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Another Chapter in the China Milk Saga

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As a jurisdiction that currently has no formal restructuring regime, the appointment of a provisional liquidator has long since been utilised for the purpose of facilitating a corporate restructuring in the Cayman Islands.

A provisional liquidator may only be appointed following the presentation of a winding up petition against a company[1]. Pursuant to Section 94(1) of the Companies Law one of the persons[2] able to petition to wind up a company is the company itself. This has historically resulted in directors of a company presenting a petition to wind up the company absent approval from the shareholders in general meeting or express authorisation in the articles.

This historic practice received judicial approval in the 2011 judgment of Jones J in *re China Milk Products Group Ltd.*[3] in which it was held that the directors of an insolvent company could petition to wind up the company without approval of the shareholders.

Whilst convenient from the perspective of both directors of insolvent companies and the restructuring community generally, the decision in *China Milk* was considered to be contrary to the express provision of Section 94(2) of the Companies Law which provides that a company may petition for its own winding up on the following basis:

"Where expressly provided for in the articles of association of a company the directors of a company incorporated after the commencement of this Law have the authority to present a winding up petition on its behalf with the sanction of a resolution passed at a general meeting."

A plethora of articles was written in late 2015[4] when in her judgment in *China Shanshui Group Limited*[5] Mangatal J rejected the position set out in *China Milk*. Here Mangatal J held that as a matter of statutory construction, directors could only petition to wind up a company if so authorised by either the articles or the members in general meeting. This position reflected the old English common law position as set out in *Re Emmardart Ltd.*[6].

The ability to facilitate a 'soft' restructuring was therefore somewhat hampered. Whilst *China Shanshui* provided certainty and almost certainly reflects the literal reading of the Companies Law, it left directors of an insolvent company in a very difficult position in that they are unable to petition to wind up the company and therefore may find themselves personally liable for its debts incurred post-insolvency.

In the recent unreported judgment of McMillan J in *CHC Group Limited* (the "Company"), it appears that a workaround may have been achieved.

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[1] Section 104(1) Companies Law (2016 Revision)
[2] Together with a creditor, contributory and CIMA
[3] [2011] (2) CILR 61
[4] Including Nigel Meeson QC's 'No Crying Over Spilt Milk'.
[5] [2015] (2) CILR
[6] [1979] Ch 540

In *CHC* it was noted that the Company and the group of companies of which it was the holding company were promoting a US Chapter 11 plan and sought the appointment of provisional liquidators to assist with the same. In order to circumvent the problems caused by *China Shanshui*, a related creditor, CHC Helicopters SA, presented a creditors petition against the Company, which was immediately followed by an application made by the Company to appoint provisional liquidators.

Sidestepping the debate caused by the competing decisions in *China Milk* and *China Shanshui*, McMillan J determined that neither were applicable in the immediate instance, holding:

"It is the view of this Court that neither the Judgment of Jones J nor the Judgment of Mangatal J has any bearing on the situation where there is a separate creditor winding up petition in existence and where in those limited circumstances there [sic.] *an application by the Company, through its directors, for the appointment of JPLs."*

In coming to his conclusion, McMillan J noted that in presenting a petition the directors are effectively attempting to bring the company to an end, whereas by appointing provisional liquidators, the company is attempting to present a compromise or arrangement to a company's creditors.

So whilst the problems caused by the lack of a specific statutory restructuring regime remain, *CHC* does provide a workaround. What *CHC* does not do is consider the apparent inconsistency between the Companies Law and the Companies Winding Up Rules in this area. Order 4, Rule 6(1) of the Companies Winding Up Rules suggests that a company may only apply to appoint provisional liquidators when the company itself presents the winding-up petition. This provision is somewhat narrower than Section 104 of the Companies Law and this inconsistency could well bring the *China Milk*/*China Shanshui* debate back to the forefront.

Insolvency professionals across the jurisdiction are however optimistic that legislative reforms can be enacted shortly to cut across the entirety of this age old debate.

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