersey law does not have the same insolvency procedure. Such Canadian proceeding is analogous to the Cayman soft-touch provisional liquidation in the present case. For present purposes, the relevant passages of the Jersey judgment are as follows:

> "The [Companies' Creditors Arrangement Act ('**CCAA**')] is a Canadian federal statute allowing insolvent debtors to restructure their business and financial affairs. In particular, it allows a company to continue its business whilst it seeks to make arrangements with its creditors. This includes 'debtor in possession' insolvency proceedings whereby the debtor … remains in possession of their property and are able to carry on their business until conclusion of the proceedings. The proceedings are carried out under the supervision of the court with the assistance of an independent insolvency practitioner known as the 'Monitor'…
>
> The Ontario Court requests the assistance of the Royal Court to act in aid of the applicants and the Monitor in the conduct of the reorganisation of the applicants and in particular, in summary, by recognising the appointment of the Monitor; by recognising the rights and powers of the applicants and the Monitor in respect of the property of Lydian International; by declaring that no action shall be taken or proceeded with against Lydian International except by leave of the Ontario Court and by granting such further or other relief as the Royal Court shall think fit in aid of the applicants and the Monitor in the reorganisation of Lydian International…
>
> It is true that the relief available under the CCAA including, for example, the appointment of the Monitor and certain other orders made by the Canadian Court, are not features of Jersey law…
>
> Although there is no precedent in Jersey for a Canadian CCAA order or similar order being enforced or recognised in relation to a Jersey company, we had no doubt that we should assist the Canadian Court in this case. There were no reasons of Jersey public policy impeding the court making the orders sought. To the contrary, it is consistent with Jersey's status as a responsible jurisdiction for the Royal Court to lend assistance in order to facilitate an international insolvency process in a friendly country that has a potential to benefit the creditors of the Lydian Group as a whole.
>
> Further, whilst of course this court retains a discretion as whether or not to assist an overseas court and as to the nature

> and degree of assistance, the fact remains that it is the Ontario Court which is exercising the principal insolvency jurisdiction in this case, and this court should have regard to the decisions of that court particularly where, as in this case, we have been supplied with a substantial body of material explaining the background to this matter, together with a reasoned judgment of the Ontario Court, following a hearing to which the creditors were convened and certain of the creditors represented by counsel."[9]

7. The *Lydian* decision holds, **first**, that the common law recognition of foreign insolvency proceedings extends to proceedings opened in places other than the country of incorporation. **Secondly**, it holds that the common law recognition regime extends to foreign proceedings, which involve insolvency and a mechanism, which addresses an issue, which arises in insolvency, even if there is no local equivalent mechanism in the jurisdiction of the recognising court.

8. The first holding is not relevant to the present application. The second proposition, however, directly confirms the soundness of recognising foreign soft-touch provisional liquidation in Hong Kong even though such use of provisional liquidation in Hong Kong is restricted as a consequence of the *Legend* decision [10].

9. As is well known, other than schemes of arrangement Hong Kong has no legislation that provides for corporate debt restructuring or rehabilitation. This unsatisfactory state of affairs has been the subject of much invariably adverse comment for two decades now. It is brought into unforgiving focus by the economic problems that Covid-19 is causing. It makes it all the more important that the courts of Hong Kong and the Special Administrative Region's practitioners rise to the challenges we

[9] [6], [13], [22], [33]–[34].
[10] Footnote 4.

now face to find, within the flexibility of the common law, mechanisms to address the financial problems companies face. It is fortunate that great strides have been made in this regard in recent years as illustrated by the authorities referred to earlier in this decision. That having been said it is clearly desirable that some steps are taken immediately to improve the legislative position. Immediate (by which I mean the kind of alacrity shown in other major financial centres around the World in the last couple of months) amendment to *section 193* of the *Ordinance* to provide expressly for provisional liquidators to be given restructuring powers is desirable.

10. The Companies Court has developed a standard practice on applications for recognition orders and such applications may be granted on a written application:

> "The increasing number of applications for recognition and assistance in recent years has allowed a form of order to emerge that this Court will generally be prepared to grant on written application made pursuant to a letter of request. Such applications can be granted very quickly. I note for the benefit of practitioners that although such applications are very familiar to me, they will not necessarily be familiar to other judges who hear company matters, and applications should comply with Practice Direction 3.5 and be accompanied by a paginated and indexed hearing bundle to assist the court in processing them quickly."

(*Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* [11]).

11. To help facilitate the grant of recognition orders on the papers, the Companies Court has also provided a standard-form order to guide applicants, as set out in *Re Joint and Several Liquidators of Pacific Andes*

[11] (Unrep, HCMP 3560/2016, 27 January 2017) at [6].

Enterprises (BVI) Ltd [12]; *Re Joint Provisional Liquidators of Hsin Chong Group Holdings Ltd* [13]; *Re CEFC Shanghai International Group Limited* [14].

12. The current order departs from the standard form in that it provides powers that focus on restructuring rather than the more general powers to be found in the standard form. Given the reasons for recognising and assisting the provisional liquidators I see nothing objectionable in this. Paragraphs 2 of the order (which is appended to this decision) largely tracks paragraph 10 of the letter of request, which contains the powers that the Cayman court has sought to be recognised and assisted in Hong Kong. It is desirable, largely because it makes the applications more straightforward and thus quicker and cheaper, that letters of request are sought in terms that reflect orders, which the Hong Kong Court has indicated it will normally be prepared to grant. The appended order, which may be susceptible to improvement over time, in my view is appropriate if what is sought is recognition and assistance of a soft touch provisional liquidation. I, therefore, make an order in the terms appended to this decision.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Look Chan Ho, instructed by Michael Li & Co,
for the provisional liquidators

12 *Supra*.
13 *Supra*.
14 *Supra*.

