



IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO 349 OF 2021 (MRHJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF EVERGREEN INTERNATIONAL HOLDINGS LIMITED

Appearances: Ms Gemma Lardner with Nour Khaleq and Harry Clark of Ogier for the
Petitioner
Mr. Bhavesh Patel of Travers Thorp Alberga for the Company

Before: Hon. Mrs. Justice Margaret Ramsay-Hale

Heard: 6 January 2022

Date of Decision: 6 January 2022

Draft Circulated: 7 January 2022

Judgment Delivered: 11 January 2022

HEADNOTE

Companies - Winding Up - Petition to wind up Company on ground Company unable to pay its debts - debt not disputed - cross-application by Company for appointment of 'light touch' liquidators - principles governing the appointment of provisional liquidators for the purpose of restructuring - ss 92 (d) and 93(e) Companies Act

REASONS FOR DECISION

Introduction

- 1 The Petitioner seeks an immediate winding up of Evergreen International Holdings Limited ("the Company") pursuant to section 93(a) of the **Companies Act** (2021 Revision) (the "Act") on the ground that it is unable to pay its debts as and when they fall due.
- 2 The Company is an exempted company incorporated under the laws of the Cayman Islands and listed on the Hong Kong Stock Exchange ("HKSE"). Its principal places of business are in the PRC and in Hong Kong SAR. It is the holding company of a corporate group (the "Group") which is engaged in the business of manufacturing and retail of apparel for men and children in the PRC and Hong Kong SAR.

- 3 The Petitioner is a Hong Kong company which is principally an investment holding company specialising in global finance and is licensed pursuant to the **Securities and Futures Ordinance** to carry on various regulated activities in Hong Kong SAR.

The Petitioner's Debt

- 4 On 31 March 2016, the Company and the Petitioner entered into a placing agreement whereby the Petitioner was appointed to act as the Company's placing agent for the purposes of arranging for investors to subscribe for bonds to be issued by the Company in the aggregate principal amount of HK\$200,000,000.
- 5 On 31 March 2017, the Company and the Petitioner entered into a further placing agreement whereby the Petitioner was appointed to act as the Company's placing agent for bonds to be issued by the Company in the aggregate principal amount of HK\$100,000,000.
- 6 The Company's purpose in issuing the bonds was to support the continuous business development of the Group and it intended to use the proceeds from the Bonds for the expansion of and investment in apparel and accessory products and to expand its online business.
- 7 A debt became due to the Petitioner consequent upon the Company defaulting on the interest payments that fell due in respect of some of the bonds on 31 December 2019. On 28 February 2020, the Company paid the Petitioner a sum of HK\$4,781,227.43 in response to letter of demand sent by the Petitioner through its Hong Kong solicitors. The sum paid did not extinguish the debt.
- 8 On 30 June 2020, the Company defaulted on the half-year interest payment on the bonds. On 17 August 2020, the Petitioner again wrote to the Company through its solicitors demanding payment of HK\$33,217,288.36, representing the total interest due and unpaid on 30 June 2020. The Petitioner did not receive payment of any of the amounts owed on 30 June 2020.
- 9 By letter dated 16 September 2021, the Petitioner gave notice to the Company that an event of default had occurred in respect of the bonds held by the Petitioner some of which had matured but not been redeemed by the Company and others in respect of which interest due under the terms and conditions on which the bonds were issued had not been paid.
- 10 On 23 September 2021, pursuant to section 93(a) of the **Act** and Order 2 of the **Companies Winding Up Rules**, the Petitioner served the Company with a statutory demand which sought payment of an outstanding debt of HK\$ 67,233,452.05 (the "Statutory Demand"). Between service of the Statutory Demand and the date of the Petition, four Bonds were registered with an individual bondholder and not the Petitioner who now claims a debt due to it in the sum of HK\$55,350,993.15.

