

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 0084 OF 2016 (NAS)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF GRAND T G GOLD HOLDINGS LIMITED

IN CHAMBERS

Before: The Hon. Justice Segal

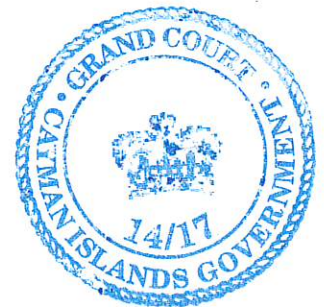
**Appearance: Mr Rupert Bell and Amy McLeish of Walkers on behalf of
the Petitioner**

**Mr Fraser Hughes of Conyers Dill & Pearman on behalf of
the Applicant**

Date of Hearing: 18 July 2016 (further evidence filed after the hearing)

Ruling Delivered: 22 August 2016

**Released for
Publication: 30 August 2018**



RULING

1. I have now had the opportunity to consider carefully the further evidence and written submissions filed following the hearing on 18 July (together with the evidence and written submissions filed before and oral submissions made during the hearing).
2. I summarise my decision below.
3. The winding-up petition shall be adjourned with a further hearing to be held on 29 September (subject to confirmation that this date is convenient to counsel).
4. The Petitioner (based on the evidence filed and arguments made to date) has standing to present the petition:

- (a). the Company relies not on a prohibition against assignments in the Loan Agreement (and Supplemental Loan Agreement) but on non-compliance with the terms of a notice clause.
 - (b). there is a dispute as to whether the notice clause is to be interpreted as covering a notice of assignment of the loans. It seems to me to be likely that it does although I do not finally decide the point on this application.
 - (c). but even if the notice clause does apply to the notice of assignment, the clause, in my view, is intended, and should be construed so as, only to protect the Company by permitting it to ignore a non-compliant notice (i.e. one that does not comply with the requirements if the notice clause). Failure to comply with the notice clause does not affect or invalidate the assignment. As regards the notice of assignment, the notice clause prevents this from having effect as against the Company - the assignment is therefore a silent or non-notified, and an equitable, assignment.
 - (d). there is clear authority (although this has not been cited to me) that an equitable assignee has standing to present a winding-up petition - see *Re Montgomery Moore Ship Collision Doors Syndicate Ltd* (1903) 72 LJ Ch 624, *Parmalat Capital Finance Ltd v Food Holdings Limited* [2009] 1 BCLC 274 (dealing mainly with the standing of an assignor to petition) and page 509 of French (3rd ed.) and the cases cited in footnotes 903 and 904.
 - (e). I note that the Petitioner has argued that the affixing by the Company of its chop to the notice is at least evidence of, but should also be taken to be an acknowledgement of, receipt of the notice which should result in a waiver of the Company's rights under the notice clause or otherwise prevent the Company from relying on the clause and denying receipt of the notice. However, since the Petitioner has standing even if the notice of assignment has not been validly served (and since, I believe, there is authority on the effect of notices given otherwise than in compliance with notice clauses which has been cited to me) I do not propose to decide this issue at this stage.
5. There is sufficient evidence of the fact that Company is unable to pay its debts for the purposes of section 92 of the Companies Law (2013 Revision):
- (a). The loans appear to be due and payable and the Petitioner has made it clear that it is seeking immediate repayment of the sums owed to it – the failure to serve a formal demand in accordance with the notice clause does not prevent the sums falling due or the debt to the Petitioner from being taken into account for the purpose of the cash-flow test under section 92..
 - (b). The loans became due on 30 April 2016 without the need for a demand under the terms of the Loan Agreement (and Supplemental Loan Agreement). Even if the letter of demand dated 25 May 2016 is non-compliant and fails to satisfy the requirements of the notice clause, the loans were still due and payable and repayment was in fact required by the Petitioner before and as at the date of the petition.
 - (c). The loans are not subject to a bona fide dispute on substantial grounds. The fact that the Company is still checking the circumstances surrounding the



making and receipt of the loans is not relevant where the Company, as here, is unable to identify any substantial basis for challenging its liability to pay.

