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OFFSHORE CASES
APRIL 2018

BERMUDA

SUPREME COURT

IN THE MATTER OF SEADRILL LIMITED - IN PROVISIONAL LIQUIDATION AND IN THE MATTER OF NORTH ATLANTIC DRILLING LTD – IN PROVISIONAL LIQUIDATION AND IN THE MATTER OF SEVAN DRILLING LIMITED - IN PROVISIONAL LIQUIDATION AND IN THE MATTER OF THE COMPANIES ACT 1981

REASONS FOR DECISION

[2018] SC (Bda) 30 Com (5 April 2018)

PARALLEL RESTRUCTURING PROCEEDINGS FOR BERMUDA COMPANIES – BERMUDA PROVISIONAL LIQUIDATION AND CHAPTER 11 PROCEEDINGS IN US – US COMI-APPLICATION BY PROVISIONAL LIQUIDATOR FOR PROSPECTIVE RECOGNITION ORDER IN RELATION TO US PLAN – OPPOSITION TO RECOGNITION ORDER BY MINORITY SHAREHOLDERS WHO HAD PREVIOUSLY SUBMITTED TO THE JURISDICTION OF THE US BANKRUPTCY COURT – STANDING OF MINORITY SHAREHOLDERS TO OPPOSE GRANT OF RECOGNITION ORDER AND/OR THE GRANT OF A STAY IN SUPPORT OF THE RECOGNITION ORDER

Background

On September 13, 2017 the Companies presented winding-up petitions to the Court. The previous day, they had entered into a Restructuring Support Agreement ("RSA") and filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code with the United States Bankruptcy Court for the Southern District of Texas. The petitions averred that the Chapter 11 proceedings had been commenced to serve as a platform for restructuring the Group as a response to liquidity challenges resulting from the downturn in the oil and gas industry.

Hellman J heard and granted the Companies' Ex Parte Summonses issued on the same date seeking to appoint the Joint Provisional Liquidators (JPLs). The Order empowered the JPLs to:

(a) review the financial position of the Company;
(b) oversee the continuation of the business of the Company;
(c) *oversee, in conjunction with the Board, the Chapter 11 case.*

On 27 October, 2017 the petitions were adjourned until April 2018 with the consent of all those who appeared. In January 2018, the Court gave directions sought by the JPLs for the issuing and service of an *inter partes* Summons seeking recognition of a Chapter 11 Plan and permanently staying all claims of creditors and shareholders against the Companies. Certain Minority Shareholders of Sevan Drilling Limited opposed the Summons.

On March 29, 2018 the Court granted the Recognition Order and Permanent Stay sought by the JPLs and the Companies. These are the reasons for that decision.

The inter partes Summons

The JPLs primarily sought an Order that

1. recognised the Plan of Reorganisation filed by the Companies under Chapter 11

2. Gave effect to the Plan in Bermuda:
   a. *"All claims by creditors and shareholders that have been brought in this jurisdiction against the Company are hereby permanently stayed;*
   b. *Leave shall not be granted under section 167(4) of the Companies Act 1981 for the commencement of proceedings against the Company; and*
   c. *No debts may be proved by any creditors whose claims are affected by the Plan on its terms, and no claims may*

be brought by shareholders/contributories, within these proceedings…."

Legal basis for the JPLs' application

The JPLs submitted that the "restructuring of Bermudian companies by way of parallel proceedings under Chapter 11 of the US Bankruptcy Code in the US, and light touch provisional liquidation proceedings in Bermuda, has been standard practice in the Bermuda Court since the case of *ICO Global Communications Limited* [1999] Bda LR 69." The Order sought was similar to Orders made by this Court in *Re Energy XXI Ltd* [2016] SC (Bda) 79 Com, and *Re C & J Energy Services Limited* [2017] SC (Bda) 20 Com.

Legal findings: jurisdiction to restrain creditors and shareholders from pursuing existing or future claims against Sevan

That the Court possessed the jurisdiction to grant the stay sought was not ultimately challenged. In *Re Energy XX1 Ltd.,* the jurisdiction is explained in broad terms, including the following: "*The main function of the [Recognition] Order is to restrain parties who have submitted to the jurisdiction of the Texas Court and/or who are otherwise bound by any confirmation order from seeking to pursue claims that they have either affirmatively waived or passively lost under US Bankruptcy law."*

Findings: merits of Minority Shareholders' objections to permanent stay sought by JPLs

Kawaley CJ stated in his findings: "Having exhausted their remedies in the Chapter 11 Proceedings, the Minority Shareholders appeared to be seeking to place a roadblock in the path of the Chapter 11 convoy, in the hope that some last-ditch and otherwise unlikely bargain could be extracted against all the odds.

When a Bermudian company is placed into provisional liquidation for the purposes of pursuing an insolvent restructuring, this Court makes three central interlocutory findings:

(1) a prima facie case for winding-up has been made out on the grounds of insolvency;

(2) the creditors have displaced the shareholders as the key stakeholders in the company; and

(3) an arguable case that a restructuring is where the best interests of the creditors lie has been made out.

These findings underpinned the Ex Parte Order made by Hellman J on September 13, 2017. The appropriate time and place for creditors or shareholders of Sevan to challenge those interlocutory findings was the hearing of the Petition, which the Rules require to be advertised for this purpose. The statutory basis for the Court deciding whether or not an insolvent company should be wound up or restructured or, indeed, is not insolvent at all, is section 164 of the Companies Act 1981, which provides:

"*(1) On hearing a winding-up petition, the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit*…"

The Petition in the present case was first heard on October 27, 2017. On that date all parties appearing assented to the JPLs pursuing the Chapter 11 Plan route. The adjournment Order implicitly confirmed the Ex Parte findings that the Companies were insolvent and that the creditors' best interests were what the Companies were required to seek to vindicate. Even if the Minority Shareholders are not strictly bound by these interlocutory decisions, they adduced no credible evidence in support of the improbable proposition that Sevan is not in fact insolvent and that they as shareholders do still possess a commercial interest in the Company. The suggestion that if Sevan was willing to give full disclosure without restricting their right to pursue claims against Sevan, the true position would be revealed beggared belief. It made no sense that sophisticated creditors would support a Plan which promised to deliver a partial recovery and release directors from pre-petition claims if the true position was that:

- Sevan was in fact solvent and able to pay its debts in full; and/or
- viable claims could be pursued against the directors which likely ensure a 100% return for creditors with a surplus in which the shareholders could participate.

The fact that the JPLs are in office undermines the essential basis for a derivative claim. In addition it would be an abuse of process for the Minority Shareholders to be able to derail an orderly and substantial cross-border restructuring process by intervening at the tail-end of the process rather than at the outset…

The Sevan Minority Shareholders filed their claims in the Chapter 11 Proceedings and on February 6, 2018 requested the US Court to postpone the Chapter 11 process. On February 26, 2018 the US Court gave directions for voting to take place on the Plan. If the Plan is confirmed, the Minority Shareholders would clearly be bound both by the Plan and the related permanent stay of proceedings against Sevan under US Bankruptcy law. It would clearly also be an abuse of process to permit the Minority Shareholders to reserve the right to bring proceedings against Sevan in Bermuda in breach of their obligations to the US Court.

In short, recognition of the Confirmation Order necessarily included recognising and enforcing under Bermuda law the permanent stay imposed by the US Court. The two limbs of the Order sought by the JPLs were inextricably intertwined, and the beguiling invitation to view them as severable could only properly be rejected."

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.