- 11 The Company has failed to pay any of the debt claimed in the Statutory Demand or the Petition and the Petitioner now seeks the winding up of the company pursuant to section 92(d) of the **Act** on the ground that that Company is deemed to be unable to pay its debts pursuant to section 93(a) of the Act on the basis of its failure to comply with the Statutory Demand. Ms. Lardner who appears for the for the Petitioner relies in support of its application on the note made of the judgment of Parker J *In the Matter of Pinnacle Global Partners Fund I Limited* 2019 (1) CILR Note 3 by the learned editors of the Law Reports which records that:

"The company had not raised any genuine dispute that it was under an obligation to pay the substantial sums to the petitioners. Despite demands, it had failed to do so and it was a matter of inference that it was unable to do so (Cornhill Ins. PLC v. Improvement Servs. Ltd., [1986] 1 W.L.R. 114, referred to; Mann v. Goldstein, [1986] 1 W.L.R. 1091, referred to). The court was satisfied that a reasonable inference from the company's failure to pay its debts was that it was unable to do so."

Company's application to adjourn the Petition and appoint 'light touch' Provisional Liquidators

- 12 The Company does not dispute the debt which it says it has not been able to settle because its cash flow does not allow it to meet creditor debts.
- 13 In his affidavit sworn in support of the Company's Summons, the Chairman of the Board, Mr. Chan Yuk Ming, asserts that the Company was trading successfully and growing rapidly, but since the second half of 2019 has been severely impacted by various trade deals between PRC and other countries, time delays on payments being sent from PRC to Hong Kong, and, more lately, by the global pandemic caused by COVID-19. Further, changes to its management and board have impacted its day to day operations.
- 14 Mr. Chan asserts that although it is cash poor, the Company is asset rich, the most valuable assets being real estate in PRC which could be sold to satisfy creditors. Mr. Chan estimates the current value of the Company's real estate as RMB 850 million. Exhibited to his affidavit is a balance sheet - unhelpfully in Mandarin - which, he says, details total assets of RMB 1.1 billion against total liabilities of RMB 478 million, with net assets of RMB 638 million. He says, however, that the process of selling real estate in the PRC is a cumbersome and time consuming process and this is the primary reason for the delay in the Company being able to realise cash sufficient to meet its debts.
- 15 Mr. Chan asserts that the Company is confident that the sale of the PRC properties, once complete, will realise substantial value such that its creditors can be repaid and the Company can return to successful trading.

- 16 He says that the Company had attempted to negotiate with the Petitioner and/or agree a short adjournment to allow the Company time to put together and implement its restructuring proposals but those overtures failed and the Petition was presented.
- 17 The Company now seeks the appointment of provisional liquidators with a view to finalising a restructuring proposal given the impact that official liquidators will have on the Company and its investments and assets and ability to operate, and in particular the immediate loss in value of the Company's assets if the Petition were to be granted.
- 18 Mr. Chan suggests that if the Company were put into liquidation the potential buyer in the sale of some properties in the PRC currently being negotiated would probably walk away and the process be restarted by the official liquidator, which would no doubt be at a lower value given the "fire sale" nature of a liquidation asset sale. Many of the Company's debts would immediately fall due if the Company were put in liquidation and a certain property in the PRC currently valued at RMB 200 million would be at risk of confiscation by the local government.
- 19 Mr. Chan says further that he has made loans to the Company in the sum of HK \$52 million to maintain operations and that placing the Company in liquidation would end any hope of the Company being able to trade its way out of its difficulties with consequences for its 250 employees.
- 20 The Company's position is that the appointment of provisional liquidators would avert those consequences and be in the best interests of all of its stakeholders and, in particular, all of its creditors as it would give the Company necessary breathing space while the restructuring takes place.
- 21 Mr. Chan says that its major creditor in the PRC, Mr. Max Era, majority shareholder, Pacific Success BVI, directors, and certain trade creditors have been informed of the restructuring proposal and have indicated their support for it.
- 22 Mr. Chan says further that the Company is due to be de-listed from the HKSE. The hearing of its appeal against the decision is to be heard on 12 January 2022 and the prospects of that appeal will suffer if the Company is placed into official liquidation before then. If, however, a restructuring under light touch provisional liquidators is permitted to proceed, then the Company will have a realistic prospect of survival and returning to normalcy.
- 23 Mr. Patel who appears on behalf of the Company acknowledges that there is no present proposal for restructuring but submits that that is not a bar to provisional liquidators being appointed. The power of the Court to appoint provisional liquidators is to be found in s.104(3) of the Act which provides that they may be appointed where the company is or is likely to become unable to pay

its debts, and where the company intends to present a compromise or arrangement to its creditors.

24 In support of his application to adjourn the Petition, Counsel relies on the decision of the Chief Justice in *Sun Cheong Creative Development Holdings Limited*, Unrep. 20 October 2020 in which he noted that the Court has a “*broad and flexible discretion*” in relation to such applications, citing his own previous judgment in *Fruit of the Loom Ltd.*, Unrep. 26 September 2000 where he describes the breadth of the discretionary power as being “*very wide*”.

25 The Chief Justice set out the factors to be considered when the Court exercises its discretion at para 37 of the judgment which include

(a) The express wishes of creditors, to which a caveat was added by Segal J Grand TG Gold Holdings Limited, Unrep. 21 August 2016, who stated that the Court should be cautious not to simply “count up the claims of supporting and opposing creditors”;

(b) Whether the refinancing is likely to be more beneficial than a winding up order;

(c) Whether there is a real prospect of refinancing and/or a sale as a going concern being effected for the benefit of the general body of creditors

(d) The considered views of the Board as to the best way forward.”

26 Mr. Patel submits that weight of authority in the jurisdiction favours the Court should stepping in to rescue a company where the evidence suggests that there is a real prospect of restructuring the Company for the benefit of the general body of creditors.

27 He submits further that in *Sun Cheong* the Chief Justice confirmed that the language of s.104(3) does not impose a requirement on the Company to provide evidence of the viability of its restructuring plan, just that there is a clear intention to present a compromise or arrangement. Mr. Patel submits that the evidence before the Court is that the Company intends to present a restructuring proposal to its creditors that goes beyond the sale of the PRC real estate.

28 With respect to any such sale, Counsel cautions that the effect of putting the Company into official liquidation will have an adverse impact on the value of those assets.

The Petitioner’s Response

29 The Petitioner objects to the appointment of provisional liquidators for the following reasons:



Misconduct and Mismanagement of the Company

- 30 Firstly, it has expressed concerns about the conduct of the management of the Company which arise in this way:
- 31 On 20 December 2019, two of three directors of the Company caused an indirect wholly-owned subsidiary, Guangzhou Changzhuxing Trading Co. Ltd ("Changzhuxing") to enter into a loan agreement with Shaoguan City Hong Tai Hui Investment Co., Ltd ("Hong Tai Hui") under which it advanced RMB 350 million for a term of 12 months at an interest rate of 10% per annum ("the Loan Transaction").
- 32 The Loan Transaction was made without shareholder approval and the funds under the Loan Transaction were advanced to Hong Tai Hui four days before the Company was required to make payment to the Petitioner of interest owed on the Bonds.
- 33 The Loan Transaction was flagged by the Company's auditors in March 2020 as the loan had been made to private company which is not a part of the Group and the money which was loaned by the subsidiary company appeared to have originated outside the Group.
- 34 The auditors subsequently suspended their audit work and recommended a forensic investigation of the transaction, stating that they would evaluate how to proceed with the audit after receiving information and supporting documents through the independent forensic investigation.
- 35 In September the auditors resigned for the reason, in part, that the Company had not appointed an independent forensic accountant to conduct the recommended independent review of the Loan Transaction.
- 36 Company finally engaged RSM Corporate Advisory ("RSM") in December 2020 to conduct an independent review of the Loan Transaction. Its preliminary findings disclosed that the loan monies were, in fact, generated outside the Group even though the Company's bank ledgers record that the funds came from a fixed term deposit with a PRC bank held by another subsidiary.
- 37 RSM also discovered that certain discrepancies between the bank balances of the Company's subsidiaries and what was recorded in the Group's internal records were eliminated when the Loan Transaction funds were injected into Changzhuxing by the outside entity, before the monies were paid out under the loan agreement.
- 38 Questions still remain about the Loan Transaction itself, the details of which were not disclosed by the Company to the HKSE as required and for which the Company failed to obtain shareholder approval. The lack of transparency surrounding the Loan Transaction and the fact that the

