IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 11

CAUSE NO: FSD 309 OF 2023 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF HOLT FUND SPC

FOR AND ON BEHALF OF HOLT FUND INCOME SEGREGATED PORTFOLIO 02

FOR AND ON BEHALF OF HOLT TROPHY CRE SEGREGATED PORTFOLIO 03

IN CHAMBERS

Before:	The Hon. Justice Kawaley
Appearances:	Stephen Leontsinis, Simon Hurry and Kirsten Bailey of Collas Crill LLP for the Joint Restructuring Officers ("JROs")
Heard:	On the papers
Date of decision:	11 February 2025
Draft Judgment circulated:	31 January 2025

Judgment delivered: 11 February2025

Application for discharge of restructuring officers' order and approval of fees—objection based on need for an investigation-application on the papers-open justice-function of restructuring officers-Companies Act (2023 Revision), sections 91B, 91D, 91E, 91G- Companies Winding Up Rules (2023 Consolidation), Order 1A rules 9-10

250211 - Holt Fund SPC - FSD 309 of 2023 (IKJ) - Ruling on Discharge Application

RULING ON REMUNERATION AND DISCHARGE APPLICATION

Introductory

1. By Order dated 18 December 2023 (the "JRO Order"), David Griffin and Iain Gow of FTI Consulting were appointed as Joint Restructuring Officers ("JROs") of Holt Fund SPC (the "Company"). The Company is a segregated portfolio company ("SPC"). The appointment was made in relation to two specific portfolios, SP02 and SP03 pursuant to section 91B of the Companies Act (2023 Revision) (the "Act"). Because of the novelty of the restructuring officer regime, I gave reasons for that decision focussing on jurisdictional matters in *Re Holt Fund SPC*, FSD 309 of 2023 (IKJ), Judgment dated 26 January 2024 (unreported).

2. On 14 November 2024, the JROs' attorneys filed a Summons seeking, *inter alia*, approval of their fees and a discharge of the JRO Order. A covering letter explained that it had been agreed with the Company's management that the 'Restructuring Proposal' they were appointed to seek to implement was not viable. The Summons was supported by the Second Affidavit of Iain Gow ("Gow 2") (the "Application"). It was explained in the letter and Gow 2 (at paragraph 71) that the Application would be served:

    (a) by personal service on the Company;

    (b) by email on the portfolios' stakeholders, inviting comments within 14 days; and

    (c) by email on the Cayman Islands Monetary Authority (the "Authority"), inviting its comments within 14 days.

3. Subject to responses received from the parties whose comments on the Application were sought, it was suggested that the application could be made on the papers and indicated that the Court would be updated in due course. By letter dated 17 January 2025, the JROs' attorneys filed a bundle of documents including the promised updating Third Affidavit of Iain Gow ("Gow 3"). The letter invited the Court, in both instances on the papers, to:

    (a) seal part of Exhibit IG-3 to keep confidential the names and personal details of the two persons, "Individual A" and "Individual B", who had

responded to the request for comments on the Application, along with correspondence provided by Individual B; and

(b) notwithstanding the objections to the discharge limb of the Application by Individual B, grant the remuneration application and discharge the JRO Order.

4. The JROs were directed by paragraph 4 of the JRO Order not to reveal confidential information in their reports and it was averred by Mr Gow the identities of these individuals, along with correspondence provided by Individual B, were considered to fall within the ambit of paragraph 4 of the JRO Order. The underlying legal basis of the sealing application, the Companies Winding Up Rules (2023 Consolidation) ("CWR") Order 1A rule 16 (7), provides:

> "*The Court may direct that the whole or part of any report, order, affidavit or other document (except the petition or restructuring order) which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the same grounds as set out in Order 24, rule 6 of these Rules.*"

5. On 29 January 2025, on the papers, I granted the sealing order sought in the following terms:

> "*1. Pursuant to Order 24 Rule 6(1) read with Order 1A Rule 16(7) of the Companies Winding Up Rules (2023 Consolidation):*
>
> *(a) the 17 January Letter be sealed and not open to inspection by any party or other person except with the prior leave of the Court; and*
>
> *(b) pages 8 to 33 of Exhibit IG-3 be redacted and the unredacted version of Exhibit IG-3 be sealed and not open to inspection by any party or other person except with the prior leave of the Court.*
>
> *2. Any application for leave referred to in paragraph 1, above, shall be made in writing and on not less than seven days' written notice to the JROs.*"

