In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2016 No: 183

IN THE MATTER OF UP ENERGY DEVELOPMENT GROUP LTD

IN THE MATTER OF THE COMPANIES ACT 1981

EX TEMPORE JUDGMENT
(REASONS)

Dates of Hearings:	Friday 27 July 2018 / Monday 29 October 2018
Date of Judgment:	Monday 29 October 2018
Date of Reasons:	Monday 19 November 2018
The Petitioner:	Mr. John Wasty (Appleby (Bermuda) Limited) for Credit Suisse AG, Singapore Branch
Creditors Supporting Petition:	Mr. Mark Burrows, (Zuill & Co Limited) for Baosteel Resources International Company Limited
Creditors Opposing Petition:	Mr. Christian Luthi, (Conyers Dill & Pearman Limited) for Kaisun Energy Group Limited
Joint Provisional Liquidators:	Mr. Kevin Taylor and Ms. Nicole Tovey, Walkers Bermuda for Roy Bailey of Ernst & Young and Osman Mohammed Arab and Lai Wing Lun of RSM Corporate Advisory (Hong Kong) Limited

Petition to Wind-Up Bermuda Exempted Company / Unless Orders
Winding Up Orders Ex Debito Justitiae / Just and Equitable Principles
Objections by Majority of Creditors and Joint Provisional Liquidators
Whether to adjourn Petition to Wind-Up

JUDGMENT of Shade Subair Williams J

Introduction

1. This Court is concerned with a winding-up petition of the Company which is incorporated in Bermuda and publicly listed on the Main Board of Hong Kong Stock Exchange.

2. The Petitioner is an undisputed and unsecured creditor who holds Tranche A and Tranche B Convertible Notes issued by the Company at a redemption value of HK$150,000,000 which matured on 18 January 2016. On account of the Company's non-payment on any portion of the redemption value, the Petitioner made a statutory demand for payment which was served at the Company's registered office on 1 April 2016.

3. The petition was subsequently filed on 6 May 2016 following a long standing dispute between the Petitioner and the CEO of the Company, who is also the ultimate beneficial owner of the Company.

4. The Petitioner applied to wind up the Company under section 162(a) of the Companies Act 1981 on the grounds that it is unable to pay its debts. In the alternative, the Petitioner asks that the Company be wound up under section 161(e) on the basis that it would be just and equitable to do so.

5. The Court appointed Joint Provisional Liquidators (JPLs) on 7 October 2016. After a year's worth of adjournments following the appointment of the JPLs, the Court heard and refused the Petitioner's plea for the Company to be wound up on 13 October 2017 and instead adjourned the petition in favour of the wishes of the majority of creditors and the JPLs.

6. In April 2018 the Court approved a timeline for a restructuring plan. However, several projected steps were unachieved.

7. In a two-part hearing in July 2018 and October 2018, the Petitioner applied for the Company to be wound up. The Petitioner's application was once again opposed by the JPLs and a majority (ie. 50% plus) of the unsecured creditors. At the conclusion of the contested hearing of the Petition, I refused the application to wind up the Company at this stage of the

proceedings but reserved judgment on the Petitioner's alternative application for Unless Orders in the following terms:

"*Unless the JPLs file an application (by way of summons) to convene a creditors' meeting by 4pm on 23 November 2018 Up Energy Development Group Limited (Company) shall be wound up on that date and at that time pursuant to the usual winding up order.*

Unless the JPLs serve on the Petitioner and file with the court a final draft scheme of arrangement by 4pm on 30 November 2018 the Company shall be wound up on that date and at that time pursuant to the usual winding up order."

8. I now give my reasons for refusing to wind up the Company at this stage in favour of a further adjournment of the petition and also give my decision on the Petitioner's alternative plea for the making of Unless Orders.

Background Proceedings

9. By petition dated 29 March 2016, HEC Securities Limited sought to wind up the Company in the Hong Kong High Court on the grounds of an unpaid debt in the form of a matured convertible note for HK$230,000,000.