Company has not sought to recover the loan although the debt has matured and has not been repaid, supports the view that there was no underlying commercial purpose of the loan.

- 39 In light of the apparent misconduct of the two directors who remain in place and the mismanagement of the Company, the Petitioner considers that a compulsory winding up would better protect and preserve the remaining assets of the Company for the benefit of the creditors than allowing the current management of the Company to retain control of the Company's affairs in the context of a light touch provisional liquidation.

Suspension of Trading on the HKSE

- 40 The suspension of audit work by the auditors as a result of the Loan Transaction, caused the Company to postpone the publication of its 2019 audited accounts and its interim results for the six months ending 30 June 2020. The reporting delays constituted non-compliance with the HKSE Listing Rules which ultimately culminated in the suspension of trading in the Company's shares on the HKSE on 30 March 2020.
- 41 Trading in the Company's shares has not resumed because of the Company's failure to meet the resumption conditions imposed by the HKSE and the Company is now at significant risk of being de-listed.

Financial Performance

- 42 Ms. Lardner notes that in his affidavit, Mr. Chan suggests that the Company was doing well until late 2019 and links the decline in the Company's performance to external factors including the impact of the COVID pandemic on its retail business. She submits, however, that these assertions are not supported by the Company's financial reports. The Company's audited balance sheet for 2018 shows there was a pre-pandemic loss of USD 12 million and a loss of USD 17.5 million the year before. In the Chairman's Statement in the Company's Annual Report for 2018, Mr. Chan made the point that the PRC's gross domestic product grew by 6.6% and the total retail sales of consumer goods realised in urban areas and rural areas grew at a rate of 8.8% and 10.1% compared to the previous year. Despite the market in the PRC doing well, the Company's revenue decreased by 15.2%.
- 43 When the 2018 results are compared with the 2017 results, Ms. Lardner submits it is clear that the Company's performance has deteriorated in almost every metric.
- 44 Ms. Lardner submits further that the assertion that the Company is asset rich is not supported by the Company's financial statements. In 2018, the audited Reports show current assets which are listed make up over two-thirds of the total assets, stated at RMB 661 million versus RMB 329 million for investment properties. The auditor's notes record that, at 31 December 2018, those investment properties had been pledged to secure general banking facilities to the Group.

- 45 In 2019, the Company noted that the market in the PRC continued to improve with an increase in total retail sales of 8.4% as at 30 June 2019 to the same period the year before yet the Company's performance continued to decline.
- 46 The unaudited reports show that at 30 June 2019, the Company's cash position had deteriorated even further, down to RMB 89 million from RMB 458 million at 31 December 2018.
- 47 Ms. Lardner makes the point that no explanation has been given for this approximately RMB 370 million hole in the Company's financials. She drew the Court's attention to a "Time Deposit" in the sum of RMB 350 million which is recorded as current asset in the 2019 unaudited financial statement which is not explained by any note. Ms Lardner points out that it is in the same sum as the impugned RMB 350 million Loan Transaction. In circumstances where the investigation of that Loan Transaction has shown that the monies were provided by a third party and the funds injected into the Company to cover up missing cash, Ms. Lardner submits that the inference to be drawn is that that RMB 350 million 'time deposit' does not exist and that in fact, the Company's asset position is less than its liabilities.
- 48 With respect to the assertion made by Mr. Chan that the net value of the Company's properties, taking into consideration any encumbrances on them, is estimated to be approximately RMB 850 million which far exceeds the debt, Ms Lardner submits that this is not supported by the documentary evidence which is available. The 2018 financial statements state that those properties were worth RMB 395 million in 2018 so it is either the property has more than doubled in value, which is not supported by any valuation evidence, or the Company has acquired more real estate despite its declining revenues since 2017, which is unlikely.
- 49 Referring to the 2021 Company financials (in Mandarin) on which Mr. Chan relies, Ms. Lardner also points out that the total assets of the Company have remained the same as in 2018 - RMB 1.16 billion in 2021 versus RMB 1.2 billion in 2018 - notwithstanding Mr. Chan's assertion that its investment properties have apparently more than doubled.
- 50 Ms. Lardner invites the Court to reject Mr. Chan's evidence which is entirely unsupported by any documentary evidence and which, where it can be cross-checked, raises more questions than it answers.

Restructuring Proposal

- 51 So far then as the views of the Board are concerned, Ms. Lardner submits that no weight should be accorded to Mr. Chan's view as Chairman, as to what is in the best interest of the company or its creditors.

- 52 Ms Lardner also makes the point that this case is a world apart from *Sun Cheong* which Mr. Patel prayed in aid. In that case, there was a white knight investor in the wings; the company proposed new business lines and had launched an online platform; it had a history of profitability up until the year before the Petition was presented and the Court had the benefit of financial statements and an independent financial report informed the Court about the likely outcome of the proposed restructuring.
- 53 In this case, there is no restructuring proposal even though RMS was instructed by the Company to explore ways in which the Company could restructure. The Company has been posting losses since 2017 and yet it continues to boast about its reliance on main street concrete store fronts, a business model which is not going to improve in light of the COVID pandemic. The proposal is to realise assets which are already encumbered, the stated value of which is not supported by any evidence.
- 54 Ms. Lardner also submits that, even if the Company sold its assets to pay off its debts, there is no prospect of the business moving forward as there is no plan.

Applicable Legal Principles

- 55 It is well-settled that if a creditor with standing to make an application wants to have the company wound up, and if the Court is satisfied that the company is unable to pay its debts, a winding up order will follow, unless there are some special reasons why it should not. *In Re Lummus Agricultural Services Ltd.* [2001] 1 BCLC 137 at 141 which was cited by the learned Chief Justice in *Sun Cheong*, the Court said:

"It is sometimes said that in such a case, a petitioning creditor is entitled to a winding-up order 'ex debito justitiae'. I therefore start with the assumption that such an order should be made in this case, and the burden of argument rests on [the respondent company] to show me why it should not"

- 56 As Mr. Patel submits, the authorities demonstrate that the Court will depart from this principle and grant adjournments of winding up petitions in aid of restructuring proceedings.
- 57 The Court has demonstrated its willingness to appoint provisional liquidators to explore the viability of a restructuring as Kawaley J did in *Re ACL Asean Tower Holdco Limited* (Unreported, 8 March 2019). In that case, the learned Judge gave the following guidance on applications to adjourn Petitions:

"Although the Court may in general terms be willing to grant a shorter adjournment than a longer one, a rational basis for the adjournment must nonetheless be advanced" at para 33;

"It is for the respondent company seeking the adjournment to persuade the Court that a winding up order ought not to be made" at para 39; and
"The Court should generally be leery about last minute adjournment applications made by insolvent companies" at para 39.

- 58 The notion that a *"rational basis"* must be advanced for the granting of an adjournment was alluded to by Justice McMillan in the matter of *G3 Explorations Limited* (Unreported, 24 July 2020) at [26] citing *Lewison LJ in Sekhon and another v Edginton* [2015] 1 WLR 4435:

"The Court has the power to adjourn the petition, but the practice is to do so only if there is credible evidence that there is a reasonable prospect that the petition debt will be paid within a reasonable time."

