IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 295 OF 2023 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF CHINA MEDONLINE INC.

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Tom Lowe KC of Harneys for the Applicant

Mr Richard Fisher KC of Ogier (Cayman LLP) for the Petitioner

Mr Denis Olarou of Carey Olsen for Tencent Mobility Limited

Heard: 15 December 2023

Judgment Delivered: 15 December 2023

HEADNOTE

Winding-up order sought by petitioning creditor-failure of company to appear-adjournment application made by two creditors-governing principles

EX TEMPORE JUDGMENT

Introductory

1. This is an application to adjourn the Winding-Up Petition moved by two purported redemption creditors whose redemption requests have not been accepted by the Company.

2. The Petition in this matter was presented by CTS Hermitage Healthcare Fund, a Cayman Islands company, on 29 September 2023, although the Petition was not sealed until 3 October 2023.

3. The Petitioner's counsel Mr Fisher KC helpfully handed up a procedural chronology which demonstrates that the Company has failed to respond to the Petition in an effective or reasonable manner.

4. The precise reasons for the Company's ineffective response and very surprising failure to appear in opposition to the Petition, appear in large part to be attributable to a combination of factors. The most important of those factors appears to be the question of the balance of power on the Board. And very central to that question of balance is the fact that the applicants in an ancillary proceeding, commenced by parties that I will refer to as the Trustbridge and Baidu parties, have complained that the Company has failed to properly appoint a preferred shareholder representative. They contend that this would help to stabilize the balance of power on the Board.

5. The present management of the Company is clearly not coherent in its approach. It is suggested that the current Chairman may wish a winding-up order to be made; but yesterday, by email to the Court, he requested the Court to adjourn the Petition on the grounds that a winding-up order would

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not be in the best interests of the Company. The long and short of it is that the division on the Board has made it impossible for the Company to instruct counsel.

The law relating to adjourning winding-up petitions

6. The law relating to adjournment is fairly uncontroversial. The Court is given a broad discretion to grant adjournments under the Companies Act (2023 Revision)[1], but as Mr Fisher KC rightly submitted, that discretion has to be exercised in the context of the relevant surrounding legal principles and the most important of those principles is the proposition which was referred to by Justice Snowden in *Edgeworth Capital (Luxembourg) S.A.R.L.-v- Glenn Maud* [2020] EHCW 974 (Ch) beginning at paragraph 71:

> "*The class question*
>
> *71. I dealt with the objective of the court in considering the interests of creditors as a class in the Appeal Judgment at [78] to [82]. For present purposes it is sufficient to refer to the summary from Re Leigh Estates:*
>
> *'Although a petitioning creditor may, as between himself and the company, be entitled to a winding-up order ex debito justitiae, his remedy is a 'class right', so that, where creditors oppose the making of an order, the court must come to a conclusion in its discretion after considering the arguments of the creditors in support of and opposing the petition: see Re Crigglestone Coal Company Ltd [1906] 2 Ch 327, in particular the statements of principle of Buckley J at first instance, and s. 195 of the Insolvency Act 1986…It is plain from the well-known authorities on the subject that, where there are some creditors supporting and others opposing a winding-up petition it is for the court to decide as a matter of judicial discretion, what weight to attribute to the voices on each side of the contest…'…*

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[1] Section 95 provides:

"*(1) Upon hearing the winding up petition the Court may —*

(a)…

(b) adjourn the hearing conditionally or unconditionally…"

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> *78. In my judgment, the authorities demonstrate that the starting point for the court in determining whether to give effect to the right of the class ex debito justitiae to a bankruptcy order or a winding up order, is to look at the value of debts of the creditors on each side of a disagreement among the class. However, it is also clear that the court's role in determining whether or not to give effect to the class remedy is not limited to a question of simple mathematics. The court will also look at the reasons advanced by the creditors on each side of the debate in order to assess whether those reasons are commercially rational and will have regard to other evidence to assess whether the weight and rationality of a particular creditor's approach is diminished by any extraneous factors such as personal antipathy or affection on the part of the creditor for the debtor (or those connected with it in the case of a company).*"

7. Reference was also made by Mr Fisher KC to my own decision in *Re ACL Asean Tower Holdco Limited*, FSD 171/2018 (IKJ), Judgment dated 8 March 2018 (unreported), in which I affirmed the observation of Justice Neuberger (as he was then) in *Re Demaglass Holdings Ltd.* [2001] 2 BCLC that there had to be a rational basis for even a short adjournment.