10. The petition for this Court to wind up the Company was filed on 6 May 2016 and made returnable for 1 July 2016.

11. By written public announcement made on 23 May 2016 (following several previous announcements), the Company issued the following statement, in part:

"*THE COMPANY'S LEGAL ACTION PERTAINING TO DEBT RESTRUCTURING*
As disclosed in the Announcements, the Company is in the process of formulating a Reorganization Plan and will implement a Scheme in the Supreme Court of Bermuda for sanction. Upon the successful approval of the Scheme, the Company will have the benefit of protection in Bermuda and time to implement the Reorganization Plan in the best interests of all stakeholders.

WINDING UP PETITION
On 20 May 2016, the Board was notified by the Bermuda legal counsel of the receipt of a winding up petition dated 18 May 2016 (Bermuda time) filed by Credit Suisse AG, Singapore Branch (the "Petitioner") against the Company in the Supreme Court of Bermuda for the outstanding balance of the matured Convertible Notes in the principal amount of

HK$150,000,000 (the "Winding Up Petition"). The hearing of the Winding up Petition was scheduled to be heard on 1 July 2016.
The Company is currently seeking legal advice in respect of the Winding Up Petition with a view to defend the Winding up Petition by challenging whether the Winding Up Petition is filed in the proper jurisdiction; and/or reach a settlement with the Petitioner on this matter; and / or implement the Reorganization Plan by way of a Scheme. The Company will keep its shareholders and potential investors informed of any further significant development when appropriate. Shareholders of the Company and potential investors should accordingly exercise caution when dealing in the securities of the Company."

12. In support of the Petition, Baosteel Resources International Company Limited ("Baosteel") filed a notice of intention to be heard via their (then) attorneys at Harneys Bermuda Limited. Baosteel is a creditor of the Company in respect of an outstanding balance on a matured Tranche A convertible note in the principle amount of HK$155,000,000 in addition to a default interest rate at 15% per annum. Baosteel's support of the Petition was outlined in the 29 June 2016 affirmation of its investment director, Mr. Huang Xin.

13. A notice of intention to be heard in opposition of the Petition was filed by Taylors law firm on 29 June 2016 on behalf of China Minsheng Banking Corp Ltd Hong Kong Branch ("CMBC").

14. By Ex Parte Summons dated 30 June 2016 and supported by the affirmation of Mr. Jason Epstein, (the Petitioner's solicitor from Clifford Chance LLP) the Petitioner applied to the Court for the appointment of Joint Provisional Liquidators ("JPLs") to oversee the development of a restructuring proposal exhibited to the affirmation of Mr.Wang Dayong made on 28 June 2016.

15. The Petition and the Ex Parte summons were both adjourned to 4 July 2016 by the then Hon. Chief Justice, Mr. Ian Kawaley who in his reported ruling dated 20 September 2016 at paragraph 7 held:

"*7. The Company on July 4, 2016 opposed the appointment of JPLs referring to its retention that very day of independent restructuring advisers RSM Corporate Advisory (Hong Kong) Limited ("RSM"). It argued that deference ought to be given to the majority of the creditors' position. Mr. Taylor supported the Company's position, in part because of the stigma that provisional liquidation carried in Asia. I felt that the case for an immediate appointment had not been made out as there was no evidence of any misconduct on the part of management and a significant creditor constituency appeared to be supportive of there being no JPL appointment. I sought to fill the gap in independent monitoring by imposing as a condition of*

the adjournment Order a requirement that the Company attempt to form an informal creditors' committee."

16. The Petition was adjourned to 9 September 2016 and the then learned Chief Justice Kawaley ordered:

"*The Company shall, either through its Board of Directors or Independent Restructuring Advisors, use its best endeavours to establish a framework for communicating with all unsecured creditors of the Company, on an ongoing basis, in respect of all issues relating to implementation and feasibility of the restructuring proposal exhibited to the Affirmation of Wang Dayong made 28 June 2016 at pages 1 to 23 or any variation thereof*."

17. The application for the appointment of JPLs was renewed and vigorously contested on 9 September 2016 which was followed by Kawaley CJ's chambers ruling of 20 September 2016 confirming the appointments. In an amended Order of the Court dated 28 October 2016, Roy Bailey of Ernst & Young Ltd and Osman Mohammed Arab and Lai Wing Lun of RSM Advisory (Hong Kong) Limited were appointed JPLs against some background of controversy between the parties as to the preferred nominee liquidators. Reasons for the Court's decision were reported in Kawaley CJ's ruling of 4 November 2016.

