IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 75 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF CHINA RESOURCES AND TRANSPORTATION GROUP LIMITED

Appearances:	Mr. Jonathon Milne and Ms. Róisín Liddy-Murphy of Conyers Dill & Pearman for Mighty China International Limited
	Mr. Tony Heaver-Wren of Appleby (Cayman) Limited for China Resources and Transportation Group Limited
Before:	The Hon. Justice David Doyle
Heard:	23 April 2021
Judgment delivered:	23 April 2021

HEADNOTE

Determination of application to appoint provisional liquidators; section 104 of the Companies Act (2021 Revision)

JUDGMENT

Introduction

1. I shall now deliver a short judgment in open court in respect of the summons to appoint joint provisional liquidators. I will start with a little bit of background.

2. By letter dated 23 March 2021 Mr. Milne of Conyers Dill & Pearman ("Conyers") on behalf of Mighty China International Limited (the "Petitioner") indicated that the Petitioner sought a winding up order of China Resources and Transportation Group Limited (the "Company") "on the just and equitable grounds pursuant to sections 92(d) and/or 92(e) of the Companies Act (2021 Revision)".

3. Section 92 provides that a company may be wound up by the court "(d) if the company is unable to pay its debts"; or "(e) the court is of opinion that it is just and equitable that the company should be wound up".

4. Under section 93(a) there is provision for the service of statutory demands and deemed inability to pay debts if the company neglects to pay the amount demanded or to secure or compound for the same to the satisfaction of the creditor. Section 93(b) concerns execution of process issued under judgments, decrees or orders and section 93(c) provides that a company is deemed to be unable to pay its debts if "it is proved to the satisfaction of the court that the company is unable to pay its debts".

5. Section 94(1) (b) in effect provides that an application to the court for the winding up of a company shall be by petition and may be presented by "any creditor or creditors (including any contingent or prospective creditor or creditors)".

6. In its demand letter dated 11 December 2020 there is reference, in somewhat unusual wording, to the Petitioner "who shall be the prospective creditor of your company" (perhaps something was lost in the translation). The letter is addressed to the Company at an address in Kowloon. The letter refers to the maturity date on the promissory notes issued by the Company to the Petitioner of 15 April 2024 and expressly accepts that the "debts are not yet due". The letter gives the Company 14 days to "redeem the above promissory notes and pay relevant interests" and if that is not done it is stated that "our client shall have no choice but to take relevant actions without further notice".

7. The winding up petition was filed "dated this day of March 2021" and subsequently "23rd" was inserted into the blank. At paragraph 11 of the petition it is stated that "the Petitioner seeks a winding up order on the grounds of insolvency and that it is just and equitable in the circumstances". In paragraph 8 under the heading "Grounds for winding up" it is stated "the Company is unable to pay its debts"; at paragraph 9 it is stated that "the Company is insolvent on both the balance sheet basis and the cash flow basis"; at paragraph 10 a generalised complaint is made in respect of "mismanagement".

8. The Petitioner also filed a summons for directions dated 29 March 2021 and a summons (also dated 29 March 2021) for the appointment of joint provisional liquidators stated to be pursuant to section 104 of the Companies Act (2021 Revision).

9. The matter was listed before me for 09:30am today 23 April 2021.

10. By letter dated 1 April 2021 (the Thursday before Easter Friday) Mr. Milne of Conyers indicated his understanding that the Petitioner and the Company had "agreed terms in respect of a confidential out-of-court settlement". A summons and a draft order were filed to withdraw the petition and discontinue the proceedings. Mr. Milne confirmed that the Company "consents to this order being made". Then surprisingly by email dated 6 April 2021 at 12:48 p.m. (the Tuesday after Easter Monday), Mr. Milne communicated further with court administration indicating "whilst we understand that settlement negotiations looked very promising initially, our client now wishes to proceed with the extant petition proceedings and the summons to appoint joint provisional liquidators in the interim".

11. Within the evidence is the second affirmation of Li Yongxiang a director of the Petitioner. That evidence tries to explain why the Petitioner sought to withdraw the winding up petition and why it then sought to withdraw the withdrawal summons. It is a remarkable read. It refers to Mr. Fung an executive director and Vice-Chairman of the Company contacting a representative of the Petitioner on 1 April 2021 and promising that a detailed settlement proposal would be sent to the Petitioner, if the Petitioner withdrew the proceedings, and on that basis the Petitioner apparently instructed Conyers to withdraw the proceedings on 1 April 2021. No settlement proposals were forthcoming so Conyers were instructed not to proceed with the application to discontinue the proceedings.