6. I now proceed to consider the merits of the JROs' Summons seeking approval of their remuneration (and expenses), a discharge of the JRO Order and relief in the following terms:

"*1. the JROs' costs, expenses and remuneration in the sum of US$727,794 for the period to 8 November 2024 are approved;*

2. the JROs' costs, expenses and remuneration be paid out of the assets of the Portfolios pursuant to paragraph 14 of the JRO Order;

3. the JRO Order be discharged, save for paragraph 9;

4. the JROs' costs arising out of, and incidental to, this summons be paid out of the assets of the Portfolios; and

5. such further and other relief as the Court considers appropriate."

Factual matrix: the Restructuring Proposal could not be implemented as initially hoped

7. The same factual matrix is relevant to both limbs of the present Summons. At a high level what the JROs were appointed to do can be discerned from the principal powers conferred on them by the JRO Order:

> "*2. The powers of the Restructuring Officers appointed pursuant to paragraph 1 above shall be limited to doing all things necessary and incidental to assist the board of directors (Board) of the Company in developing, proposing and implementing a restructuring of the Portfolios' indebtedness, with a view to making arrangements with the creditors and stakeholders(or any class thereof) of SP02 and SP03, including (without limitation) by way of: consensual arrangements; compromises or arrangements by way of a scheme of arrangement pursuant to sections 86 or 91I of the Companies Act; or any other law of a foreign country.*"

8. A fuller picture is provided by Gow 2, Gow 3 and the JROs' Reports. The Company is an investment fund regulated by the Authority. SP02 and SP03's liquidity problems prompted an attempt to restructure their debt through the present proceedings. It is common ground amongst the Company's directors, its Investment Manager and the JROs, that they should be discharged because the Restructuring Proposal has turned out not to be viable.

9. SP02 was formed on or about 30 March 2021 to invest in fixed income securities and US real estate. Through "Cayman SPV", SP02 owns 99% of SP03. Its other principal assets are believed by the JROs to be US Government sponsored enterprise bonds. Its main pre-petition liabilities are sums due under promissory notes issued to investors. SP03 was formed on the same date. SP03 through the "SP03 Delaware Entities" has principally invested in real estate in Boca Raton, Florida (the "Boca Portfolio"). SP02's commercial fortunes are primarily dependent on those of SP03 and its property portfolio.

10. Accounts for 2023 (SP02) and for 2021, 2022 and 2023 (SP03) have not yet been audited. Nevertheless, liquidity problems are apparent. The Restructuring Proposal offered a preferable option to a liquidation because it sought to defer payment obligations for a period during which it was hoped Federal interest rates would fall, and the value of and returns from the Boca Portfolio would rise. The Proposal was based on various assumptions about future cashflow which could not (in the JROs' judgment) ultimately be supported. In the months leading up to the discharge application, it became apparent that the costs of the present proceedings were themselves an impediment to developing an alternative successful restructuring plan with the initial Restructuring Proposal of doubtful viability and not supported by some stakeholders.

11. In these circumstances it was agreed as between the Company's management and the JROs that their appointment should be discharged and their fees paid so the Company could pursue other options with stakeholders directly.

12. Having given notice of the Application to stakeholders, only two responses were received. Individual A raised certain queries which were responded to, and no further concerns were raised. Individual B raised positive objections to the discharge limb of the application, which will be considered further below. However, on the face of it, Individual B as a beneficiary of a trust which is a direct stakeholder has no standing to object and raised a ground of objection (the need for an investigation into the Company's affairs) which was legally invalid. The sole objector to the discharge limb of the Summons did not insist on being heard and their anonymity was sought by the JROs on contractual confidentiality grounds.