18. From 9 September 2016 the Petition was adjourned to 18 November 2016 and again to 17 February 2017 with liberty to restore the Petition by letter to the Registrar. By letter dated 12 December 2016, Counsel for the Petitioner requested for the Petition to be relisted on 16 December 2016. On this date the Petition was adjourned further to 27 January 2017 and again to 10 February 2017.

19. By Orders made on 10 February 2017 and 28 April 2017, the Court confirmed the exclusive powers of the appointed JPLs. On 12 May 2017 the Petition was adjourned to 15 September 2017 and thereafter to 22 September and 13 October 2017.

20. Under an Order of the Court made on 23 June 2017, a Letter of Request was ordered for issue to the Hong Kong High Court asking for the previous orders of this Court to be recognized.

21. On an ex parte summons filed by Counsel for the JPLs, dated 1 September 2017, the Court's approved of a funding agreement dated 22 August 2017 between the Company (in provisional liquidation) and Kaisun Energy Group Limited. On 14 September 2017 the Petition was again adjourned to 22 September 2017 when the Court heard the Petitioner's application to set aside the funding agreement. Judgment on the set aside application was reserved (and later refused on 13 October 2017) and the Petition was adjourned to 13

October 2017. The JPLs were also ordered to produce a liquidation analysis and an updating report explaining the status of the Hong Kong Stock Exchange resumption proposal and the efforts to find an investor to fund the restructuring.

22. On 13 October 2017 the Petitioner unsuccessfully sought a winding up order against the recommendation of the JPLs for the petition to be further adjourned to facilitate restructuring efforts. The Court adjourned the petition to 2 February 2018 and thereafter to 9 March 2018 and 29 March 2018.

23. By ex parte summons filed by Counsel for the JPLs, an application was made for the Court's sanction of a facility agreement dated 6 March 2018 between Integrated Capital (Asia) Limited, the Company and the JPLs. No order was made on the application and the Court adjourned the petition to 26 April 2018.

24. By agreement between the parties, the Court further adjourned the petition and incorporated in the 26 April 2018 Order a proposed timetable for a restructuring plan.

The Competing Issues for Resolution

25. The disputed issues raise the following points for resolve:

- Whether a petitioning creditor's entitlement to a winding up order *ex debito justitiae* is subordinate to the wishes of the majority of the unsecured creditors and the recommendation of the JPLs for an adjournment;

- Whether it would be 'just and equitable' to wind up the Company despite the objections of the majority of the unsecured creditors (currently over 50% but under 75% of the total currently known claims) and the recommendation of the JPLs;

- Whether Up Energy Group Limited ("UEGL"), currently a secured creditor connected to the Company, may elect to renounce its security and vote with the other unsecured creditors in a scheme of arrangement;

- Whether the Court should attach any or some weight to the views of UEGL who entertains the option of giving up its security in order to achieve a voting majority in a scheme of arrangement;

- Whether or to what extent the Court ought to determine if the prospective success of a scheme of arrangement is based on a speculative assertion that a restructuring will occur; and

- Whether the Petitioner is entitled to the benefit of Unless Orders for the purpose of imposing a final deadline on the ongoing timelines to obtain the Court's approval of a scheme of arrangements.

The Relevant Law and Legal Principles

Winding Up Orders *Ex Debito Justitiae*

26. Section 161 of the Companies Act 1981 prescribes the circumstances in which a company may be wound up by the Court. Section 161(e) provides the statutory basis for a petition being presented on the grounds that the company is unable to pay its debts.

27. In *Re LAEP Investments Ltd [2014] Bda LR 35 and Re Gerova Financial Group Ltd [2012] Bda LR 43*, it was held:

"*a petitioner who can prove that a debt is unpaid and that the company is insolvent is entitled to a winding up order ex debito justitiae, which has been taken to mean that, in accordance with settled practice, the court can exercise its discretion in only one way, namely by granting the order sought* (Andrew Keay's McPhearson's Law of Company Liquidation, 2nd English Edition at Paragraph 3.033, see also *In re Douglas Griggs Engineering Ltd. [1963] Ch. 19 at 23* and *Western of Canada Oil, Re (1873) 17 Eq.1*)

28. In *Bowes v Hope Life Insurance Co (1865) 11 H.L.C. 389; 11 E.R.*1383 Lord Cranworth stated that it was:

"*…not a discretionary matter with the court when a debt is established, and is not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, both at law and at equity. One does not like to say positively that no case could occur in which it would be right to refuse it; but ordinarily speaking, it is the duty of the court to direct a winding up*."

