IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 192 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF ICG I

Appearances:	Mr. Spencer Vickers of Conyers Dill & Pearman LLP for Sean Wilson Baguley, the Petitioner
	Mr. Liam Faulkner of Campbells LLP for Lai Kar Yan (Derek) and Michael Green in their stated capacities as Receivers and Cheng Chi Kin in his stated capacity as the sole director of ICG I
Before:	**The Hon. Justice David Doyle**
Heard:	**26 July 2021**
Decision:	**26 July 2021**
Draft Reasons Circulated:	**30 July 2021**
Reasons Delivered:	**4 August 2021**

HEADNOTE

Application for the appointment of provisional liquidators-relevant law-the four hurdles- (1)presentation of winding up petition (2) legal standing (3) prima facie case for a winding up order and (4) necessity to prevent dissipation or misuse of company's assets, minority oppression, mismanagement or misconduct on the part of the company's directors

REASONS

Introduction

1. On Monday 26 July 2021 I dismissed an application made by way of summons filed on behalf of Sean Wilson Baguley ("Mr Baguley") for the appointment of joint provisional liquidators of ICG I ("ICGi"). I now provide brief reasons for that decision.

Appearances

2. Mr Spencer Vickers of Conyers Dill & Pearman LLP appeared for Mr Baguley.

3. Mr Liam Faulkner of Campbells LLP appeared for Lai Kar Yan (Derek), and Michael Green of Deloitte & Touche stated to be Receivers of the issued shares of ICGi (the "Receivers") and Cheng Chi Kin in his stated of capacity as the sole director of ICGi.

4. The Receivers say that they were duly appointed on 26 July 2021 by Aspect Properties Japan Godo Kaisha as receivers over the shares legally and beneficially owned by LC Capital Limited ("LC Capital'). Upon their appointment, written resolutions of the sole shareholder of ICGi were passed removing the existing directors and appointing Cheng Chi Kin a "professional independent director" (in the words of Mr Faulkner) nominated by Deloitte & Touche.

5. I am most grateful to the attorneys for their valuable assistance to the court.

Further background and submissions

6. The first issue to consider was Mr Baguley's standing to make the application. Mr Vickers referred to various documentation which he said supported his submission that Mr Baguley holds 99 shares and LC Capital only holds 1 share. In particular, Mr Vickers referred to a document which is entitled "ICGI Register of Members" and is stated to be printed 5 November 2018 and that document refers to Mr Baguley holding 99 shares and LC Capital only one share. Mr Vickers also referred to the written resolutions of Jonathan Cheng (described as the sole director) and LC Capital (described as the sole shareholder) dated 22 October 2018 and resolving that 99 shares be allotted and issued to Mr Baguley.

7. Mr Faulkner produced what he described as ICGi's register of members (printed 27 July 2018), which referred to LC Capital Limited as the sole shareholder. He undertook to produce an affidavit or affirmation exhibiting such document within 48 hours for the court record.

8. Mr Faulkner said that Mr Baguley had no standing to seek the appointment of joint provisional liquidators as he was not a contributory. Mr Faulkner added that in any event there was no prima facie case for making a winding up order and the appointment was not necessary, pursuant to section 104(2) of the Companies Act (2021 Revision) (the "Act").

9. Mr Faulkner said that as a result of the appointment of the Receivers and their reconstitution of Board of Directors of ICGi, the affairs of ICGi are under the supervision of licensed insolvency practitioners from Deloitte & Touche who can reasonably be expected to preserve and cause the director to preserve ICGi's assets. Moreover there would be no mismanagement or misconduct on the part of ICGi's newly appointed director.

10. It was difficult, if not impossible, to finally determine at the short hearing on 26 July 2021 whether or not Mr Baguley held 99 shares giving him standing to present his application. I note in passing that it took a 7 day hearing before Parker J before he was able to determine the standing issue in *Rasia* (unreported judgment 28 July 2021 Grand Court FSD) albeit in a much more complicated factual context. Parker J's judgment should be compulsory reading for any judge facing the difficult task of finding facts when these are hotly disputed by both sides.