- (e). The failure to pay a single debt can be sufficient to satisfy the inability to pay test, even where there has been no statutory demand (see *Taylor's Industrial Flooring Ltd v M&H Plant Hire* [1990] BCLC 216 and the discussion at pages 482-485 of French). Furthermore, the Company has failed to file evidence which properly explains its cash resources and demonstrates that it has sufficient cash to pay its liability to the Petitioner.
6. However, after having carefully considered the evidence filed to date I am of the view that it would not be appropriate in light of all the circumstances to make a winding-up order immediately:
- (a). I give considerable weight to the fact that the Petitioner is an unpaid creditor with a debt which is not bona fide disputed on substantial grounds and the normal practice of Court to make a winding-up order in such a case;
 - (b). However, a winding-up order is a class remedy and it is well established that the Court should consider the views of other creditors and have regard to the interests of creditors generally and where there are exceptional circumstances or special reasons the Court may decline to make the order sought;
 - (c). The Company has formulated and is seeking to progress the Resumption Proposal and the Second Affirmation of Ms Ma has provided a further explanation of and update on the terms and status of the Redemption Proposal and the process by which it will be taken forward.
 - (d). While the Resumption Proposal remains at an early stage and there are a significant number of critical elements to be agreed and conditions to be satisfied:
 - (i). the basic structure and core features of, and the process and timetable for progressing, the Resumption Proposal are established;
 - (ii). the core features involve a fairly conventional debt for equity swap by consenting creditors and an underwritten capital raising exercise through an open offer to all shareholders that will permit the Company to pay in full all creditors who do not consent to participate in the debt cancellation and swap and provide the Company with working capital to allow it to resume operations and the trading of its shares on the GEM market of the Hong Kong Stock Exchange;
 - (iii). importantly the Resumption Proposal requires the approval of the Listing Committee of the Hong Kong Stock Exchange;
 - (iv). Ms Ma has affirmed that in her view the Company's restructuring plan based on the Resumption Proposal "has reasonable prospects of success (to say at least)";
 - (v). the Resumption Proposal has been formulated with the assistance of an experienced adviser and the proposed underwriter has confirmed that it "is interested in underwriting the Proposed Open Offer subject to the terms and conditions as agreed [with ..] the Company";



- (vi). a significant number of the Company creditors have confirmed in writing their agreement in principle to capitalise their debt;
 - (vii) a significant number of the Company's creditors have also confirmed their support for the Resumption Proposal and that in their view a winding-up would be damaging to the interests of all creditors, and their opposition to the making of a winding-up order. Such creditors have instructed counsel and filed notices of appearance in the winding-up proceedings. They may well constitute a majority of the Company's creditors although many of them may well be connected with the Company as shareholders, directors or advisers;
 - (viii). there is some evidence to suggest that an immediate winding-up would be viewed unfavourably by the Listing Committee and may prevent the Listing Committee giving, or seriously damage the prospects of obtaining the Listing Committee's, approval to the relisting of the Company's shares.
- (e). The Petitioner has challenged the Company's evidence and in my view raised a number of proper and serious concerns. In particular that:
- (i). the Resumption Proposal has only recently been reduced to writing, remains at a preliminary stage and is incomplete so that there is a serious risk that the Resumption Proposal will not (and it is noted that the Company has not established that it is more likely than not that it will) proceed;
 - (ii). a number of critical agreements and terms remain to be negotiated and established including the agreement with the proposed underwriter and the financial and other important terms of the Open Offer;
 - (iii). all the confirmations of support and agreements to participate in the debt cancellation and Open Offer are only in principle or heavily conditioned statements of support;
 - (iv). many of the creditors giving such support are insiders or connected with the Company so that their views should be given no or less weight than those of the independent creditors, in particular the Petitioner (and possibly the creditors it says also support the petition). In particular it is not clear from the evidence that a majority of the independent creditors of the Company oppose the making of a winding-up order.
 - (v). the information provided by the Company is limited and unreliable. There are no audited financial statements; the new board of the Company has made it clear that it is still in the process of verifying and validating the information relating to the Company's financial position and there are no valuations available or other credible expert (or other) evidence filed to support the assertion that the Open Offer is likely to be attractive to shareholders and successful in raising the amount of capital referred to in the Resumption Proposal and needed



by the Company in order to allow it to resume operations and secure the resumption of trading in its shares;