29. A long line of more recent authority strongly establishes that the Courts retain an unfettered discretion whether to recognize a petitioning creditor's *prima facie* right to a winding up order. Indeed the learned editors of the second edition of McPhearson's Law of Company Liquidation opine that Lord Cranworth's above statement too widely stated the *ex debito justitiae* principle, as it did not appear to contemplate the list of exceptions which would justify a refusal, such as the opposition of other creditors.

30. Mr. Wasty relied on the principle stated by Neuberger J (as he then was) in *Re Demaglass Holdings Ltd [2001] BCLC 633 at 638a*:

"*…the petitioning creditor has to establish the possibility of the prospect of some sort of benefit from a winding up. The test, however, appears to be a low one. In Re Crigglestone Coal Company, Limited [1906] 2 Ch 327 Collins, MR, appears to have thought that the petitioner need only show a reasonable possibility of some advantage (see 333A). The other two members of the Court of Appeal seem to have considered that the test was even lower than that. Romer LJ at 338 observed that he could not say that the prospect was "hopeless". At 339 Cozens-Hardy LJ said the evidence against the petitioners "did not support the contention that there is no possibility" of a dividend being paid to the unsecured creditors*."

31. Of course, it is for the Petitioner to show that the benefit of a winding up order is not for the Petitioner individually but for the wider benefit of the class to which the Petitioner belongs. The right *ex debito justitiae* is not the Petitioner's individual right but a representative right. (See Buckley J in *Crigglestone Coal Co, Re [1906] 2 Ch. 327 at 331-332*. and para 3.054 of Andrew Keay's McPhearson's Law of Company Liquidation, 2nd English Edition)

'Just and Equitable' Principles:

32. No issues of contention arose on the principles of law which govern the meaning of 'just and equitable' in the context of a winding up application. In the Privy Council decision in *Loch v John Blackwood Ltd [1924] AC 783 at page 790* Lord Shaw said:

"*It is undoubtedly true that at the foundation of applications for winding up, on the 'just and equitable' rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs*."

33. See also *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd [2017] Ba LR 78* paragraph 77:

"*These principles were not in dispute. Mr. Atherton QC referred the Court to various authorities, including the Caymanian Grand Court decision in Re The Washington Special Opportunity Fund, FSD No. 151 of 2015, Judgment dated March 1, 2016 (unreported). In the latter case, in which Mr. Atherton QC successfully appeared for the fund, Ingrid Mangatal J refused to wind up the fund because its management's conduct did "not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect" (transcript, at page 59)*."

Consideration of the Views of the Majority of Unsecured Creditors who support adjournment

34. The Courts have long recognized the powerful force of an objection from the majority of unsecured creditors against a winding-up order.

35. In this same matter, the then Hon. Chief Justice, Mr. Ian Kawaley held at paragraph 10 in his ruling of 20 September 2016:

"*10. ...It was well settled that the views of the majority of unsecured creditors would ordinarily be given considerable weight, if not hold sway, when deciding whether or not to adjourn for restructuring purposes rather than immediately winding-up…*"

36. In the English Court of Appeal case *P. & J. Macrae Ltd Re [1961] 1 WLR 229 at 235* Wilmer L.J. held:

"*Where the majority of creditors do for good reason oppose a petition…then prima facie they are reasonably entitled to expect that their wishes will prevail, in the absence of proof by the petitioning creditor of special circumstances rendering a winding-up order desirable in spite of their opposition*."

37. Likewise, Lord Diplock held in *J D Swain, Re [1965] 1 WLR, 909 CA*:

"*…for the wishes of the petitioner to overrule those of the majority of the creditors there must be some special reason why the wishes of the majority should be overridden*."

38. At paragraph 13 of the Petitioner's written submissions, however, it is argued:

"13. *A petition cannot properly be adjourned on the basis of a speculative assertion that a restructuring will occur which would make a winding up unnecessary (Re Argenco Ltd [2014] Bda LR 94 [AB/6/38]). Further, when considering whether to adjourn a petition, the court should consider whether there is a "reasonable prospect of the petition debt being paid in full within a reasonable time" (Maud v Aabar Block S.a.r.I [2016] EWHC 2175 (Ch) at pa. 99 [AB/7/68])*."