Application on the papers despite objection to application: open justice

13. Against this background, it is unsurprising and entirely consistent with the stakeholders' interests that the Application should be presented in the most economical and streamlined

manner possible. Because of the novelty of the restructuring officer regime, counsel could not realistically address the legal issues I have canvassed below in an economical manner consistent with a case where it is uncertain that professional fees will actually be recovered. It is also obvious, having considered the materials, that the relief sought should be granted. In many cases, such an application could be properly granted without a public hearing or reasoned judgment. However, in this case Individual B, a lay member of the public with an interest in the proceedings (albeit not contending a right to directly intervene), has written to the Court opposing the main limb of the Application on the basis of serious mismanagement concerns.

14. The open justice principle is accordingly engaged, because it is important to provide as full an explanation as possible to the 'objector' as to why this Court is declining to accede to their concerns. Absent reasons for the Court's approach, Individual B would be able to plausibly complain that a quixotic Cayman Islands Court has, inexplicably, refused to even countenance a potentially valid ground for keeping the JROs in office. What open justice requires depends on the context, and a public hearing is clearly not required in all cases. The constitutional requirement for proceedings to take place and judgments to be pronounced in public is subject to exceptions, for instance in relation to interlocutory proceedings (Cayman Islands Constitution, section 7 (9), (10) (a)). The public decision rendering requirement is today widely recognised as being met by the electronic publishing of a written judgment, a common current practice in much of the common law world.

15. Where there is no hearing at all because an application is appropriately dealt with on the papers, in my judgment the requirements of open justice (when actively as opposed to merely passively or technically) engaged, publication of a judgment explaining the application and the way in which it has been adjudicated should suffice. The public's ability to scrutinise the judicial process is what is important, so the opportunity to review a written judgment following a paper hearing is a modern proxy for being able to attend court and observe an oral hearing. A helpful recent summary of the essence of the open justice principle can be found in the judgment of Sir Geoffrey Vos (Master of the Rolls) in *Tickle and Summers-v- The BBC et al* [2025] EWCA Civ 42 where he stated:

> "*44. The open justice principle was more recently summarised by Lord Judge CJ in R (on the application of Mohamed) v. Secretary of State for Foreign & Commonwealth Affairs [2010] EWCA Civ 65 at [38] as follows: Justice must be done between the parties. <u>The public must be able to enter any court to see</u>*

> *that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.*"

Remuneration application

Legal principles

16. I was not referred to any authority on the principles governing fee approval applications in a restructuring proceeding context and it would be surprising if any considered authority exists. The only authorities of which I am aware address the statutory jurisdiction to engage the still relatively new restructuring officer regime, not the discontinuance of such proceedings.

17. Firstly, the Act must be considered and then the Rules. Section 91D provides:

> "*(6) The remuneration of a restructuring officer appointed under section 91B or 91C shall, on the application of the restructuring officer, be fixed by the Court from time to time in accordance with section 109.*"

18. Section 109 of the Act provides:

> "*(2) Where a company is wound up, the expenses properly incurred in any petition for a restructuring officer and during the term of appointment of the restructuring officer appointed —*
>
> *(a) under section 91B(3)(a); or*
> *(b) on an interim basis under section 91C (3),*
>
> *including the remuneration of the restructuring officer, are payable out of the company's assets in priority to all other claims.*

> *(3) There shall be paid to a restructuring officer, including a restructuring officer appointed on an interim basis, and the official liquidator, such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155.*
>
> *(4) If more than one restructuring officer, including a restructuring officer appointed on an interim basis, is appointed by the Court under section 91B or 91C, the remuneration paid under subsection (3) shall be distributed among the restructuring officers in such proportions as the Court may direct."*

19. Section 109 (2) deals expressly with the priority status of properly incurred restructuring officer proceeding costs, but only where a winding-up later occurs. Section 109 (3) deals with the present scenario, restructuring officer costs being approved in circumstances where there is no liquidation and no fundamental legal requirement to consider issues of priority. However, what happens in a liquidation is, it seems to me, without the benefit of argument or authority, highly relevant to the present context. Here cash-flow insolvency exists and the possibility of a winding-up of the Company is foreseeable.

