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ARTICLE

Restructuring the Cayman Islands Segregated Portfolio Company: A Closer Look at *In re Oakwise Value Fund SPC*[1]

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Synopsis

The Grand Court has recently had cause to consider the interplay between the Cayman Islands restructuring officer regime, which was introduced following legislative changes in 2022, and the traditional 'light touch' provisional liquidator regime: *In re Oakwise Value Fund SPC*.

This latest decision clearly indicates that the provisional liquidator restructuring regime, which has survived the introduction of the dedicated restructuring officer regime albeit in modified statutory format, will continue to feature on the Cayman Islands restructuring landscape in the years ahead. Where a restructuring is needed, and subject to the facts of the case, there *appears* now to be a choice on offer: should provisional liquidators be appointed, or dedicated restructuring officers? As is explained below, the answer to that question may depend upon whether, in any given restructuring case, there is an additional need for independent management (in the form of provisional liquidators) to be appointed to protect stakeholder interests.

The *Oakwise* decision also provides a helpful analysis of the application of the winding up jurisdiction of the Cayman Islands court in the context of segregated portfolio companies, in circumstances where some segregated portfolios are solvent, and some are (or may be) insolvent.

The Cayman Islands restructuring officer regime

Now into only its third year, the Cayman Islands restructuring regime allows a company[2] to present a petition to the Court for the appointment of restructuring officers ('ROs') on the grounds that it is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors (or classes thereof).[3] The petition may be presented by the company acting by its directors, without a resolution of its members or an express power in its articles of association.

The presentation of a petition for the appointment of ROs automatically gives rise to an immediate statutory moratorium on all proceedings, other than criminal proceedings, against the company (although this has no bearing on the rights of secured creditors to enforce their security without leave of the Court and without reference to the proposed appointment).[4] On the hearing of the petition, the Court may make an order for the appointment of ROs, adjourn the hearing conditionally or unconditionally, dismiss the petition or make any other order as the Court thinks fit, *except* an order placing the company into official liquidation.[5]

If ROs are appointed, they shall have the powers and carry out only such functions as the Court may specifically confer on them in the order of appointment. The order of appointment will also set out the manner and extent to which the powers and functions of the ROs affect and modify those of the company's directors.

The Cayman Islands provisional liquidator regime

At any time after the presentation of a winding up petition but before the making of a winding up order, the Court has the jurisdiction to appoint a liquidator provisionally. As is the case for ROs, provisional liquidators ('PLs') shall carry out only such functions as the Court may confer on them and their powers may be limited by the order of appointment. The order of appointment

Notes

1 Unreported, FSD 303 of 2024 (IKJ) (16 December 2024).

2 For these purposes, the term 'company' includes companies incorporated and registered under the Cayman Islands Companies Act, bodies incorporated under any other Act, foreign companies, and any other entity or partnership (including Cayman Islands exempted limited partnerships) to which the restructuring and winding up provisions of the Companies Act applies.

3 s.91B(1) of the Companies Act.

4 As a matter of Cayman Islands law, the statutory moratorium is of extraterritorial effect.

5 The Court may only make a winding up order following the presentation of a winding up petition.

will also specify the powers, if any, remaining with the company's directors.[6]

There have, historically, been two parallel 'tracks' for the appointment of PLs, serving fundamentally different purposes in different cases: (i) applications brought by creditors or contributories in circumstances in which independent management in the form of PLs is necessary in order to prevent the misuse of company assets, oppression or mismanagement; and (ii) applications brought by the company itself in so-called 'light touch' restructuring cases, where there is a need to obtain a statutory moratorium on claims so that restructuring efforts may be pursued.

'Protective' PLs on the application of a creditor or contributory[7]

An application for the appointment of PLs may be made by a creditor or contributory on the grounds that there is a *prima facie* case for making a winding up order and the appointment of PLs is necessary to prevent the dissipation or misuse of company assets, prevent the oppression of minority shareholders or prevent mismanagement or misconduct on the part of the company's directors.[8]

An order for the appointment of PLs in these circumstances is a draconian step to take and will not be made lightly or without 'anxious consideration.'[9] Clear or strong evidence is needed that PLs are necessary.[10]

Restructuring PLs on the application of the company: pre-August 2022

Prior to the introduction of the RO regime on 31 August 2022, the only way in which companies in financial distress were able to obtain a statutory moratorium on claims for the purposes of a restructuring, was for a winding up petition to be presented against the company and, thereafter, for the company to apply to appoint PLs on a so-called 'light-touch' basis. With the breathing space afforded to the company by virtue of the statutory moratorium then in place, the company could then explore potential restructuring options.

The previous regime for the appointment of PLs was generally seen as effective and – as more recent decisions of the Court concerning the RO regime have shown – previous case law in respect of applications for the appointment of PLs is likely to be relevant and persuasive when it comes to determining applications for the appointment of ROs. This is a function of the fact that: (i) the jurisdictional threshold formerly in place for the appointment of light-touch PLs upon the application of the company (namely, the inability to pay debts and an intention to present a compromise) is the same jurisdictional threshold that is now in place for the appointment of ROs; and (ii) cases under the previous regime record valuable judicial and legal experience in the essentially the same commercial sphere.[11]

However, there were a number of issues with the previous PL regime, including but not limited to the fact that it could not be accessed without a winding up petition having first been presented against the company. This was, in a certain sense, counterintuitive to the idea of a proposed restructuring (as opposed to a winding up) and was conceptually unattractive from a debtor perspective. The new RO regime was introduced into Cayman Islands law in order to resolve, at least in part, these and other issues.

Restructuring PLs on the application of the company: post-August 2022

Notably, the coming into effect of the RO regime in August 2022 has *not* displaced the jurisdiction of the Court to appoint PLs on the application of the company.

In fact, the jurisdiction of the Court to appoint PLs on the application of the company is now arguably broader than it was previously. Whereas formerly, restructuring PLs could be appointed on the application of the company where it was unable to pay its debts and intended to present a compromise to creditors, the position now is that upon an application by the company, the Court may appoint PLs 'if it considers it appropriate to do so.'[12] This is, on its terms, a broader and far less prescriptive jurisdiction.

What this means in practice for companies wishing to restructure is that they *may* have a choice as to how to go about doing so. In the factual circumstances of any given case, consideration needs to be given to the following question: should the company seek the appointment of ROs or PLs?

Notes

6 CWR O.4, r.4(3).
7 Or, in certain circumstances, the Cayman Islands Monetary Authority.
8 s.104(2) of the Companies Act.
9 *HMRC v Rochdale Drinks Distributors Ltd* [2013] BCC 419 at [76]; *Re a Company (No 007070 of 1996)* [1997] 2 BCLC 139 at page 142.
10 *In re CW Group Holdings Limited,* Unreported, FSD 113 and 122 of 2018 (RPJ) (3 August 2018) at [61]-[62].
11 *In re Aubit International,* Unreported, FSD 240 of 2023 (DDJ) (4 October 2023) citing *In re Oriente Group Limited,* Unreported, FSD 231 of 2022 (8 December 2022).
12 s.104(3) of the Companies Act (current iteration).

The distinctions between the RO and PL regimes

There are obvious distinctions between the RO and restructuring PL regimes:

- The jurisdiction to appoint PLs only arises following the presentation of a winding up petition. That is not the case for the RO regime, which is accessible by petition for the appointment of ROs.
- In cases where PLs are appointed, the statutory moratorium on claims commences upon appointment. With the RO regime, the statutory moratorium commences earlier, upon the filing of the petition and *before* the Court has had an opportunity to consider the merits (although the Court has made clear that the RO regime must not be abused simply in order to obtain the statutory moratorium or add credibility to the company's management;[13] moreover, unless the Court otherwise directs, the petition for the appointment of ROs must be heard within 21 days of filing in any event, thereby striking a balance between creditor and debtor interests[14]).
- As its name suggests, the purpose of the RO regime is essentially confined to a financial restructuring. It is not intended to provide a mechanism whereby the RO's main role is to recover assets, data, documentation and company records or to undertake a forensic investigation into the affairs of the company.[15] Although the Companies Act allows the Court to clothe the RO with appropriate powers and functions which are 'seemingly unlimited in scope,' the Court has held that it is implicit that there is a presumption that, following the appointment of ROs, the directors will retain at least some powers and functions to continue to control the company's day to day operations.[16] By contrast, the restructuring PL regime is more flexible (PLs may be appointed in any case in which the Court thinks it 'appropriate') and may, in particular, be of more utility in circumstances where, in addition to a proposed restructuring, independent management is also required in order to step in and manage the company's affairs in times of instability and/or management disagreement.[17]

In re Oakwise Value Fund SPC

The interplay between the RO and PL regimes has very recently been addressed within the context of an application brought by the directors of a segregated portfolio company to appoint PLs. The question for the Court was: 'Can a company present a winding-up petition and appoint PLs for restructuring purposes or is the exclusive restructuring regime now found in the RO regime?'

The *Oakwise* decision also examined the basis upon which PLs may be appointed over an SPC, but with different powers in relation to its solvent and insolvent segregated portfolios. These points are explained below.

Segregated Portfolio Companies

The concept of the Cayman Islands segregated portfolio company ('SPC') is that a company, which remains one single legal entity, may create separate segregated portfolios ('SPs') which do not have separate legal personality. The assets and liabilities of each SP are statutorily ring-fenced from: (i) the assets and liabilities of each other SP; and (ii) the general assets and liabilities of the SPC. Any income and other property of an SPC that is not attributable to a particular SP constitutes the general assets of the SPC. Standard offshore fund structures, such as multi-class hedge funds, umbrella funds and master-feeder structures can benefit from the statutory ring-fencing feature of SPCs in order to protect against cross liability issues between assets and liabilities of different classes with separate equity and debt profiles.

The Oakwise application to appoint PLs

Oakwise was an SPC registered as a mutual fund with three active SPs invested in a variety of debt and equity instruments issued by PRC and US companies in various industry sectors. Two of its SPs were said to be solvent but the other segregated portfolio ('EFI SP'), which was invested in Chinese real estate, was arguably no longer solvent on a cash-flow basis.

The factual background to the presentation of the petition for the winding up of the SPC was, in summary, as follows:

Notes

13 *Aubit* at [127]-[145] and [171].
14 CWR O.1A, r.1(6).
15 *Aubit* at [171]. See also, very recently, *In re Holt Fund SPC*, Unreported, FSD 309 of 2023 (IKJ) (11 February 2025) at [42]-[47], in which the Court, upon an application by ROs for the discharge of their appointment, held that 'investigating management 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.'
16 *In re Kingkey Financial International (Holdings) Ltd,* Unreported, FSD 56 of 2024 (JAJ) (12 April 2024), by reference to s.91B of the Companies Act, at [32]-[35].
17 *Kingkey* at [37]; [49]; *Oakwise* at [30]-[42], discussed in further detail below.

- On 24 November 2022, following the submission of a redemption request by its largest creditor (CMB International Securities Limited ('CMBI')), and in the light of the downturn in the PRC real estate market, the directors of Oakwise (i.e. the SPC) resolved to suspend redemptions in EFI SP.
- On 23 December 2022, judgment in default was obtained in the Hong Kong court against Oakwise (i.e. the SPC *as a whole*) by three individual redemption creditors of EFI SP (the 'HK Judgment Creditors') for $3.3m.
- On 29 December 2022, CMBI petitioned for the appointment of receivers, alleging that EFI SP was indebted to it in the sum of in excess of USD$90m. The receivership application was initially dismissed by the Court (on the basis that it was not satisfied on the balance of probabilities that EFI SP was balance sheet insolvent[18]). However, the Court of Appeal, overturning that decision, subsequently remitted the petition in the receivership proceedings back to the Court.[19] The receivership proceedings were outstanding as at the date of this latest hearing.
- On 28 March 2024, the HK Judgment Creditors obtained a garnishee order against the SPC as a whole (as opposed to EFI SP as a single SP). The SPC was, at the date of the application to appoint PLs, in the process of appealing that garnishee order. Notably, although the HK Judgment Creditors were creditors of EFI SP, the garnishee order they had obtained took effect against bank accounts held by Oakwise in respect not only of EFI SP, but also other segregated portfolios.
- In addition, a further approximately US$10m in unpaid redemption claims from EFI SP was outstanding.