12. The evidence filed on behalf of the Company in respect of the 1 April 2021 telephone call indicates that "No commitment was made by Mr. Fung, who indicated that other matters could be discussed later". There is reference to a text exchange stated to be between Mr. Jimmy Zhan of the Petitioner and Conyers Hong Kong Office at 1.13pm "This is to formally inform you that, Mighty China International Limited, has already reached settlement with China Resources and Transportation Group Limited. Therefore, an immediate withdrawal of the Cayman Court action is necessary".

13. On 16 April 2021, the Company published an announcement on the website of the Hong Kong Stock Exchange (upon which it is listed) indicating that a winding-up petition had been filed and stating that on 13 April 2021 the Company received notice from the Petitioner's legal representative that "the hearing of the application to appoint joint provisional liquidators to the Company and for directions in relation to the Petition will take place on 23 April 2021 at 9:30 a.m.". It was further stated that the Company was taking legal advice and is "negotiating with the Petitioner".

14. There has over the last 2 days been a flurry of activity with the filing of evidence and skeleton arguments, all of which I have considered.

The submissions

15. I am grateful to the attorneys for their assistance to the court. Mr. Milne appeared today on behalf of the Petitioner and Mr. Heaver-Wren of Appleby (Cayman) Ltd appeared for the Company. He produced an extremely well-focused and concise skeleton argument within a very short period of time as the Petitioner's skeleton was only produced on 21 April 2021. It would have been better if the Petitioner had filed and served its skeleton argument much earlier. It would also help if, in the future, hearing bundles could have a continuous pagination rather than simply being separated by dividers with a different pagination within each bundle of each divider (some 24 in this case).

16. Mr. Milne's main submissions are as follows:

(1) The company is insolvent on both a cash flow and balance sheet analysis;

(2) There is cogent evidence of mismanagement by the directors of the Company;

(3) There is an urgent need for an investigation into the affairs of the Company;

(4) Prospective creditors have standing under section 104(2) of the Companies Act;

(5) There is a good prima facie case (or if it is necessary to make the submission it is also "likely") that a winding-up order will be made;

(6) There is a concern in respect of a further deterioration in value and the Petitioner seeks to prevent mismanagement and/or misconduct on the part of the Company's directors before the petition is heard;

(7) The Petitioner acknowledges that it is seeking "exceptional relief" and it has a "heavy burden" to demonstrate that the appointment of provisional liquidators is necessary;

(8) There is no need for the Petitioner to provide security or an undertaking in damages (despite Order 4 Rule 3 of the Companies Winding-Up Rules, 2018) as the Company has notice of the proceedings;

(9) In an email sent on 21 April 2021 at 11:35 a.m. the attorney for the Company stated that the Company's evidence would include reference to the Company being engaged in negotiations with a view to a restructuring proposal and considering making an application for appointment of joint provisional liquidators on a light touch basis. Under section 104(3) the Company could only do that if the Company is or is likely to become unable to pay its debts within the meaning of section 93 and the Company intends to present a compromise or arrangement to its creditors; and

(10) The independent auditors have insufficient information upon which to form a view and Rimer LJ, in the well-known English Court of Appeal authority of *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2012] 1 BCLC 748, suggests that if there are serious issues with the Company's record keeping this could also found a basis for the appointment of a provisional liquidator who will be able to secure the records and commence his own enquiries.

17. Mr. Heaver-Wren's main submissions are as follows:

(1) There is no prima facie case for the Company to be wound-up;

(2) No debt is presently due to the Petitioner;

(3) The Company has the support of its other creditors;

(4) No misconduct or mismanagement has occurred in relation to the Company;

(5) There is no risk of dissipation of the assets of the Company;

(6) The Company is in discussions with creditors and potential equity investors in respect of restructuring its debt and raising additional equity and the Company should be allowed to pursue and complete those discussions;

(7) The Company is not insolvent;

(8) The appointment of provisional liquidators is not necessary;

(9) Other than a vague reference to measures to "safeguard the financial conditions or the high-way assets" (for which the Company has reasonable explanations) the Petitioner has not identified any assets of the Company which it says are at risk of dissipation; and

(10) The Petitioner has not identified any instances of actual mismanagement or misconduct by the board of directors.