20. It is relevant because I am bound to ask myself this question: on what basis can the JROs properly invite the Court to approve the payment of their fees in full out of the assets of a company attributable to portfolios which are admittedly cash-flow insolvent? The only obvious answer is as follows. If the Company is later wound-up, section 109 (2) will be engaged and the "*properly incurred*" remuneration of the JROs will be accorded priority. It may be possible to impugn the propriety of approval conferred under section 109 (3) for a restructuring officer's remuneration in very exceptional circumstances, in the context of a subsequent winding-up or otherwise. However, this Court may properly approve such remuneration without anxiety about the potential preference conferred in the event of a subsequent winding-up.

21. Were this not the correct legal analysis, it is ultimately clear to see, the restructuring officer regime would be entirely unworkable. The first of two pivotal requirements for presenting a restructuring officer petition is that the company "*is or is likely to become unable to pay its debts within the meaning of section 93*". Restructuring officers are entitled to be paid for attempting to avoid the need for recourse to winding-up proceedings even where a company is actually insolvent. Full stop.

22. CWR Order 1A rule 10 provides in salient part as follows:

> "*10. (1) Subject to section 91D of the Law and unless the context otherwise requires or the Court orders otherwise, the provisions of the Insolvency Practitioners' Regulations (as amended and revised) shall apply mutatis mutandis to restructuring officers (save that the Independence Requirement in Regulation 6 shall not apply, Regulations 12 and 13 shall not apply and 'restructuring officer' shall be substituted for 'official liquidator').*
>
> *(2) The remuneration of a restructuring officer shall be approved on an application to the Court by the restructuring officer for approval of the restructuring officer's remuneration.*
>
> *(3) An application by a restructuring officer for approval of the restructuring officer's remuneration shall be made by summons in CWR Form No 16A and be supported by an affidavit setting out the grounds in support of the restructuring officer's remuneration. The application may be made ex parte and determined on paper but the Court may order that the application be served on creditors, including prospective and contingent creditors, and/or on members in such manner as the Court thinks fit.*
>
> *(4) Where the remuneration of a restructuring officer has been approved by creditors and/or members by approval of the compromise or arrangement, there is a rebuttable presumption that the remuneration of the restructuring officer is fair and reasonable..."* [Emphasis added]

23. The CWR do not explicitly articulate any principles for dealing with remuneration applications in the restructuring proceeding context, but the alignment of some aspects of the procedural framework (e.g. the application of the Insolvency Practitioner Regulations (2023 Consolidation (the "IPR")) suggests the liquidation approach to fee approval applications will generally serve as a useful guide. One obvious distinction is that when a restructuring is approved by stakeholders on terms which include the officers' fees, they are presumed to be "fair and reasonable" and so little or no judicial scrutiny will, presumably, ordinarily be required.

24. It is also noteworthy that CWR Order 20 sets out a list ranking the order of priorities indicating that restructuring officer costs and expenses rank ahead of those of provisional and official liquidators. This further buttresses the view expressed above (paragraphs 17-19) that the efficacy of the restructuring officer regime depends on such officer being able to be compensated for reasonably attempting a restructuring which fails, without being anxious that their remuneration may be clawed back in a subsequent liquidation.

25. The rationale of the requirement in section 91D (1) of the Act that a "*restructuring officer appointed under section 91B or 91C shall be a qualified insolvency practitioner*" seems obviously to be to ensure that professional rigour and independence is brought to a restructuring proceeding so that only credible proposals are implemented, and non-viable proposals are abandoned.

26. In summary:

(a) restructuring officers must apply to the Court to have their remuneration approved;

(b) such applications may be dealt with *ex parte* and on the papers, although the Court may require the application to be served on relevant stakeholders;

(c) the Court's approach to approving remuneration applications will generally be broadly similar to the approach adopted by the Court in applications made by provisional or official liquidators;

(d) the statutory scheme expressly contemplates that if a restructuring proposal does not succeed and the company is subsequently wound-up, the "*properly incurred*" remuneration of the restructuring officers will be entitled to be given high priority.