11. For the purposes of the hearing, I pragmatically assumed (without deciding) that Mr Baguley was a contributory and had standing to present the application for the appointment of joint provisional liquidators.

12. Mr Vickers submitted that the requirements of section 104(2) of the Act were satisfied in that there was a prima facie case for the making of a winding up order, and the appointment of joint provisional liquidators was necessary in order to prevent dissipation or misuse of the ICGi's assets and/or to prevent mismanagement or misconduct on the part of the directors of ICGi.

13. It was common ground that the assets of ICGi's comprised of two properties in Japan.

14. Mr Vickers referred to his client's concerns in 3 main areas. The following summary does not fully record the detail eloquently developed by Mr Vickers but the headlines are as follows:

(1) the creation and interplay between two companies with similar names, ICGi and ICG 1. Basically, his client thinks that Jonathan Cheng (a director of ICGi) and his colleague Y C Chen (not a named director of ICGi but a de facto/shadow director submitted Mr Vickers) are up to no good at his expense;

(2) the suspect documentation produced in respect of the Japanese properties and the fact that both properties are subject to a local seizure order dated 13 May 2021 due it is thought to failure to pay local taxes despite written notices being served by the local authority; and

(3) the serious discrepancies in respect of a Citibank remittance statement in respect of US$400,000.00 which Mr Baguley says he has not received.

15. Mr Vickers referred to what he described as the chaos over the two companies and their affairs and the intermingling of the names and says in effect that the confused position, concerns and irregularities all point towards the need to appoint provisional liquidators to undertake an investigation and to preserve the books and records of ICGi.

The Law

16. I now refer to some of the relevant law.

The four hurdles

17. The law, insofar as it is relevant to the summons, may be briefly outlined as follows:

(1) Under section 104 (1) of the Act the Court may, at any time after the presentation of a winding up petition and before the making of a winding up order, appoint a liquidator provisionally.

(2) Under section 104 (2) of the Act an application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company

or, subject to subsection (6), the Cayman Islands Monetary Authority (the "Authority"), on the grounds that-

(a) There is a *prima-facie* case for making a winding up order; and

(b) The appointment of a provisional liquidator is necessary in order to-

i. prevent the dissipation or misuse of the company's assets;

ii. prevent the oppression of minority shareholders; or

iii. prevent mismanagement or misconduct on the part of the company's directors

(3) It can immediately be seen from the plain wording of these provisions that an applicant seeking the appointment of a provisional liquidator pending the determination of a winding up petition has four main hurdles to jump:

(a) The applicant must satisfy the court that a winding up petition has been duly presented and a winding up order has not yet been made (the "presentation of the winding up petition hurdle");

(b) The applicant must satisfy the court that the applicant has standing to make the application i.e. the applicant is a creditor, contributory or the Authority (the "standing hurdle");

(c) The applicant must satisfy the court that there is *prima-facie* case for making a winding up order (the "*prima-facie* case hurdle"); and

(d) The applicant must satisfy the court that the appointment of the provisional liquidator is necessary in order to prevent the dissipation or misuse of the company's assets; and/or the oppression of minority shareholders; and/or mismanagement or misconduct on the part of the company's directors (the "necessity hurdle").

As a winding up petition had been presented and a winding up order had not yet been made, Mr Baguley had successfully jumped the first hurdle which confronted him namely the presentation of the winding up petition hurdle. The other hurdles proved more problematic for him. In this case the main focus was on the serious arguments deployed in respect of the remaining hurdles namely the standing hurdle, the *prima-facie* case hurdle and the necessity hurdle.