- (vi). the incomplete information makes it unclear which creditors are connected and whether certain creditors are creditors of the Company or of other group companies (I note that the unaudited financial information put in evidence by the Company is only consolidated group accounts which do not clearly and separately establish the balance sheet and financial position of the Company as a separate entity);
- (vii). the position and requirements of the Listing Committee are as yet unknown and the Company's previous failure to obtain the consent of the Listing Committee to a resumption of share trading suggests that the Company's view on what is needed to satisfy the Listing Committee is not to be relied on;
- (viii). the precise cost to the Company of, and the amount of liabilities being incurred by the Company in, the process of seeking to formulate, agree and implement the Resumption Proposal is unclear so that it is not possible to assess the full impact on the rights and interests of creditors of proceeding with the Resumption Proposal. The evidence indicates that Mr. Ma, who is a minority shareholder in the Company's principal Chinese operating company, has been making funds available to pay the costs of the process of progressing the Resumption Proposal but the terms and basis on which he is doing so and the impact of such funding on the Company's position are unclear. The evidence refers to a statement made by Mr. Ma to the effect that he will cease to make further funds available to cover the additional costs to be incurred in connection with the Resumption Proposal and this is another reason for thinking that a winding-up is likely to make it difficult or impossible to complete the Resumption Proposal. However, it is a cause for concern that there is insufficient disclosure of the terms on which Mr. Ma is funding these costs, the governance arrangements in place for ensuring that the Company's board controls and oversees the incurring of expenses for which the Company has been or will be liable for assessing the impact of the arrangements on the Company's creditors;
- (ix). of course, section 99 of the Companies Law will apply, in the event of a winding-up order being made, to any post-petition dispositions of the Company's property but may well not impact on the arrangements made with Mr. Ma. The Company's directors, however, will need to be mindful of their duties and ensure that the interests of the Company and its creditors are properly taken into account and protected;
- (x). in this connection the Petitioner has noted that substantial liabilities appear to have been incurred and sums paid to advisers in connection with the Resumption Proposal and that it is unclear whether such expenditure is reasonable and can be justified in the circumstances. Furthermore, the advisers are included in the list of supporting creditors and the Court needs to take their position and separate



interests as advisers into account when assessing what weight, if any, to give to their views on the petition.

- (f). While I accept the seriousness of and take fully into account these concerns I consider that on balance the most appropriate course, having regard to the interests of all the Company's creditors as a class and all the circumstances, is to adjourn the petition for a suitable period that is long enough to allow the Company to make and demonstrate substantial progress in advancing the Resumption Proposal but short enough to permit a further review of the position by the Court to ensure that the position of creditors is being protected and to review whether a winding-up order should be made. I would note the following points in particular:
- (i). it seems to me that the Resumption Proposal is both credible and clearly has a chance of being successful, and if successful is likely to result in substantial benefits to the Company's creditors who will be able to choose to take equity in the Company or be paid in full. In the absence of evidence before the Court as to the likely outcome for creditors of a winding-up I take account of the risks for creditors flowing from a winding-up and the possibility that creditors will not be paid in full;
 - (ii). one of the risks is that a winding-up will seriously damage the chances of obtaining the Listing Committee's approval of or cause the Listing Committee to refuse to give its approval for the resumption of trading of the Company's shares. While the position is not clear the evidence establishes that there is at least a serious concern and risk;
 - (iii). the timetable for progressing and completing the Resumption Proposal is relatively short and therefore it is likely that the prospects of success and the detailed terms of and conditions applicable to the Resumption Proposal will become much clearer in the short term. The Company in its evidence has said that it is contemplating (I assume that this means planning) to submit the Resumption Proposal to the Listing Committee by 15 September (this is described as a "tentative" date in the draft of the Resumption Proposal exhibited to the Second Affirmation of Ms. Ma), that all outstanding financial information for the Company for the last six years will be published by mid-November and that the Resumption Proposal can and will be approved and completed, with there being a resumption of trading in the Company's shares, by mid-December 2016;
 - (iv). the Resumption Proposal has the support of a significant group of creditors who have also urged the Court not to make a winding-up order. As explained further below, I have noted and taken account of their views although their views are only one of a number of factors I have taken into account. I have noted and taken into account the Petitioner's concerns and submissions concerning the credibility and connections of the opposing creditors (as well as the concern that some debts may be owed by Taizhou and not the Company). I have also given less weight to the views of those creditors who appear to be connected to the Company.