27. Identifying these principles is relevant not just to the merits of the remuneration application but also the legal efficacy of the following provisions of the JRO Order itself:

> "*9. In the event that a winding-up order is made against the Company, any fees and expenses of the Restructuring Officers, including all costs, charges and expenses of any attorneys and all other agents, managers, accountants and*

> *other persons that they may employ, which are payable in accordance with the terms of the orders which may be made by this Court, and which are outstanding at the date of the winding-up order, shall be treated as fees and expenses properly incurred in preserving, realising or getting in the assets of the Company for the purposes of Order 20 of the Companies Winding Up Rules (2018, as amended), subject to any further order that the Court might make.*"

28. On reflection, paragraph 9 of the JRO Order is probably surplusage because any priority which the JROs are entitled to enjoy derives more clearly from the provisions of section 109 (2) of the Act rather than this Court's Order. I was more concerned in the prelude to granting the JRO Order about the jurisdiction to make the appointment in relation to particular segregated portfolios than the precise terms of the Order.

29. It is of course important to identify, albeit concisely, what principles the Court is actually applying in considering whether or not to approve restructuring officers' remuneration in relation to a restructuring proposal that has effectively failed. While the burden is clearly on the office holders to demonstrate the reasonableness of their fees in terms of value received by the 'estate' for the work done in every case, there is a different evaluative approach required when the application is contested as opposed to uncontested.

30. I recently considered the approach to contested remuneration applications in *Re Global Cord Blood*, FSD 108/2022 (IKJ), judgment dated 14 November 2024 (unreported). At paragraph 9, I quoted the insightful observations of Smellie CJ (as he then was) in *Re Liberty Capital Limited et al* 2002 CILR 606 (Smellie CJ, Sanderson J and Henderson Ag. J) which articulate an overarching principle which applies irrespective of whether an application is opposed or not:

> "*59. The court recognizes that insolvency practitioners are professionals and deserve to be adequately compensated for the important work they do. It is not the court's intention to be miserly, if, indeed, such an expression could ever apply to the rates we have set. The paramount objective must be to safeguard the lawful interests of the creditors. We must be astute to recognize the inevitable tension that arises from the liquidator having to fulfil his duties to the creditors and the court, yet, at the same time having to secure his own interests by maximizing what he can earn from a retainer*." [Emphasis added]

31. How this general objective is evaluated from case to case will differ in contested and uncontested cases because of a golden thread which runs through English-based company law. The stakeholders are generally assumed to be the best judges of where their own commercial interests lie. Even commercial courts exist primarily to make legal judgments, not commercial judgments, although it would be wrong to suggest that legal and commercial considerations exist in hermetically sealed compartments. Where stakeholders appear to be reasonable and can be assumed to be acting in good faith, the Court will be slow to substitute its own views for the stakeholders', as to where their best interests lie.

32. I considered the approach to uncontested remuneration applications, not too many years ago, in *Re World Properties Ltd (in Official Liquidation)*, FSD 49/2018 (IKJ), Judgment dated 3 October 2022 (unreported), albeit extrapolating from the approach to contested applications:

> "*20. It is possible to extrapolate from these established principles applicable to contested remuneration applications what the approach of the Court should be in the context of uncontested applications where the liquidation committee and/or other stakeholders have simply withheld their affirmative approval rather than opposing the application. It is not an infrequent occurrence where stakeholders, in the oft-quoted words of Alexander Pope, are "Willing to wound, and yet afraid to strike; Just hint at fault and hesitate dislike". When this occurs, in my judgment the Court ought to be entitled to presume, absent grounds for displacing such assumption, and provided the fee approval application is prepared in the expected manner, that no valid objections exist. The Court cannot be expected to assume a more onerous adjudicative burden in relation to an uncontested remuneration agreement than in the case of a fully contested one where the objectors are required to articulate specific and coherent objections, in part at least to assist the Court.*
>
> *21. It is not customary to give reasons for uncontested liquidators' fee approval or remuneration applications because it is typically self-evident on the face of the papers that a prima facie case for approval has been made out and there are no formal objections requiring adjudication. The liquidators will typically have explained the work which was done during the relevant period, set out in tabular form the workstreams and the various fee earners and their rates, demonstrating that they fall within the prescribed limits. They will also*

invariably have demonstrated that the liquidation committee and/or other consented to the application or (2) refused to approve the application, albeit without electing to make positive representations to the Court in opposition to the application. Because they are mindful of their obligations on what is analogous to an ex parte on notice application, the liquidators will invariably draw to the Court's attention the unpursued objections that the committee or other stakeholders have previously made."