18. Andrew Jones J in *Orchid Development Group Limited* (21 December 2012; 2012 (2) CILR Note 14) at paragraph 5 of his admirably concise judgment set the relevant statutory provisions in context by stating:

> *"Prior to the enactment of the Companies (Amendment) Law 2007, the Court had a very broad discretion to make orders for the appointment of provisional liquidators which tended to be abused by petitioners, who would make ex parte applications for the appointment of their own nominees as provisional liquidators in the knowledge that it would be difficult, thereafter, for the main body of stakeholders to secure the appointment of an official liquidator of their own choice. This mischief was cured by the provisions of what is now section 104(2) of the Companies Law (2012 Revision) which sets out limited and very specific grounds upon which provisional winding up orders can be made on the application of a petitioning creditor. I have jurisdiction to appoint provisional liquidators only if it is necessary in order to prevent (i) the dissipation or missue of the Company's assets or (ii) the oppression of minority shareholders or (iii) mismanagement or misconduct on the part of the Company's directors…"* (my underlining)

The prima facie case hurdle

19. There has been much debate over the years as to the *prima-facie* case hurdle. Most recently in *Grand State Investments Limited* (Grand Court FSD unreported judgment 28 April 2021) Parker J referred to previous authority (*Re Asia Strategic Capital Fund LP* 2015 (1) CILR N-4; Segal J) and quoted the following:

> *"…it is not necessary to demonstrate that a winding-up order will be granted: a prima facie case is established if the allegations made in the petition for the appointment of provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing."*

20. Parker J also referred to the well-known and much cited English case of *Revenue and Customs Commissioners v Rochdale Drinks* [2013] BCC 419; [2012] 1 BCLC 748 where Rimer LJ in the

English Court of Appeal at paragraph 77 regarded the continued use of the phrase "good *prima-facie* case" as unsatisfactory and added:

> *"Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition."*

21. Rimer LJ stated at paragraph 76 that the appointment of a provisional liquidator to a trading company is a most serious step for a court to take. It is not an order to be made lightly and its making required the giving by the court of the most anxious consideration.

The risk of dissipation test

22. Parker J at paragraph 88 of his judgment in *Grand State Investments* helpfully referred to the test for establishing a risk of dissipation of assets as described by Segal J in *Re Asia Strategic Capital Fund LP* as follows:

> *"On a contributory's petition…it is sufficient if it is shown that the assets of the Company (or partnership) are being, or are likely to be, dissipated to the detriment of the petitioners…"*

23. Parker J referred to Segal J's citation of an English authority to the effect that there must be a good case for the court appointing its own officers. It is not dissipation in the asset freezing sense of deliberating making away with the assets but any serious risk that the assets may not continue to be available to the company. The threshold for establishing such a risk has been described as a "heavy burden" and as requiring clear or strong evidence as to necessity *(Re CW Group Holdings Limited* unreported Grand Court FSD judgment Parker J 3 August 2018 at paragraph 62).

24. Parker J in *Re CW Group Holdings Limited* also recognized at paragraph 60 that it was not, at the stage of hearing the application for the appointment of provisional liquidators, possible for the court to resolve "the many, varied and complex factual questions raised in the evidence."

Mismanagement or misconduct on the part of directors

25. In respect of section 104 (2)(b)(iii) of the Act mismanagement or misconduct on the part of directors connotes culpable behaviour involving a breach of duty or improper behaviour that involves a breach of the governing documents and governance regime (*Re Asia Strategic Capital Fund LP* at paragraph 60 Segal J).

26. Kawaley J in *Pacific Fertility Institutes Holding Company Limited* (unreported Grand Court FSD judgment 17 July 2019) dealt with an application to appoint joint provisional liquidators on the just and equitable ground in the context of allegations of deadlock, misconduct in the management of the company, a loss of trust and confidence and the loss of substratum. In that case, the "main man" Mr. Li had been convicted and had also been questioned by the police in connection with the suspected misappropriation of funds. Understandably, Kawaley J had no hesitation in finding that there was a *prima-facie* case for winding up "and that does not mean that the court would today make a winding up order" (para 12) . Kawaley J also felt that there was "clearly a risk of dissipation of assets because it appears that it is reasonable for this Court to be concerned that Mr Li might, directly or indirectly, be engaged with misconduct in connection with the Company's affairs". In that case "the other joint venture partner… [was] unable to appear formally because it is currently struck off the register in the British Virgin Islands" (para 4 of judgment).

Determination

27. Leaving aside the standing and prima facie case hurdles, what was clear to me on 26 July 2021 was that Mr Baguley had not jumped the "necessity" hurdle.

28. The burden was on Mr Baguley to persuade this court that the appointment of joint provisional liquidators was necessary in order to, on his case, (a) prevent the dissipation or misuse of the ICGi's assets and/or (b) prevent mismanagement or misconduct on the part of the ICGi's directors.

29. Despite the persistent eloquence of Mr Vickers I reached the conclusion, on the evidence and submissions presented to the court, that Mr Baguley had failed to discharge the onerous burden placed upon him by section 104(2) of the Act and the relevant case law.

30. I do not doubt from the evidence that Mr Baguley has genuine and serious concerns over the activities of Y C Chen and Jonathan Cheng. A lot of the documentation provided does not paint a satisfactory or clear picture.

31. In respect of dissipation or misuse of ICGi's assets it was common ground that the assets are two properties in Japan. The properties are presently the subject of a local seizure order. It appears that it would be difficult to dispose of the properties whilst such seizure order is in place. I appreciate that others may seek to discharge the debt to release the properties but as things stand it appears that the seizure order is still in place. Moreover, an independent professional director has been appointed who can take control of the assets. It was not necessary to appoint joint provisional liquidators to prevent the dissipation or misuse of ICGi's assets

32. If Mr Baguley has further concerns in respect of the Japanese properties he could of course adopt a more proportionate approach and seek further advice from Japanese lawyers to see if he can obtain the equivalent of an asset freezing injunction if such remedy exists as a matter of Japanese law and if not he can make use of any other remedies which he may have as a matter of Japanese law and procedure.

33. I refer now to whether there was a necessity to appoint provisional liquidators to prevent mismanagement or misconduct on the part of the directors between 26 July 2021 and the date of the determination of the winding up petition. Although Mr Baguley raised serious concerns over the past management of ICGi even assuming that Y C Chen can be regarded as a director, such alleged mismanagement or misconduct is in the past as ICGi now appears to be under the control of the Receivers and an independent professional director. The management of ICGi from now until the determination of the winding up petition will be in the hands of a Deloitte & Touche nominee against whom no complaint has been raised.

34. Mr Vickers sensibly did not attempt to attack the integrity of the Receivers or the director they have nominated but did raise issues as to the validity of their appointments. If it is indeed the case as Mr Baguley put forward that he holds 99 shares and LC Capital only holds one share it may well be that if the Receivers' director does not stand down voluntarily Mr Baguley could take steps to remove the sole director appointed by the Receivers but in the meantime Mr Baguley has some protection by the presence of an independent director and the seizure order over the Japanese properties.

35. If it transpires that the director has not been duly appointed by the Receivers and Mr Baguley is not content with him staying in office he is at liberty to come back to this court for whatever relief he, upon advice, considers appropriate and such application can be dealt with on its merits at the relevant time, but as at 26 July 2021 and based upon the evidence presented to the court I was not satisfied that it was necessary to take the serious step of appointing provisional liquidators.

36. It is a very serious step to appoint provisional liquidators and there is a heavy and onerous burden on those who seek such orders.

37. In my judgment for the brief reasons stated above Mr Baguley had not jumped the necessity hurdle and I was not satisfied that he had discharged the heavy and onerous burden upon him.

David Doyle

GRAND COURT FINANCIAL SERVICES DIVISION CAYMAN ISLANDS

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT