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The next generation of corporate rescue in the Cayman Islands: Lessons from Re Oriente Group Limited

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On 31 August 2022 the Cayman Islands entered a new generation of corporate restructuring when the Companies (Amendment) Act 2021 came into effect.

The Amendment Act is significant in that it introduced a new regime for the restructuring of financially distressed companies. Prior to the Amendment Act, corporate restructurings were typically effected by way of a provisional liquidation coupled with a creditors and/or members scheme of arrangement (commonly known as 'soft touch' or 'light touch' provisional liquidation). Corporate restructurings are now effected under a new section of the Companies Act headed "Company Restructuring" which establishes a dedicated restructuring regime similar to US Chapter 11 or UK administration.

This article takes stock of the first judgment under the dedicated restructuring regime in *Re Oriente Group Limited* (unreported, 8 December 2022 Kawaley J).

Re Oriente Group Limited

The case concerned the parent company (the **Company**) of a corporate group that operates a large Asia-based financial technology platform providing microfinance and alternative sources of credit. The group's finances were significantly impacted by the COVID-19 pandemic and other global factors that caused a substantial increase in non-performing loans and other operating pressures. This caused the Company and various group members to default on a number of secured and unsecured loans.

On 29 August 2022 two creditors (the **Petitioning Creditors**) issued statutory demands against the Company. When those demands were not satisfied, the Petitioning Creditors presented a petition for the Company's winding up in the Grand Court of the Cayman Islands in September 2022 (the **Cayman Petition**). In response to the winding up petition, the Company filed its own petition under the new regime on 21 October 2022 seeking the appointment of restructuring officers (the **RO Petition**).

The RO Petition was listed for hearing on 11 November 2022. A day before that, the Petitioning Creditors filed a separate, further petition for the Company's winding up in the High Court of Hong Kong (the **Hong Kong Petition**).

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At the hearing of the RO Petition, the Petitioning Creditors sought to challenge the RO Petition on the grounds that:

a) a petition for the appointment of restructuring officers could not be presented if a winding up petition was already afoot; and

b) that the global moratorium on proceedings under the new regime did not apply to winding up proceedings such that the Cayman Petition and Hong Kong Petitions could be continued with, notwithstanding the RO Petition.

The Court rejected both arguments and appointed restructuring officers.

Similarities between Soft-Touch PL and Restructuring Officer Regimes

In doing so, the Court confirmed that in many ways the new regime will be the same as or similar to the old regime.

First, the Court confirmed that case law authorities under the soft-touch regime are both relevant and persuasive as they "record valuable judicial and legal experience in essentially the same commercial sphere"[1]. The Court further noted that authorities under the old regime are relevant because (a) the grounds upon which a restructuring officer can be appointed are expressed in the same terms as the grounds for appointing soft-touch provisional liquidators under the old regime (i.e. an intention to present a compromise or arrangement to creditors); and (b) the solvency test under the new regime is the same as for the former soft-touch regime (cash-flow insolvency).

Relying on previous authority, the Court went on to confirm that the exercise of the Court's discretion to appoint restructuring officers is the same as it was in respect of the discretion to appoint soft-touch provisional liquidators[2]; and that the Court's approach to evaluating evidence of a proposed restructuring will also be the same under the new regime[3].

The Court ultimately concluded that the jurisdiction to appoint restructuring officers (in keeping with the jurisdiction to appoint soft-touch provisional liquidators) is a broad discretion to be exercised if the Court is satisfied that:

1. the statutory precondition of insolvency (i.e. that the company is insolvent on the cash flow basis) is met by credible evidence;
2. the statutory precondition of an intention to present a restructuring proposal to creditors is met by credible evidence of a rational proposal with reasonable prospects of success; and
3. the restructuring proposal has or will potentially attract the support of a majority of creditors as a more favorable commercial alternative to a winding up.

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Having determined that these criteria were satisfied, the Court appointed restructuring officers on terms, and with powers, substantially the same as those that were typically granted on the appointment of soft-touch provisional liquidators.

Moratorium on Claims against the Company a "significant innovation"

Notwithstanding the significant similarities between the two regimes, the Court did make clear that the new regime differs materially in the way the statutory moratorium preventing claims against the restructuring company operates.

In rejecting the Petitioning Creditors' arguments (referenced above), the Court held that (i) the moratorium plainly applies to winding up proceedings, and (ii) unlike the soft-touch provisional liquidation regime, the moratorium arises upon the *filing* of a petition for restructuring officers. Under the old regime, the moratorium would not kick in until provisional liquidators were appointed (which would inevitably be after the winding up petition was filed). The Court described the automatic imposition of a moratorium upon filing as a "significant innovation" that "turbo-charge[s] the degree of protection...to the petitioning company in contrast with the former remedy of presenting a winding-up petition for restructuring purposes" (and described the filing of the Hong Kong Petition, a day before the appointment of restructuring officers, as a "flagrant breach" of the moratorium).

Conclusion

The judgment is a welcome indication that the new restructuring regime appears to have struck the right balance between retaining those aspects of the soft-touch regime that, for many years, worked well (both in the Cayman Islands and other common law jurisdictions) while remedying its admitted short-comings.

[1] Paragraph 8.

[2] Citing *In re Sun Cheong Holdings* [2020 (2) CILR 942] with approval.

[3] Citing *In re Midway Resources International* (unreported, Segal J, 30 March 2021) with approval.

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