22. The Court's task in such cases is essentially limited to:

(a) satisfying itself that a prima facie case for approval has been made; and

(b) where some stakeholders have, in effect, grumbled and griped without having the gumption to positively oppose the application, the Court in my judgment must further satisfy itself that there is, taking a high-level view, nothing 'eyebrow-raising' about the level of fees and expenses. If there is readily discernible cause for concern, the Court of its own motion should consider making appropriate disallowances after carrying out a more rigorous review."

33. I consider these observations of some utility in the present, novel restructuring officer remuneration application context. A restructuring proceeding which does not result in a successful restructuring means that the fees are being sought to be paid by a company which is either insolvent or likely to become insolvent. Stakeholders ought to be similarly concerned to ensure that assets they have a potential claim to are not wasted. And whether they are formally required (like a liquidation committee) to approve an application or not, their express or tacit consent and/or the absence of any positive objections ought generally to mean that the Court's adjudicative function is limited to:

(a) confirming that the remuneration application has been made in a formally correct manner (applying the prescribed rates, explaining the work done); and

(b) satisfying itself that a *prima facie* case for approval has been made out.

Merits of remuneration application

34. The JROs have reported their fees and expenses to stakeholders and this Court in four Reports, each of which was exhibited to Gow 2. This Affidavit explained the various fees and expenses incurred in a clear and systematic manner consistent with what is now standard practice for remuneration applications in winding-up proceedings. It is expressly averred that work was assigned to appropriate levels of staff with a view to economy. It is not expressly averred that these rates fall within the range prescribed by the IPR, no doubt an oversight. Schedule 1 Part A to the IPR set out the range for seven levels of fee earner (expressed in US dollars) for the period after 1 September 2022. The rates charged by the JROs as set out in their Reports (e.g. Appendix 5 to the Fifth Report) all relate to this period and appear to fall within the prescribed range.

35. Mr Gow averred critically as follows:

> "*57. The JROs and their appointed legal counsel took proactive, careful and reasonable steps in order to try to put forward a viable restructuring plan which would result in a better outcome for Stakeholders compared to the estimated range outcomes in a liquidation scenario. The JROs are disappointed not to be able to ultimately do so for the reasons set out in Sections D and E below.*"

36. It is clear from the steps which are then described, that the JROs stress-tested the viability of the Restructuring Proposal and found it wanting. And the conclusion which they reached, pivotally, was that cashflows were insufficient to fund a restructuring implemented by the JROs, and was accepted by both Management and stakeholders. They were tasked to make a diagnosis and, like doctors, were not engaged on terms that the client would only pay if the diagnosis was a positive one. Their fees in respect of this work were reported to stakeholders on a regular basis, and no comments were forthcoming in response to these Reports (it is averred in Gow 2) nor in response to the application for their approval by this Court (it is averred in Gow 3). All this notwithstanding, the JROs are unsure as to how much of their claim will actually be paid.

37. The JROs have established a clear *prima facie* case for approval of their remuneration application on the basis that the relevant expenses were properly and reasonably incurred.

Discharge application

Governing legal principles

38. Section 91E of the Act provides as follows:

> "*91E.* ***Variation or discharge of the order appointing a restructuring officer***
>
> *(1) — At any time after the appointment of a restructuring officer by the Court under section 91B or 91C*
>
> *(a) the company acting by its directors;*
>
> *(b) a restructuring officer appointed under section 91B or 91C;*
>
> *(c) a creditor of the company, including a contingent or prospective creditor; a contributory of the company; or*
>
> *(d) the Authority, in respect of any company which is carrying on a regulated business,*
>
> *may apply by way of summons to the Court for the variation or discharge of the order appointing the restructuring officer.*
>
> *(2) An application under subsection (1)(a) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.*
>
> *(3) The Court may, on hearing an application under subsection (1) —*
>
> *(a) vary the order appointing the restructuring officer;*
>
> *(b) discharge or continue the order appointing the restructuring officer;*
>
> *(c) adjourn the hearing conditionally or unconditionally;*
>
> *(d) dismiss the application; or*
>
> *(e) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in*

accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94." [Emphasis added]