Unless Orders:

39. In my previous ruling in *Heart & Soul Construction Ltd v Veleka Eve [2017] SC Bda 113* I considered the law and guiding principles on Unless Orders. In the UK, the factors for a Court's consideration are set out in Blackstone's Civil Practice when looking at Part 23 of the CPR.

40. Effectively, Unless Orders, serve as a final warning before punitive action is taken by the Court. Such orders denote a willful or intentional default on the part of one side in the litigation.

41. See also *In the matter of Atrium Training Services Limited [2013] EWHC 2882* where Henderson J at first instance was quoted at paragraph 12 of the Judgment to have said:

"*I accept that an unless order should normally be regarded as one of last resort, or perhaps more accurately as one of penultimate resort, since even after an unless order has taken effect it is always open to the party in default to seek relief from sanctions under CPR 3.9: see generally Marcan Shipping (London) Limited v Kefalas [2007] EWCA Civ 463, [2007] 1 WLR 1864. I also accept that, before making an unless order, the court should always carefully consider whether the sanction imposed for non-compliance is appropriate in all the circumstances of the case. I consider, however, that the stage has been reached in the present case where it is appropriate to make such an order in the Atrium proceedings, and that the sanction for non-compliance should be for the claims in those proceedings to be struck out, subject to the right of the Liquidators to apply (if they can) for relief from sanctions.* "

42. In Atrium the default in question related to the alleged refusal or failure of the liquidators to fully disclose relevant documents in their possession as per the order of the Court. The warned consequence behind the Unless Order was to strike out the liquidators claims that a former director of Atrium was fraudulently trading contrary to section 213 of the Insolvency Act 1986.

43. While Birss J sitting in the Chancery Division of the High Court of Justice found on the facts that the extent of liquidators' breach of Henderson J's order was not such to warrant an Unless Order but to instead impose more case management, no criticism was made of Henderson J's recital of the governing legal principles.

Analysis

44. The Court has a wide discretion to adjourn a petition for good reason (see *Z-OBEE Holdings Limited [2017] Bda LR 19* at paragraph 10).

45. In the case of an insolvent company, the Court's primary concern is for the creditors. Amongst the general pool of creditors, the greater priority is obviously given to the views of the unsecured creditors as they have no other means of reimbursement outside of liquidation proceedings. Thus, the wishes of the majority of the unsecured creditors will inevitably factor heavily in the exercise of the Court's discretion.

46. The Petitioner was not alone in its desire to wind up the company. It has the confirmed support of two other unsecured creditors, namely HEC Securities Limited and Up Energy Capital Limited (UECL).

47. However, in assessing and ascertaining the majority position, the Court will have regard to the nature and value of each creditor's debt. So, the meaning of a majority position, in the context of whether the Court will adjourn a winding up order in exercise of its unfettered discretion, will not necessarily find parity with the meaning of 'majority' as defined by s.99 of the Companies Act when having regard to the rules for sanctioning a scheme of arrangements.

48. In my judgment, the Court need not at this stage satisfy itself on the certainty of success of a scheme of arrangement in order to adjourn the petition. A reasonable prospect of success will do. It is sufficient to establish, in deciding whether to adjourn the petition, that a majority (even if not yet up to 75%) of unsecured creditors are desirous of adjourning in order to support the JPLs further attempts for a restructuring. If the current majority (51% plus) of unsecured creditors are reasonably optimistic that a scheme of arrangement at 75% majority of voting creditors' claims is attainable, the Court will usually decide in favour of the wishes of the unsecured creditors who are the real stakeholders.

49. The Petitioner has sought a winding up order on the grounds of non-payment of convertible notes to the value of HK$150,000,000. There are two confirmed unsecured creditors in support of the Petition, namely HEC Securities Limited (the petitioning creditor in the Hong Kong proceedings) and Up Energy Capital Limited who is owed approximately HK$237,500,000. It is agreed on the evidence that the Petitioner and the supporting creditors hold a minority of the overall debts owed by the Company.