Determination

18. The issue presently before the court for determination is whether joint provisional liquidators should be appointed pending the hearing of the winding up petition.

19. For the purposes of today's hearing I am content to assume that the Petitioner is a prospective creditor. This is not in issue. The promissory notes in its favour do not mature until 15 April 2024.

20. Under section 104(2) Companies Act (2021 Revision) an application can be made by a "creditor" for the appointment of provisional liquidators. I also assume for the hearing today, without deciding, that the word "creditor" in section 104 (2) includes prospective creditors, although it does not (unlike section 94(1)(b)) expressly say so.

21. In the particular circumstances of this case the Petitioner has to satisfy the court firstly that:

(a) there is a prima facie case for making a winding up order;

and secondly that

(b) the appointment of provisional liquidators is necessary in order to:

"(i) prevent the dissipation or misuse of the Company's assets"; or

"(iii) prevent mismanagement or misconduct on the part of the Company's directors."

22. I have considered the voluminous authorities (21 of them) supplied by the attorneys. In particular the ruling of Jones J in *Orchid Developments Group Limited* (21 December 2012), the reasons of Segal J in *Asia Strategic Capital Fund LP* (17 March 2015) and the judgment of Parker J in *CW Group Holdings Limited* (3 August 2018).

23. I leave open the question whether there has been established a prima facie case for the making of a winding up order, as even if I was satisfied in that respect I have concluded that I have not been satisfied that the appointment of provisional liquidators is necessary in order to prevent the dissipation or misuse of the Company's assets or to prevent mismanagement or misconduct on the part of the Company's directors.

24. There is insufficient evidence before the court to take the serious step of appointing provisional liquidators. I do not accept Mr. Milne's submission that the Court has been provided with "cogent evidence of mismanagement by the directors of the Company". I would describe the evidence on the mismanagement point as flimsy. It is little more than mere assertion. Furthermore, I do not accept Mr. Milne's submission that there is an urgent need for an investigation into the affairs of the Company.

25. I note that no application was made for an asset freezing order. Indeed, the evidence filed in respect of this matter would not justify the granting of such relief either.

26. I note also that the application does not appear to have the support of any other creditors despite the public announcement on the website of the Hong Kong Stock Exchange of this hearing today. I note the letter of support dated 22 April 2021 from China Life Insurance (Overseas) Company Limited ("China Life") and its support for the Company's restructuring. China Life (which is said to hold HK$1.5billion aggregate principal amount of non-convertible bonds) believes it would be beneficial to all creditors to allow the Company to continue its restructuring efforts. Another bondholder Strait Capital Service Limited (HK$800million principal amount of non-convertible bonds) has also provided the Company with a letter of support dated 21 April 2021 as has Mr. Miao Zhenguo (said to have made a loan of just HK$2million to the Company). It would appear that the Petitioner does not have the support of the Company's other creditors in seeking the appointment of provisional liquidators and a winding up order.

27. I have to say that the Petitioner's somewhat curious conduct in applying to withdraw and discontinue the proceedings apparently on the reliance that some settlement proposals may be forthcoming and then a few days later seeking to withdraw the withdrawal summons was surprising and concerning. I was frankly unimpressed with the Petitioner communicating with the court (via Conyers) expressly indicating that the Petitioner and the Company had "agreed terms in respect of a confidential out-of-court settlement" when such now appears not to have

been the case. It is important that information provided to the court by parties and their attorneys is accurate.

28. Taking account of all the evidence filed and the written arguments and oral submissions so eloquently put before the court by the attorneys in this case, I have reached the conclusion that the appointment of provisional liquidators is not necessary and would not be justified in the particular circumstances of this case.

29. I do not doubt that the Company is facing serious financial difficulties but there was (as Mr. Milne wisely recognised) a heavy burden on the Petitioner to satisfy the court that the appointment of provisional liquidators prior to the hearing of the winding-up petition was necessary and the Petitioner has not discharged that heavy burden.

30. I therefore dismiss the summons for the appointment of joint provisional liquidators, for the brief reasons stated in this short judgment.

David Doyle

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The Hon. Justice David Doyle

Judge of the Grand Court