

## BERMUDA SUPREME COURT

### ***In The Matter of upEnergy Development Group Limited SC (Bda) 89 Com (4 November 2016)***

### WINDING-UP - CREDITOR PETITION - APPOINTMENT OF JOINT PROVISIONAL LIQUIDATORS TO MONITOR IMPLEMENTATION OF INSOLVENT RESTRUCTURING BY BOARD OF DIRECTORS - IDENTITY OF LIQUIDATORS - COMPETING APPOINTEES NOMINATED BY PETITIONER AND COMPANY

upEnergy Development Group Limited was incorporated in Bermuda and listed on the Stock Exchange of Hong Kong. While the Company was seeking to implement an out-of-court restructuring, a creditor presented winding-up petitions in Hong Kong and then Bermuda, and sought the appointment of provisional liquidators; professionals from Hong Kong and Bermuda. The petition was initially adjourned in order to give the Company and the majority of its creditors (who supported the adjournment against the wishes of the petitioning creditor) time to progress the restructuring. On the adjourned date for the hearing of the Petition, the petitioner sought the appointment of FTI as the provisional liquidators along with a Bermuda based insolvency practitioner, John McKenna. The Company sought the appointment of its then restructuring consultants to the Company, RSM Corporate Advisory (Hong Kong) Limited ("RSM"), together with its preferred Bermuda based insolvency practitioner. Following a contested hearing, the Chief Justice approved the petitioning creditor's application to appoint provisional liquidators to monitor the restructuring, but adjourned the question as to who should be appointed. At the adjourned hearing the Court appointed RSM (the company's Hong Kong nominee), but also appointed Mr. McKenna who was put forward by the petitioner.

While the Court was sympathetic to the petitioning creditor's concerns, surrounding the independence of RSM, it found these to be more perceptual than real and recognised the likelihood of wasted costs, if RSM was replaced altogether. In addition, the

Court noted that there was a risk of tension between any new appointees and the company's management, whereas management was already familiar with RSM. In appointing the Bermuda based professional put forward by the petitioner - to work alongside RSM the Court was trying to find a middle ground. In doing this, the Court made it clear that the provisional liquidators should work together to establish an agreed plan of action, noting that any irreconcilable differences could be brought back before the Court for resolution. The Chief Justice noted that the Hong Kong officeholders should be responsible for Hong Kong based work with the Bermuda officeholders being responsible for Bermuda based work. In his ruling, the Chief Justice referred to the primary function of the Bermuda-based officeholder as being to serve as an independent filter within the provisional liquidator team, so as to ensure that the restructuring process (which is expected to result in a scheme of arrangement) does not, as the minority wholly unsecured creditors fear, prejudice their interests. In circumstances where provisional liquidators from different firms are instructed to work 'jointly', the Judge's articulation of the Court's expectations is helpful.

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