In these circumstances, the directors applied for the winding up of the SPC as a whole on the grounds that: (i) because EFI SP was arguably not solvent on a cash flow basis, the SPC itself (as a whole) was arguably unable to pay its debts; and (ii) it was just and equitable to wind up the SPC in view of the receivership proceedings, the garnishee proceedings in Hong Kong and the other outstanding redemption requests, in order to facilitate a subsequent application by the directors for the appointment of PLs.

The application for the appointment of PLs was in turn made on the basis that appointing PLs would protect the interests of investors of each of the SPs and would ensure the orderly handing of the affairs of EFI SP specifically. In particular: (i) EFI SP required the appointment of PLs to maximise value from its underlying assets (and this was unlikely to be a short-term exercise and would likely benefit from a form of restructuring rather than a winding up); and (ii) as to the remaining solvent SPs, they would be spun off into a new company following regulatory approval.

The challenge to the PL application

Merits challenge

The HK Judgment Creditors contested the application to appoint PLs on the basis that the application had not been brought for genuine restructuring purposes, but rather to thwart enforcement steps being taken by Oakwise's creditors (including in connection with the garnishee order that had been obtained by the HK Judgment Creditors in Hong Kong). The Court noted at the outset that this was an odd complaint to make, because 'in traditional insolvency terms, one of the most common reasons for appointing PLs is to ensure that all unsecured creditors are treated equally and that the few do not receive preferential payments at the expense of the many.'[20]

The Court also noted that the HK Judgment Creditors were accused of one of the deadliest of sins an investor in an SPC can commit: failing to recognise the sanctity of the SPC structure (insofar as, in their capacity as investors in EFI SP only, they had obtained a garnishee order taking effect over assets held by other SPs in which they had not invested). Accordingly, this challenge failed, on the basis that the interests of the HK Judgment Creditors were manifestly contrary to the interests of other redemption creditors of EFI SP, and also adverse to the interests of investors in the other solvent SPs.

Jurisdictional challenge

The HK Judgment Creditors also challenged the proposed appointment of PLs on the basis that, based on well-established principles of statutory interpretation,[21] the Court simply had no statutory jurisdiction to

Notes

18 Pursuant to s.224 of the Companies Act, the Court may make a receivership order in respect of an SP (or SPs) if it is satisfied that the SP assets attributable to it are or are likely to be insufficient to discharge the claims of creditors in respect of that SP. The language of the statute 'provide for a flexible balance sheet test which, instead of contemplating a simple assessment of the relative sides of a balance sheet, involves determining on the available evidence, applying the civil standard of proof, whether the assets, taking into account the actual, contingent and prospective liabilities, are now or are likely to be insufficient in the reasonably near future to pay the claims of creditors.' See *In re CMB International Securities Limited v Oakwise Value Fund SPC* [CICA (Civil) Appeal 9 of 2023], 13 June 2024, at [50].

19 *In re CMB International Securities Limited v Oakwise Value Fund SPC* [CICA (Civil) Appeal 9 of 2023], 13 June 2024.

20 *Oakwise* at [20].

21 Citing *Shanda Games Ltd v Maso Capital Invs. Limited* 2020 (1) CILR 293 at [27].

appoint PLs in circumstances where the RO regime was now the only regime available to companies wishing to restructure. This challenge also failed. It was impossible to construe the broad language of the statute, which provides for the appointment of PLs if the Court considers it appropriate to do so, as excluding the possibility of PLs being appointed in circumstances where any of their proposed powers might include the pursuit of a potential restructuring. That would lead to absurd results.

More narrowly, it was contended that if a company is proposing to commence a restructuring whereby the primary function of the appointee is to oversee that restructuring, then the RO regime is the only statutory gateway for doing so. The Court held that this question did not ultimately arise for determination, because this was not such a case.[22] There were several reasons for seeking the appointment of PLs in this case – not just a restructuring.[23]

The SPC winding up context: solvent and insolvent segregated portfolios

The Judge in *Oakwise* noted the fact that no challenge had been made to the proposition that the winding up jurisdiction applied to SPCs. Building on recent authorities addressing that issue,[24] the Court held that that proposition was clearly correct: a straightforward reading of the RO regime suggests that it can be deployed in relation to specific classes of creditors and is not only available where the entirety of the company's business would benefit from a restructuring. Within the context of an SPC with both solvent and insolvent SPs, the automatic stay of all proceedings against the SPC itself could be modified by Court order (so as to ensure its non-applicability in respect of the solvent SPs).

Accordingly, the Court ordered that PLs be appointed in relation to Oakwise but with different powers in relation to its solvent and insolvent SPs, in light of differing legal and commercial concerns. It held that:

> 'Whether or not there are other solvent portfolios ought as a matter of principle to be irrelevant to the question of whether the winding up jurisdiction is available to a stakeholder with interests limited to a segregated portfolio. It would potentially be relevant to the separate question of whether or not a winding-up order ought ultimately to be made, but … liquidators of entire SPCs are legally required to recognise the segregation structure and adopt a "horses for courses" approach. Because a SP has no separate existence and the SPC is liable for its debts, the insolvency of a portfolio results in the insolvency of the SPC as a matter of law.'[25]

Concluding remarks

In a straightforward restructuring case in which the primary (or only) purpose of the appointee is to oversee that restructuring, the narrow question as to whether the RO regime is now the only available statutory gateway in the Cayman Islands, remains unanswered. However, it is now clear that, more broadly, the RO regime is not the only available option for a restructuring in circumstances where there is an additional need for neutral and independent third parties to be brought in to manage the company's affairs in times of conflict or instability.

The fact that an application to appoint restructuring PLs is made by company itself (as opposed to outside third parties) is, in this respect, highly likely to be a relevant and persuasive factor militating towards the appointment of PLs.[26] An additional suggestion made to the Court in *Kingkey* was that the appointment of ROs may, in certain cases, come with its challenges (such as the availability of recognition of the ROs in overseas jurisdictions), which challenges were unlikely to arise for liquidators. It remains to be seen whether that submission receives further judicial attention in due course.

In former times, the Cayman Islands statutory regime provided only for the appointment of 'protective' PLs (on the application of creditors or contributories) or 'light touch' restructuring PLs (on the application of the company). More choices are now available. The Cayman regime now provides for the appointment of 'protective' PLs, 'light touch' PLs (including PLs with supplemental powers, to the extent independent management of the company's affairs is required), or ROs. In a restructuring scenario, proper consideration needs to be given at the outset as to the comparative advantages and disadvantages of these parallel regimes, what powers any proposed appointee is likely to need and the jurisdictional thresholds that must be satisfied upon any related application.

Notes

22 *Oakwise* at [42].
23 *Oakwise* at [41], following *In re Kingkey Financial International (Holdings) Ltd* at [35] and [37].
24 Most notably *In re Holt Fund SPC* (Unreported) FSD 309 of 2023 (IKJ) (26 January 2024) and *In re Performance Insurance Company SPC* (Unreported) FSD 70 of 2021 (RPJ) (6 April 2022)
25 *Oakwise* at [49].
26 *Re United Medical Protection & Ors Ltd* [2002] NSWSC 413. The reasons for this are helpfully explained in *Oakwise* at [52], with the director of Oakwise applauded for realising and accepting that, in the difficult circumstances of the case, 'the gig was up.'

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