Merits of the adjournment application

8. The merits of the adjournment application appear to me to turn fundamentally on an evaluation of the adequacy of the evidence. Mr Fisher KC contends the evidence is insufficient and somewhat vague. But I am bound to take into account the fact that the evidence has been put together by stakeholders who are substantial investors at the last minute in circumstances where it was reasonable for them to have expected that, whatever confusion was happening at the Board level, the Company would ultimately find a way of preparing and filing evidence in opposition to the Petition.

9. Looking at the competing interests in terms of the weight of the different stakes, the position is, putting aside the question of whether or not the Petitioner has effectively redeemed and looking at the interests in the preferred class equity shares, that those seeking an adjournment (the application being moved by Mr Olarou on behalf of Tencent) have a far greater stake than that of the Petitioner. Roughly speaking the position is that the Petitioner's stake is worth 10% and some 90% of the relevant class oppose a winding-up order.

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10. The further question is whether or not the Court should adopt a technical approach or a broad-brush practical approach. Even looking at the matter technically, it seems to me that it is not crystal clear that the Petitioner has actually effectively redeemed and ceased to be a shareholder, thereby putting it in a completely different category of legal and commercial interest to those that oppose the winding- up order.

11. It appears to be the case that although a letter was sent to the Petitioner on the 18th September 2023 affirming (a) that the redemption request it had made that was valid and had been accepted, (b) that the shares had been cancelled and (c) the register would be updated promptly, that updating has not in fact occurred.

12. More recently, after he wrote the letter confirming the redemption to the Petitioner, in a letter sent to Tencent only two days or so ago, the Chairman has asserted that nobody has been redeemed or paid. And so it seems to me that the Court should adopt a broad-brush commercial assessment of what the wishes of all the relevant stakeholders are. I find that the majority view is that a winding-up order is not in their best interests.

13. The reason that is advanced is supported by evidence and it is, in a nutshell, this. The Company is in the process of effecting a sale of the underlying business to at least three competing bidders and the making of a winding-up order, while it may not necessarily result in the bidders walking away, is likely to prejudice the negotiating position of the Company. On the face of it, that assertion appears to me to be a rational one.

14. Mr Fisher suggested that the evidence that the Court required should be clearer than that. In an ideal world, perhaps, clearer evidence would have been produced by the Company itself. But we are not operating in an ideal world. This is a company that has not manage to instruct counsel to appear and oppose a winding-up Petition in circumstances where the major of interested stakeholders are opposed to a winding-up order.

Findings: an adjournment should be granted

15. In these circumstances it seems to me, consistent with my provisional view expressed at the beginning of the hearing this morning, that an adjournment should be granted. The question of how long the adjournment should be is a matter as to which I would wish to hear counsel. However, my

provisional view is that it should be in the order of three months so that a reasonable opportunity is given for the Board to see if it can put its affairs in order and progress the sale process.

16. It appears to me to be common ground between all stakeholders that a completion of the sale would be in the best interests of one and all. The only disagreement was as to whether or not a sale within the liquidation of a holding company would be worse than a sale outside of a liquidation. Mr Olarou suggested that the ability of the Company's own investors to be actively involved in the negotiating process outside of a liquidation might be significant.

17. Mr Lowe KC addressed an additional point which I do not consider it necessary for me to consider as part of the adjournment application. And that is that there is a shareholders' agreement which contains an arbitration clause and it is potentially open to his clients to apply for a stay of the present proceedings pending the resolution of a dispute as to whether or not the Petitioner is entitled to be paid out under the terms of the Articles of the Company.

18. I consider that I can properly assume that such an application could potentially be made, although I express no view as to its merits.

Conditions for the adjournment

19. The only other matter that I would wish to decide at this point is the imposition of a condition for granting the adjournment, and that relates to the question of costs. It seems to me that the Petitioner has pursued this Petition with full propriety and has demonstrated, subject to whatever arguments that may later be raised, that it has standing[2] and is *prima facie* entitled to a winding-up order today.

[2] As a contingent if not as an actual redemption creditor.

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20. The failure of the Company to appear, which has forced other interested parties to effectively stand in its shoes, has in my judgment resulted in the Petitioner deserving an award of costs to be paid by the Company on an indemnity basis and to be taxed and payable forthwith as a condition of the adjournment.

[After hearing counsel, the Petition was adjourned to the first available date after 15 March 2024. As regards the Petitioner's costs, it was additionally ordered that in the event that the Company was wound-up these costs would be treated as an expense of the liquidation]

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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