Appendix

Order

1. The provisional liquidation of China Oil Gangran Energy Group Holdings Limited (in provisional liquidation in the Cayman Islands) ("**Company**") and the appointment of Mr Yen Ching Wai David and Ms So Kit Yee Anita of Ernst & Young Transactions Limited, 22nd Floor, CITIC Tower, 1 Tim Mei Avenue, Central, Hong Kong, and Mr Keiran William Hutchison of EY Cayman Ltd, 62 Forum Lane, Camana Bay, P.O. Box 510, Grand Cayman KY11106, Cayman Islands, as Joint Provisional Liquidators of the Company for restructuring purposes ("**JPLs**"), pursuant to the Order of the Grand Court of the Cayman Islands dated 5 November 2019, be recognised by this Court;

2. The JPLs have and may exercise in the Hong Kong Special Administrative Region the following powers:

   (a) to develop and propose a restructuring of the Company's indebtedness in a manner designed to allow the Company to continue as a going concern, with a view to making a compromise or arrangement with the Company's creditors, including (without limitation) a compromise or arrangement by way of a scheme of arrangement;

   (b) to monitor, oversee and supervise the board of directors of the Company ("**Board**") in its management of the Company with a view to developing and proposing any compromise or arrangement with the Company's creditors, and any corporate and/or capital reorganisation of the Company and its subsidiaries (including but not limited to any share subscription and placement of shares in the Company and its subsidiaries);

   (c) without prejudice to the generality of the foregoing, for the purpose of any proposal to be presented to The Stock Exchange of Hong Kong Limited ("**SEHK**") for the resumption of trading of the Company's shares and maintenance of the Company's listing on the Growth Enterprise Market of SEHK, and to satisfy any resumption conditions:

      (i) to investigate matters and report to the regulatory authorities where appropriate;

(ii) to liaise with the Company's auditors in relation to the provision of the 2019 Results and Annual Report; and

(iii) to undertake a review of internal control systems and/or review the internal control report and monitor the progress of the special investigation committee of the Company;

(d) to seek out investors and financiers for the purpose of investing in and/or providing finance to the Company;

(e) to terminate, complete or perfect any agreement or transaction relating to the business of the Company, including, without prejudice to the generality of this power, to novate or assign any such agreements or transactions, so far as may be necessary for the purpose of managing the affairs of the Company, protecting the assets of the Company and restructuring the Company's assets and affairs to enable the resumption of trading of the Company's shares and maintenance of the Company's listing on the Growth Enterprise Market of SEHK;

(f) to oversee the existing Board (and attend any Board meetings) so as to effect a maximisation of returns to the stakeholders of the Company;

(g) to deal with all questions in any way relating to or affecting the assets or the restructuring of the Company;

(h) to do all such things as may be necessary or expedient for the protection or recovery of the Company's property and assets at law or in equity within the jurisdiction of this Court as the JPLs may consider to be appropriate;

(i) with the consent of the Company, to supervise the operation and/or opening and/or closing of any bank accounts in the name of and on behalf of the Company;

(j) to operate and open any bank accounts on behalf of the Company for the purpose of paying costs and expenses of the provisional liquidation of the Company;

(k) to draw, accept, make and indorse any bill of exchange or promissory note or borrow funds for the purpose of the day to day expenses of the provisional liquidation, in the name and on behalf of the Company, with the same effect with the respect of the Company's liability as if the bill or note had been drawn, accepted, made or indorsed or the loan had been entered into by or on behalf of the Company in the course of its business;

(l) to communicate with and carry out any necessary filings with regulatory bodies as appropriate, including, without limitation, the SEHK and the Securities and Futures Commission in the name and on behalf of the Company;

(m) to make payments to creditors which may have the effect of preferring such creditors, in order to minimise the interruption to the day to day activities of the Company;

(n) to discharge debts incurred by the Company after the commencement of the provisional liquidation of the Company as expenses or disbursements properly incurred in the provisional liquidation;

(o) to engage staff to assist them in the performance of their duties for the purpose of the provisional liquidation and to remunerate them out of the assets of the Company as an expense of the provisional liquidation;

(p) to take such steps as the JPLs may consider appropriate in respect of the proceedings before this Court under proceeding number HCCW 120/2019;

(q) to appoint agents, attorneys and professional advisors as the JPLs may consider necessary to advise and assist them in the performance of their duties and to remunerate them for their reasonable fees and expenses out of the assets of the Company as any expense of the provisional liquidation;

(r) to authorise the Board to exercise such of the above powers relating to the Company on such terms and the JPLs consider fit; and

(s) to do all other things incidental to the exercise of the powers set out herein;

3. Anything that is authorised or required to be done by the JPLs is to be done by all or anyone or more of the persons appointed;

4. Without prejudice to the pending winding-up petition against the Company (HCCW 120/2019), for so long as the Company remains in provisional liquidation in the Cayman Islands, no action or proceeding shall be proceeded with or commenced against the Company or its assets or affairs, or its property within the jurisdiction of this Court, except with leave of this Court and subject to such terms as this Court may impose. Any such application for leave shall in the first instance be made in writing to the Companies Judge, or another Judge if the Companies Judge is unavailable;

5. The JPLs do have liberty to apply; and

6. The costs of this application be paid out of the assets of the Company as an expense of the provisional liquidation.