- (v). the Company has stated in its evidence (with the support of the opposing creditors themselves) that 59% of creditors in value (with claims totalling HK\$67,783,610) and 60.9% in number have confirmed in writing that they oppose a winding-up order being made and support the Company's application for an adjournment (and that a further 24.1% in value and in 34.8% in number have been approached and either verbally confirmed their opposition or failed to respond and so, in the Company's submission, should be treated as neutral for the purposes of the present hearing).
- (vi). however, in addition to concerns over the reliability of the information regarding (and the existence of different lists of) creditors, the Petitioner points out, as I have noted above, that a number of creditors are connected with the Company or have separate interests from the general body of creditors. In particular, four creditors with claims totalling HK\$13,527,562 are connected to the Company by being directors or former directors or shareholders or the spouse of a shareholder while three creditors have a vested interest in the Resumption Proposal being allowed to progress as they are advisers, auditors or consultants who will earn more fees as a result (the total amount owed to these creditors appears to be HK\$7,400,000). Furthermore, the Petitioner argues that the new debts, incurred after 31 March 2016, which total HK\$27,240,000 (representing 23.7% of the total debt and which include the debts owed to the three advisers, auditors and consultants) should be treated separately from and given less weight than the claims of the Petitioner as an independent, non-conflicted, creditor whose claims did not arise in connection with or during the process of promoting the Resumption Proposal.
- (vii). The Petitioner submits that, in these circumstances, only 21.2% of the Company's opposing creditors (with claims of HK\$23,366,889.80) should be treated as independent. The Petitioner concedes that the amounts owed to these independent opposing creditors exceeds the amount owed to the Petitioner but says that the difference is only a small one.
- (viii). The Petitioner's counsel also refers in their Second Supplemental Skeleton Argument (dated 29 July) to the fact that recently (on 29 July) two further creditors have confirmed their support for, and have filed notices of appearance confirming their intention to support, the petition, and that the total amount owed to the Petitioner and these other creditors is HK\$42,791,741.80 (the position of such creditors is not dealt with in the evidence and I have not yet seen their notice of appearance but I assume that the position is as stated in the Second Supplemental Skeleton Argument). Accordingly, the Petitioner notes, if the connected debts and the new debts are excluded, the petition is supported by creditors representing 32.82% of the Company's creditors and only opposed, as already noted, by creditors representing 21.2% of creditors.
- (ix). I have noted and taken into account all of these submissions (including the authorities cited to me by the Petitioner) and points. However, I consider that the right course is to adjourn the petition and not make a winding-up order now. The position and the extent of any conflicts and



interests of the connected creditors and the creditors owed the new debts remains to be clearly established and is not clear on the evidence filed to date. Even on the Petitioner's case, 21.2% of the Company's creditors oppose a winding-up order being made now and if the new debts are taken into account (even if they are given less than full weight) the total is 44.9%. The authorities make it clear that in exercising my discretion I am not required to count up the claims of supporting and opposing creditors and make an order which gives effect to the wishes of the largest body of creditors. I do not do so here. In my view, taking into account the stated position of all the creditors who have made their views known to date and all the circumstances, the proper course is to allow the Company to progress the Resumption Proposal for a further short period in order to allow the Company to finalise all the (or all the main) terms of the Resumption Proposal, obtain the agreement of all necessary parties to the Resumption proposal (including the underwriters) and to demonstrate that the Resumption Proposal will be deliverable and completed. However, the Company's board of directors will need to be mindful of and need to take advice on their duties in the circumstances and have regard to the impact of the winding-up petition remaining on file and section 99 of the Companies Law.

- (x). I consider that an adjournment for a period of approximately five weeks will be sufficient to allow the Company to make the progress I have described. I have mentioned and would suggest 29 September, as this is a date that would be convenient to the Court. I suspect that the Company may prefer to defer lodging its Resumption Proposal with the Listing Committee until after the adjourned hearing has been held and I have given my decision. However, that will be a matter for the Company and its advisers to decide. In any event, the Company would need to work to progress and finalise the Resumption Proposal in advance of 29 September so that full and updated particulars of the Resumption Proposal can be filed with the Court in advance of the adjourned hearing together with all the further evidence that the Court will need to have in order to deal with the concerns, issues and matters raised by the Petitioner and which I have outlined and discussed above.

7. Costs shall be costs in the petition.
8. I invite counsel for the Petitioner to prepare and seek to agree with counsel for the Company and the Opposing Creditors a suitable form of order to give effect to this ruling.



The Honourable Justice Segal
22 August 2016