50. I have had particular regard, on the other hand, to the third affirmation of Mr. Chan Nap Kee Joseph, Chairman and CEO of Kaisun, who exhibited creditor letters of support for the adjournment application in pursuance of a restructuring.

51. Collectively, the unsecured creditors in favour of adjourning are owed a debt in the approximate sum of HK$1,058,618,143.00 (ICA is a creditor of the Company with an outstanding principal loan amount of HK$50,000,000 and CCB International Asset Management Limited is a creditor of the Company with an outstanding convertible note valued at HK$403,830,286.00. Convoy Collateral Limited has a liability amount owed in the sum of HK$50,000,000. The liability sum for Capital Sunlight Limited is HK $554,787,857). This does not account for the accepted liability amount of HK$100,000,000 for UEGL under receivership and China Minsheng Banking Corp Ltd Hong Kong Branch (referred to below as CMBC) which is owed HK$502,142,857.16.

52. UEGL and CMBC are presently secured creditors who oppose the petition.

53. At paragraphs 14-18 of the of 13 October 2017 ruling Kawaley CJ made the following remarks:

"*14. But I do sound a warning that it is not likely to be entirely straightforward to persuade a court that a party related to the Company can convert itself into an unsecured creditor and be regarded as properly having the necessary common characteristics with other unsecured creditors who are completely unconnected with the Company.*

15. So really, the viability of this scheme despite the support which the proposal of a restructuring presently has reflecting majority support, hangs by a very thin thread indeed. Nevertheless, on balance it seems to me that I am bound to give considerable weight to the judgment of the JPLs and their recommendation.

Disposition of adjournment application

16. And in these circumstances I decide to grant the adjournment sought. Clearly, by the next hearing of the Petition some progress will have to be demonstrated. That progress will it seems to me involve certain significant ingredients. One ingredient will be that the funder who has been identified anonymously as an interested investor in dollar terms should have 'progressed' their commitment to a level that is far more tangible than it understandably is today. Secondly, it seems to me that the JPLs will have to make further progress in demonstrating that they are likely to have the necessary support for the scheme.

1*7. It may well be that if it is impossible, for example, to buy out the opposing creditors that the Court may have to determine as a preliminary issue before funds are expended on a potentially expensive scheme whether or not it is possible for Up Energy Group Limited ("UEGL") to vote in the same class as the other unsecured creditors. Because looking at the respective stakes that the various unsecured creditors have, it seems to me that it would be impossible for the Court to be persuaded that there is requisite support for potentially passing a scheme without UEGL being eligible to vote. They at present represent just over 50% of the creditors' total claims and are presently discounted on the basis of* being secured.

18. If they do give up their security and can vote then they should be capable of carrying the day. That still leaves some measure of uncertainty because of those creditors whose views are not known. But the concerns that have been so forcefully expressed on behalf of the petitioning creditor and Boasteel are sufficiently credible that it seems to me that it would be rash for the Court to allow a restructuring process to proceed in circumstances where there is no solid evidence that there is a reasonable prospect of a scheme attracting the requisite support.

54. In October 2017, the Court did not have the benefit of any submissions on UEGL's ability to renounce its security so to vote with the other unsecured creditors. In the concluding paragraphs of Mr. Gabriel Moss QC's opinion, it is submitted:

"*On the other hand, UEGL itself is a creditor in relation to convertible notes not charged to CMBC and is a secured creditor because it has the benefit of the share charge executed by Listco (the Company) over its own property.*

Under a proposed Scheme, UEGL would have the options of (a) relying on its security insofar as it is over the property of Listco, valuing the security and proving for any shortfall (b) surrendering its security and voting for the full sum as an unsecured creditor. A further option is that UEGL, in relation to convertible notes not charged to CMBC, is excluded by agreement from the Scheme as a secured creditor but agrees to be bound by the Scheme either as a secured or as an unsecured creditor for any shortfall by a collateral contract and/or undertaking to the court. UEGL is at liberty to choose to adopt one of these options at any time before the Scheme meeting. If UEGL decides to surrender its security, it may do so in such way or manner that the parties may agree in accordance with the applicable law."

55. Although Mr. Wasty expressed reservation on Mr. Moss QC's view that the secured creditors could convert their status, no contrary submissions were developed in argument. In any event, I accept that it would be open to UEGL to forfeit their security and to vote with the other unsecured creditors.

56. In this case, the basis for the JPLs adjournment request was that more time is needed to achieve the steps prerequisite to a scheme of arrangement. However, Mr. Wasty highlighted several tasks specified in the previous agreed timetable under Kawaley CJ's 26 April 2018 Order to advance a restructuring which had not been completed. To date, the JPLs are still at a significant distance from presenting a draft Scheme of Arrangement. More so, Counsel for the Petitioner complained that the JPLs failed, *inter alia*, to produce an updated liquidation analysis.

57. Counsel pointed to the JPLs' 20 April 2018 report which proposed the completion of these tasks within the same timeframe as set out under the Court's Order. Turning the Court's attention to the JPLs' 25 July 2018 Report, Mr. Wasty complained that the JPLs sought to extend the deadline for some of the timetabled tasks by a period in excess of two months, while omitting to address other tasks which were ordered by the Court months earlier in April.

58. The Petitioner further argued that a successful scheme of arrangement in this case is speculative and slides on a platform of contingencies. He argued that the Company's existing debts will have to be restructured with an agreement from the creditors that their debts can be

converted and the Hong Kong Stock Exchange would also have to approve the company's proposed resumption scheme. Mr. Wasty also argued that, currently, there is a blocking percentage of creditors who would likely oppose a draft scheme of arrangement. Mr. Wasty pointed to what he would describe as the miraculous share capital which would have to be raised to generate the suggested profit in order for the Company to remain on budget. He submitted that it was doubtful that there would be any real or genuine investment interest in a company whose trading position is so grim.

59. I have considered the Petitioner's arguments against the position taken by the JPLs. Of course, it is the role of a liquidator to maintain an even and impartial hand between all individuals whose interests are entangled in the liquidation proceedings. So, the liquidator should not be considered to be for or against any particular individual (see *Gooch's Case Re (1871) 7 Ch. App. 207 at 211*). Notably, no suggestion was made before this Court that the JPLs have acted improperly or that they carried out their duties in any partial or professionally incompetent manner.

60. Counsel for the JPLs argued that there is in fact a reasonable prospect of completing the restructuring which is in the best interest of the general body of unsecured creditors. In answer to the criticisms launched against the JPLs for the lack of progress preparatory to achieving a scheme of arrangements, Mr. Taylor stressed that light-touch powers were only given to the JPLs up to 10 February 2017 and such that their powers were confined to seeking funding for the restructuring. These funding powers were not approved by the Court until 31 March 2017. The effective start date to the JPLs' being given full powers came by Court Order of 28 April 2017.

61. However, UEGL, a significant shareholder of the Company, withheld its support for the funding agreement which further inhibited the JPLs' ability to progress any restructuring tasks. At a subsequent stage, the JPLs were successful in securing alternate funding from Kaisun Energy Group Limited ("Kaisun") (a creditor opposing this petition). The funding agreement with Kaisun was approved by the Court on 7 September 2017. It is on this basis that Mr. Taylor argued that the JPLs in reality have only had shortly over a year to accomplish the steps requisite to a restructuring.

62. The JPLs, through their various reports filed with the Court, provided updates on the development of the Company's proposed agreements for the financing of the Company's coal mines. In a report of 4 May 2018 the JPLs provided information about a prospective investor, a private company and licensed money lender who the JPLs say has the capacity to fulfil the terms of the anticipated Facility Agreement with the Company.

63. In October 2017, the Court was impressed by apparent care given by the JPLs in the preparation of their initial assessment wherein they concluded (subject to various caveats) that there would be a liquidation recovery ranging between only 0.62 and 3.77 percent.

64. In the 27 July 2018 hearing before me, Mr. Taylor referred me to a 26 July 2018 report by the JPLs where they reported that considerable time had been spent on examining the potential of a buy-out investor while at the same time seeking a solution for the limited number of creditors, such as the Petitioner, who may not wish to have an extended association with the Company.

65. Mr. Taylor submitted that the JPLs had achieved more progress than what Mr. Wasty represented. For example, where the JPLs were criticized for not having produced a valuation report, Mr. Taylor relied on the report of 18 May 2018 wherein the JPLs confirmed receipt of a 31 March 2017 draft valuation report on the Company's three coal mines, namely the Xiaohuangshan Mine, the Quanshuigou Mine and the Shizhuanggou Mine, together with the associated property, plant and equipment of these three mines. However, I have not deafened my ears to the Petitioner's complaint that this valuation report is outdated and thus an unreliable indication of the Company's current net worth. On the other hand, the Court is not blind to the JPL's projection that a final draft of an updated valuation report will be produced by 30 November 2018.

66. In a 24 October 2018 report, the JPLs proposed a new timetable preparatory to a scheme of arrangements setting out various tasks to be accomplished by 14 December 2018. Amongst those tasks, the JPLs determined the likelihood of finalizing a new Facility Agreement with the investor of interest and calling an informal creditors' meeting by 5 November 2018.

67. During the 29 October 2018 hearing before me, Mr. Taylor advised that draft audited financial statements which were previously envisaged to be filed with the Court and served on the Petitioner had not been filed out of trepidation from KPMG Hong Kong that the reported contents thereof would be improperly relied upon, notwithstanding the protection of a sealing order. However, these draft reports do lie in the hands of the JPLs on the agreed condition that they will not be shared with any other party, including this Court. The final draft of the audited accounts for the years ending 31 March 2016, 2017, and 2018 are anticipated to be ready for service between 16 and 30 November 2018.

68. I see no reason to wholly disregard the views and recommendations of the JPLs who are optimistic in their plans to make an application to the Court by mid-December 2018 to convene a creditors' meeting to vote on a scheme. With that said, I also note the appearance of feigning creditors' support of the JPL's approach from Deloitte, who are the receivers over a sum in excess of HK$2,300,000,000 in convertible notes issued by the Company. In their

letter to the JPLs of 27 July 2018, wherein they generally support the JPLs' application to further adjourn the petition, they state at paragraphs 4 and 5:

"*4. Notwithstanding our support on the restructuring of the ListCo, we do not agree the JPLs approach to progressing the restructuring to date, as (i) the JPLs have not provided timely updates of the restructuring progress to the creditors; and (ii) the JPLs have not progressed the restructuring in an efficient manner (i.e. the JPLs have missed certain milestones as set out in your restructuring timetable).*

5. In light of this, we request the JPLs to:-

a) provide weekly written update to the Company's creditors regarding the progress or latest development of the Company's restructuring / resumption;

b) appoint an eligible/experienced licenced financial advisor to advise the JPLs in respect of the progress and implementation of the restructuring plan for the ListCo by 3 August 2018. If the JPLs fail to appoint a financial advisor by 3 August 2018, the JPLs should report to creditors in writing the reason for such failure and the expected timetable for appointing a financial advisor;

c) adhere to the revised restructuring timetable as set out in your letter to the Bermuda Court dated 25 July 2018. If the JPLs do not comply with such restructuring timetable, the JPLs should report to creditors in writing the reason of such failure and your proposed rectification action; and

d) provide creditors with copies of the resumption proposal or any other proposal submitted by the JPLs to the Hong Kong Stock Exchange and the relevant correspondence, including but not limited to the decision letter received by the Company on 3 April 2018, so that creditors may make their own assessment of the viability of the resumption plan and decide whether to continue to support the JPLs."

69. I now turn to the alternative application for the making of an Unless Order. In my judgment, an Unless Order would not be appropriate in this case. Unless Orders are, in practice, principally reserved to compel an uncooperative or dormant litigant to take action which is otherwise overdue and which falls completely within their remit and control.

70. Generally speaking, the Court will be reluctant to impose an Unless Order which purports to deprive the Courts of its powers of discretion on the return date and which compels it to wind up a company. The Court should carefully consider all of the existing factors and realities relevant to each stage of the proceedings before deciding whether or not to wind up a company. In a case involving an application to wind up a company, there will likely be a plethora of unpredictable and unavoidable circumstances, outside of the control of the liquidators, which alter the track leading to a restructuring.

71. For these reasons, I refuse the Petitioner's application for the Unless Orders. In any event, it seems to me that any absence of real progress from the JPLs in the coming weeks or months will likely result in a diminishment of creditor support for further adjournments of the petition.

Conclusion

72. The Petitioner's application for Unless Orders is refused.

73. The petition is adjourned to Friday 1 February 2019.

Dated this 19th day of November 2018

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JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT