MAPLES GROUP

UPDATE

Cayman Islands Restructuring Officers: Key Guidance from the Court

The Cayman Islands restructuring officer regime (the "JRO Regime"), now in its third year, was intended to provide a stable platform for debtors to restructure their debts while at the same time robustly protecting creditors' interests. A concern that is occasionally expressed regarding the JRO Regime (and the restructuring provisional liquidation regime it replaced (the "RPL Regime")) is that it provides scope for debtors to frustrate proper engagement with creditors, in an effort to delay enforcement of legitimate rights.

This article looks at how the key Cayman Islands Grand Court (the "Court") decisions over the last two years have addressed that issue and the practical guidance they provide for both potential debtors and their creditors[1]. These decisions, looked at together, show that: (i) the legislative safeguards are operating as intended[2]; and (ii) the Court will likely wind-up the debtor where it is concerned that there is no genuine intention to promptly pursue a restructuring.

As the decisions have demonstrated, and as with any judicial discretion, the evidence presented to the Court will be key and the outcome will be fact sensitive. Nevertheless, the following important general guidance can be taken from them.

Entry Requirements and Evidence Required

In order to appoint restructuring officers ("JROs"), the Court must be satisfied that:

(i) the company is or is likely to become unable to pay its debts – this requires credible evidence from the debtor or better an independent source;
(ii) the debtor intends to present a restructuring proposal to creditors or any class of them – this requires evidence of a rational restructuring proposal which has a reasonable prospect of success; and
(iii) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company – ideally evidence of good creditor support will be provided.

Delay in Pursuing a Restructuring – Debtors Should Usually 'Get on with it'

[1] The decisions considered are (i) *Re Evergreen International Holdings Limited*, Unreported, 11 January 2022 (FSD 349 of 2021).("Evergreen"), *Re Silver Base Group Holdings Limited*, Unreported, 5 May 2022 (FSD 329 of 2021) ("Silver Base"), both decided under the RPL regime and (iii) *Re Oriente Group Limited*, Unreported, 8 December 2022 (231 of 2022) ("Oriente"), *Re Aubit International*, Unreported, 4 October 2023 (FSD 240 of 2023) ("Aubit"), both decided under the new restructuring officer regime. Helpfully, the Court has confirmed that previous authorities on the RPL regime are likely to be both relevant and persuasive for any JRO application.

[2] The Maples Group played a leading role in assisting with the framing of this legislation. The drafters of this legislation were alive to the perceived risks which may be associated with this (and any) restructuring regime (see further below for comments from the Court in this regard).

Debtors who have delayed pursuing a restructuring, and / or have shown a lack of cooperation with officers who have already been appointed, will likely get little sympathy from the Court. The Court will ordinarily expect the debtor to get on with engaging with its creditors in a meaningful way – if not, the debtor risks a winding-up order (as was the case in *Evergreen* and *Silver Base*).

In *Evergreen*, an undisputed debt had been outstanding for more than a year when the creditor presented a winding-up petition, which the company sought to adjourn. Despite having engaged a restructuring advisor several months previously, the company had yet to offer an outline of a credible restructuring plan to creditors with only vague proposals made relating to the sale of PRC real estate (see further below). *Silver Base* concerned a company to which RPLs had been appointed to assist in formulating a restructuring plan.

Approximately five months after the RPLs were first appointed, and three months after the Court had warned the company that progress must be made, the company sought a further adjournment. However, the company had, in the Court's view, failed to engage promptly or constructively with the RPLs, and the restructuring proposal had not been meaningfully progressed.

In each case, the Court was critical of the company's conduct, including the last-minute nature of the request for an adjournment, in circumstances where a considerable period had passed between the debts becoming due, and any substantive steps being taken to move a restructuring forward. The Court in *Evergreen* described the company's application as having "*all the hallmarks of a last minute application of which the court should be leery*…", while in *Silver Base* the Court observed "*Frankly it appears to me that the Company has been dragging its heels in the vain and disrespectful hope that it could bounce this court into granting a further adjournment*".

Debtors Must have a Plan – Even if Only an Outline

While there is typically no need for a detailed pre-formulated or finalised restructuring plan, in most cases debtors should provide tangible restructuring proposals.

A common factor in *Evergreen's* and *Aubit's* failed applications was that neither company had prepared even a credible broad outline of a proposed restructuring. In *Evergreen*, there was only a loose proposal to sell real estate assets and distribute the proceeds to creditors. There was no present proposal for a restructuring and, in any event, the assets appeared to be fully encumbered and there was no evidence supporting their stated value. In *Aubit*, the supposed 'restructuring plan' stated that the company would seek various forms of litigation funding and focus on recovery of assets through claims and there was no meaningful detail.

As the Court stated in *Aubit*, "*The Court does not have to be provided with the finished fully grown plant but the seeds must be sufficient to suggest that it is likely the plant will bear some fruit before too long*".

JRO Regime: A Tool to Facilitate Financial Restructuring

In *Aubit*, the company proposed a two-phase process, whereby JROs would first conduct a forensic investigation into certain matters and take action to recover the company's assets, including by way of legal proceedings if necessary. Only after the successful completion of this stage would the JROs then formulate and oversee a restructuring with the company's creditors.

The Court concluded that the two-phase approach would in most cases be unattractive

and was not appropriate on the facts. The appointment of JROs is to facilitate and finalise a financial restructuring. The JRO regime is not intended to provide a mechanism where the JRO's main role is to undertake a forensic investigation into the affairs of the company and recover assets (if needed through legal proceedings) before deciding whether a restructuring is viable.

If an investigation is required before any decision can be made as to whether a restructuring is viable, one potential avenue to explore is to seek to appoint provisional liquidators under the relevant provisions of the Companies Act. One less promoted aspect of the reforms which bought the JRO regime into force was an amendment widening the scope for the Court to appoint provisional liquidators on the application of the company, to situations where "*it is appropriate to do so*".

Other Guardrails to Prevent Abuse

In both *Oriente* and *Aubit,* it was acknowledged that the legislation includes safeguards and protections for creditors. Notably the Court highlighted in *Oriente* that "*the learned drafters of the new CWR provisions were keenly aware of the practical implications of the broader stay provisions applicable to restructuring petitions. These provisions appear to be designed to protect the rights of creditors by conferring an opportunity to be heard in relation to a restructuring petition as soon as possible*". In *Aubit* the Court stressed the importance of the JRO regime not being abused, especially in relation to the automatic statutory moratorium[3], with the relevant competing interests (of the debtor's management, shareholders and creditors) being duly balanced. The Court's role in preventing abuse is therefore being demonstrated in practice – the Court is not a rubber stamp and will scrutinise applications to appoint JROs carefully. As the Court put it in *Aubit* the JRO regime "*is not intended to be used simply to obtain the statutory stay and to add credibility and respectability to the company's management*".

Further Information

If you would like further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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[3] Among other points it was stressed that the *"…Court should ensure that the position is not abused buy a company which is hopelessly insolvent and continues to trade*".