- 59 The cases in which the Court has exercised its discretion to grant an adjournment of a winding up petition generally fall into one of three categories:

- (i) Where an adjournment is required to facilitate a restructuring of a company's indebtedness which is in the best interests of, and may provide a better return to, all stakeholders: see *Re Sun Cheong*.
- (ii) Where there is prospect of a sale of the assets of a company: see *Byblos Bank SAL v Al-Khudhairy* [1987] BCLC 232 and/or where a solution to a company's cash flow insolvency was within reach in circumstances where a company remained balance sheet solvent: see *Re Minrealm Ltd* [2008] 2 BCLC 141 and
- (iii) Where there is a dispute as to the validity of the petition debt which falls to be resolved first (and the Court elects not to strike out the petition in its entirety).

- 60 In *Re ACL Asean Tower Justice Kawaley* noted at paragraph 29 that the authorities which illustrate a more flexible approach to adjourning winding up petitions demonstrate that there should be *"tangible grounds for an adjournment"* and that such grounds *"are likely to consist of either (a) support from the majority of creditors and a Listing Committee, (b) proactive restructuring steps taken by the company's management, and/or (c) support from the majority of creditors as well as the joint provisional liquidators"*.

Decision

- 61 I accept Ms. Lardner's submission that no rational basis has been advanced for granting the Company's application for an adjournment. Rather, the Company's summons has all the hallmarks

of a last minute application of which the Court should be leery, as Kawaley J opined in *ASL Asean Tower*.

- 62 The debt has been due since June 2020 and not been paid despite the Company's assertion of solvency. The Company has not offered even the outline of a restructuring proposal, despite a restructuring advisor being engaged since April 2021, nor has it provided any evidence, short of Mr. Chan's own bare assertions, that any creditor supports the appointment of provisional liquidators.
- 63 The only proposal put forward by the Company is the sale of its real estate assets in the PRC which, the last audited statements produced by the Company suggest, are fully encumbered. Mr. Chan's evidence that the net value of the Company's properties, taking any encumbrances into consideration is RMB 850 million is unsupported by any evidence.
- 64 The Company offers no explanation why, having defaulted on the bonds in June 2020, it made no effort to sell any of those properties until mid-2021. Mr. Chan's assertion that the appointment of official liquidators will drive off the buyer with whom the Company has been negotiating the sale of land or otherwise obstruct the sale, but not the appointment of provisional liquidators, is not fully explained.
- 65 The Company has been unable to produce any audited consolidated accounts since December 2018 to support its assertion that it is solvent, as the independent review which RSM began in December 2020 is ongoing. All the available evidence points the other way, with the financial statements before the Court showing that the Company's financial position deteriorated rapidly in 2019 against the background of anomalies discovered in its financial information as set out above.
- 66 The Company has said its appeal to the HKSE will be adversely affected by the making of a winding up order but, in the circumstances, where the Company has no audited financial results to present, it does not appear to be in a position to meet the listing resumption requirements set by the HKSE in any event, one of which requires the Company to demonstrate that it has a sufficient level of operations and assets of sufficient value to support its operations to warrant continued listing of its securities.
- 67 The directors - or some of them - with whom it is proposed the provisional liquidators would work on any restructuring proposal, are implicated in the mismanagement of the Company and, in particular, in making the Loan Transaction and arranging the injection of capital from outside the Company to conceal losses. Although Mr. Patel submits that any concerns about those directors remaining in control of the business can be addressed in the order appointing the provisional liquidators, I consider that they should be removed from the management of the Company altogether.



68 In the circumstances where the debt is indisputably due and no good reason shown why a winding up order should not be made, the Petitioner is entitled to the relief it seeks and an order made in terms of the draft order before the Court.

DATED THE 11th DAY OF JANUARY 2022

A handwritten signature in blue ink, appearing to read "A. Hale", is positioned above a horizontal line.

**The Hon. Mrs. Margaret Justice Ramsay-Hale
Judge of the Grand Court of the Cayman Islands**