39. Restructuring officers have standing to apply for their own discharge and the Court is given a broad discretion as to how to deal with such an application, save that it may not order that the company be placed into liquidation. This fetter is precisely the same placed on the Court when hearing a petition by section 91B (3).

40. An unopposed application of the papers on a statutory provision that does not appear to have received the benefit of considered judgments is not the best context for forming clear views about how the discretion should be exercised. While each case turns on its own facts, over time on a case-by-case basis as result of adversarial argument and judicial experience, greater clarity emerges over how any broad statutory discretion should be exercised. However, a helpful starting point is to have regard to the purpose of the restructuring officer's appointment, because that will potentially inform, to some extent at least, whether or not the appointment may properly be brought to an end.

41. In the present case, reference to the statutory function of the role is particularly apposite because the only objection to the discharge application is based on the ground that, in effect, the appointees still have important work to do which they have not even begun to undertake. Section 91B provides:

> "*(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —*
>
> *(a) is or is likely to become unable to pay its debts within the meaning of section 93; and*
>
> *(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring.*"

42. These provisions are found in a section of Part V of the Act which clearly deals exclusively with restructuring process, as the very term "restructuring officer" suggests. Accordingly, it

must be a potentially valid ground for discharging restructuring officers without replacing them that a "*consensual restructuring*" is no longer viable. Any attempt to obtain relief which could be obtained through a winding-up proceedings can only properly be pursued by that distinct statutory remedy.

Merits of discharge application

43. Individual B's objection apart, the relevant factual terrain has been described above. In short, by common accord the JROs' appointment should be brought to an end because the Company lacks the resources to further pursue a restructuring through the instrumentality of officers of this Court. The Restructuring Proposal which has been explored does not appear viable (at this juncture) and lacks the requisite stakeholder support.

44. The application is positively supported by the Company which appointed the JROs and either explicitly or implicitly supported by all stakeholders with undisputed standing to express a view. The merits of the application could not be stronger.

45. Individual B has written to the Court and to the Authority expressing concerns. He objects to the discharge application on the grounds that there are matters the JROs need to investigate. The JROs respond simply that investigating mismanagement is beyond the scope of their present duties and is the sort of matter which a liquidator could be appointed to deal with in winding-up proceedings. This is a short and compelling answer to the objection, which makes it unnecessary to consider any question of the objector's standing to call for an investigation.

46. There is however an important ancillary consequence of granting the discharge application, which redounds to the benefit of all stakeholders. As long as the JROs remain office, all proceedings against the Company are stayed by virtue of section 91G (b) of the Act. In Gow 2 it is pointed out that:

> "*53. Discharging the JROs will reduce the costs of the Portfolios and bring an end to the statutory moratorium which applies in respect of legal proceedings against the Company in relation to the Portfolios.*"

47. If stakeholders are or become unhappy with Management continuing to 'muddle through' its current cash-flow crisis on its own, it will be easier to petition to wind-up the Company if the JRO Order is discharged. If Individual B is right in contending that there needs to be an independent investigation carried out by insolvency professionals appointed by this Court, the discharge application facilitates rather than impedes the commencement of winding-up proceedings for that purpose. The application for a discharge is therefore granted.

Conclusion

48. For the above reasons, the remuneration and discharge limbs of the JROs' Summons are both granted, subject to one *caveat*. The Summons proposes to discharge the JRO Order save for paragraph 9, which purports to preserve priority rights in respect of the JROs' costs in the event of a liquidation of the Company. As indicated above, my provisional view is that any priority rights will properly derive from the express provisions of section 109 (2) of the Act. I will accordingly hear counsel on the papers, if required, in relation to the precise terms of the Order.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT