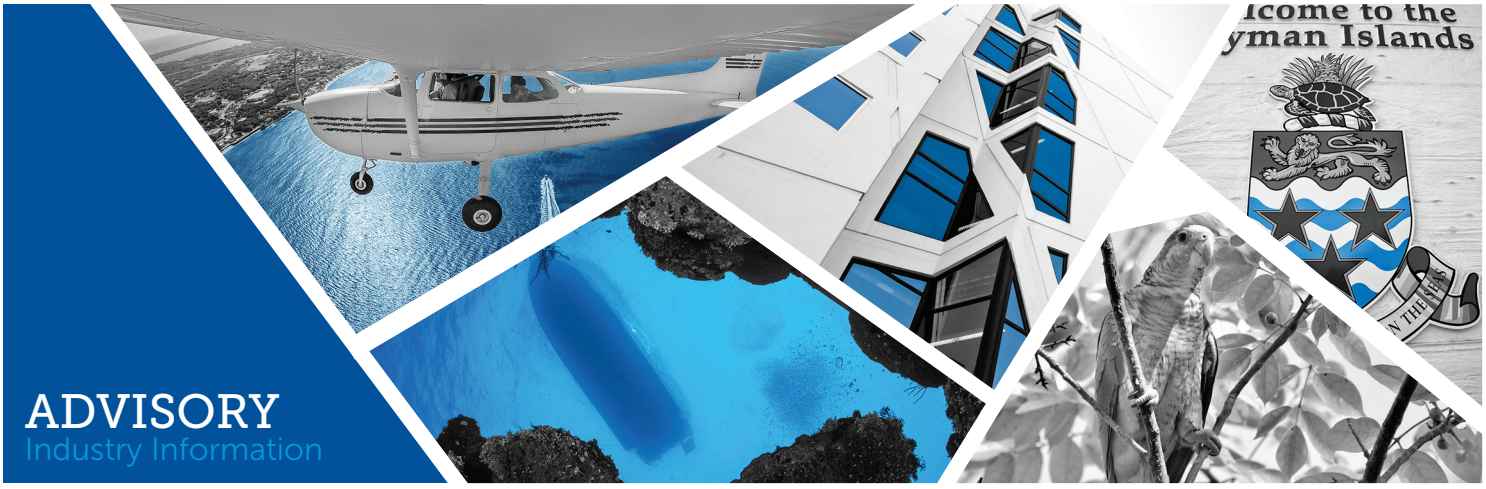

Avoiding the Nuclear Option

The Cayman Islands Grand Court Appoints Soft Touch Provisional Liquidators to CW Group Holdings Limited

15 August 2018

The Grand Court of the Cayman Islands (the "Court") has appointed 'soft touch' provisional liquidators ("PLs") to the Hong Kong listed company CW Group Holdings Limited (the "Company") in a contested matter involving two competing applications for the appointment of provisional liquidators, one by the Company (the 'soft touch') with a view to promoting a restructuring plan, and the other by certain creditors on a traditional basis (alleging mismanagement or misconduct and the risk of dissipation of assets).

Walkers acted for the Company, as the successful applicant.

In making the appointment, the Court emphasised that a key consideration in appointing PLs is to give the Company the necessary breathing space where there is a prospect of promoting a restructuring, finding that: "*to allow the company to continue as a going concern and to give the board and its advisors the best possible opportunity to secure a favourable restructuring is … in the best interests of the body of general creditors as a whole.*" This is an important decision, as the Court has confirmed that: (a) the appointment of PLs on a soft touch basis may be done in proceedings initiated by a "friendly" creditor, notwithstanding the objection of other creditors; (b) the relevant law does not require the applicant to have a formulated restructuring plan in advance before making an application for soft touch PLs; and (c) the appointment of PLs on a traditional basis must be "necessary" as required by the statute.

The background to the proceedings was significant because prior to the Cayman Islands application, the Company (and certain affiliates) had sought and obtained a moratorium by filing proceedings in Singapore, and a subsidiary of the Company had also had different PLs appointed in Hong Kong on a traditional basis. Notwithstanding that a stay was in effect as a matter of Singapore law, a creditor of the Company proceeded to file a winding up petition in the Cayman Islands, arguing that an injunction or stay in Singapore (which is not the place of incorporation) does not have any effect in the Cayman Islands.

Competing Applications

On 29 June 2018, the Company filed a summons seeking the appointment of PLs to the Company pursuant to section 104(3) of the Companies Law (2018 Revision) (the "Companies Law") on the grounds that the Company is or is likely to become insolvent and intends to present a compromise or arrangement to its creditors (the "Company's Application") (i.e. the soft touch basis). The Company's Application was filed on 29 June 2018, immediately following the presentation of a winding up petition filed by a friendly creditor of the Company.

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On 2 July 2018, just 3 days after the Company's Application, the Company was then notified that (a) on 22 June 2018, Fubon Bank (Hong Kong) Limited had presented a petition to the Court for the winding-up of the Company; and (b) on 28 June 2018, Bank of China Hong Kong ("BOC") had also filed a summons in the Court seeking the appointment of different PLs as joint PLs to the Company ("BOC's Application") pursuant to section 104(2) of the Companies Law (i.e. on the traditional basis).

As of 29 June 2018 there were, therefore, two winding up petitions and two summonses for the appointment of PLs in existence, on the two different basis.

BOC's Application and the Company's Application were heard together before the Honourable Mr Justice Parker on 11 July 2018 and 16 July 2018 (Cayman Islands time). In a judgment delivered on 3 August 2018, the Court observed that the competing applications were materially different as a matter of law and the evidence in support, and would lead to two very different outcomes.

The Company argued that the appointment of PLs to pursue a restructuring was required to prevent an irreversible destruction of value that would result from the Company entering an official liquidation process. A soft touch provisional liquidation procedure on the other hand, which would leave the existing management in place, would enable the Company to propose a restructuring of its financial indebtedness to enable the Company (and the wider group) to continue as a going concern, which would be in the best interests of all stakeholders.

BOC, however, sought the appointment of joint PLs to: (a) prevent alleged ongoing mismanagement; (b) prevent the dissipation of Company assets; and (c) investigate a number of allegedly questionable transactions and the Company's books and records. BOC argued that its application was supported by the majority of the Company's creditors who had no confidence in the current management of the Company. Further, BOC argued that the Company's Application was not supported by any restructuring plan or evidence that such a plan could or would be agreed.

The Decision

On BOC's Application, the Court held that it had to be satisfied that the appointment of PLs was necessary to prevent the dissipation or misuse of assets and mismanagement or misconduct by the directors, within the meaning of section 104(2) of the Companies Law, before it could grant the relief sought. The Court was not so satisfied, and held that there was no clear or strong evidence that it was necessary to make the appointment on a traditional basis. The Court held that the central issues concerning the Company had been satisfactorily dealt with by the Company in its evidence and found there to be no basis for the appointment of PLs under section 104(2) of the Companies Law.

BOC's Application accordingly was rejected.

The Court accepted the Company's submission that the language of section 104(3)(b) of the Companies Law only requires the Company to 'intend' to present a compromise arrangement to its creditors, not that it has done so, or that it will do so in the immediate future. The Court concluded that to allow the Company the chance to continue as a going concern and to give the Company the best possible opportunity to secure a favourable outcome through restructuring was in the best interests of the general body of creditors as a whole. In contrast, the winding up of the Company would be likely to produce a materially worse outcome for the Company and the group, and by extension, the creditors.

The Court therefore held that it would make the orders sought in the Company's Application.

A summons has been filed with the Court seeking leave of the Court to appeal the Order.

The Walkers team in Hong Kong was led by partner Joanne Collett supported by senior associate Meenaa Azmayesh. The Walkers team in the Cayman Islands was led by partner Neil Lupton supported by senior counsel Fiona MacAdam and associate Jason Taylor.

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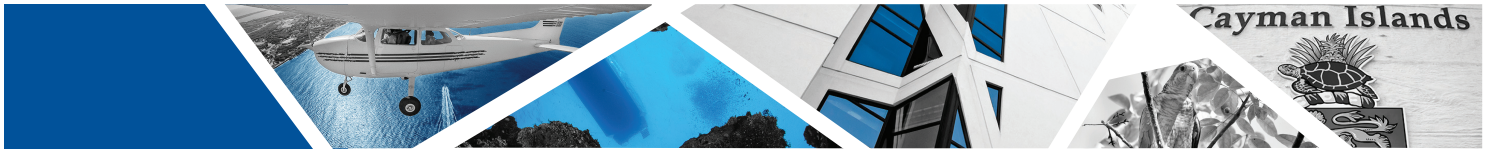

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