EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 132 of 2016

IN THE MATTER OF PACIFIC ANDES ENTERPRISES (BVI) LIMITED

BETWEEN:

BANK OF AMERICA N.A.

Applicant

-and-

PACIFIC ANDES ENTERPRISES (BVI) LIMITED

Respondent

AND

CLAIM NO. BVIHC (COM) 133 of 2016

IN THE MATTER OF PARKMOND GROUP LIMITED
BETWEEN:

BANK OF AMERICA, N.A.

Applicant

-and-

PARKMOND GROUP LIMITED

Respondent

AND

CLAIM NO. BVIHC (COM) 134 of 2016

IN THE MATTER OF PARD TRADE LIMITED

BETWEEN:

BANK OF AMERICA, N.A.

Applicant

-and-

PARD TRADE LIMITED

Respondent

Appearances:

Mr Ben Mays for the Applicant, Bank of America N.A. in each of the cases

Mr Matthew Hardwick QC and Daian Sumner for the Respondents Pacific Andes Enterprises (BVI) Limited and Pard Trade Limited and, on 7 and 8 November only, also for Parkmond Limited

Mr Moverley Smith QC (on 18 November 2016) and Mr Peter Ferrer for Coöperatieve Rabobank, U.A. Hong Kong Branch and Standard Chartered Bank (Hong Kong) Limited, creditors supporting the application of Bank of America N.A. in matters

Mr Andrew Willins for Malayan Banking Berhad, a creditor supporting the application of Bank of America N.A. in Claim No BVIHC (COM) 132 of 2016 and Claim No BVIHC (COM) 133 of 2016

Mr Jerry Samuel for American Seafood and Icicle Seafood, creditors supporting the application of Bank of America N.A. in Claim No. BVIHC (COM) 132 of 2016

Mr Robert Nader for Richtown Development Limited, a creditor opposing the application of Bank of America N.A. in Claim No BVIHC (COM) 132 of 2016

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2016: November 7, 8, 18

December 1.

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JUDGMENT

Introduction

[1] Davis-White QC J (Ag): On Friday 18 November 2016, on the application of Bank of America, N.A. ("Bank of America") I made orders placing the above-named BVI incorporated companies, Pacific Andes Enterprises (BVI) Limited ("Pacific Andes"), Parkmond Group Limited ("Parkmond") and Pard Trade Limited ("Pard Trade") (together, the "Companies") into liquidation and appointed Ian Morton, Nick Gronow and Joshua Taylor of FTI Consulting the joint liquidators of each such company. These individuals had previously been acting as joint provisional liquidators of Pacific Andes having been so appointed by me on the application of Coöperatieve Rabobank, U.A. Hong Kong Branch ("Rabobank") and Standard Chartered Bank (Hong Kong) Limited ("SCB") by order made by me on 31 October 2016.

[2] The winding up orders made by me on 18 November 2016 were made at the end of a full day's hearing and I indicated that I would provide my written reasons at a later date. These are those reasons.

Background

[3] Pacific Andes is the wholly-owned subsidiary of Richtown Development Limited ("Richtown"). That Company appeared before me by Mr Nader in its capacity as a creditor of Pacific Andes, opposing the making of a winding up order against its subsidiary. Not surprisingly in this respect it effectively adopted the submissions made by Pacific Andes.

[4] Pard Trade is a sister company of Pacific Andes, also being wholly-owned by Richtown. Parkmond is a wholly owned subsidiary of Pacific Andes.

[5] Richtown, through a number of other subsidiaries, ultimately owns China Fishery Group Limited, incorporated in Cayman and publicly listed on the Main Board of the Singapore Stock Exchange. It is an indirect (and intermediate) holding company of a number of companies known as "the China Fisheries Group".

[6] Richtown is ultimately owned (through an intermediate holding company) by Pacific Andes Resources Development Limited ("PARD"), a company incorporated in Bermuda and publicly listed on the Main Board of the Singapore Stock Exchange. PARD is itself approximately 66.5% owned by Pacific Andes International Holdings International Limited ("PAIH"), a company incorporated in Bermuda and publicly listed on the Main Board of The Stock Exchange of Hong Kong Limited.

[7] PAIH, PARD and China Fishery Group Limited, and their subsidiaries, make up the Pacific Andes Group ("the Group"). The Group is ultimately owned by members of the Ng family. The principal activity of the Group is the trading of frozen seafood products. According to an affidavit of Ng Puay Yee (also known as "Jessie Ng"), the Chief Executive Officer of PARD, and made on 30 June 2016 in winding up proceedings in the High Court of the Republic of Singapore, relating to PARD, the Group's business includes harvesting, sourcing, ocean logistics and transportation, food safety testing, processing, marketing and distribution of frozen fish products, as well as fish meal and fish oil.

[8] The Group has been under financial pressure for some time. Different insolvency proceedings have been commenced in various jurisdictions and at various times. Currently a number of companies within the Group have sought Chapter 11 bankruptcy protection in the United States, these now include PARD. Some companies within the group are also subject to collective insolvency proceedings in Peru. Certain companies have also sought bankruptcy protection under chapter 15 in the United States. The purpose of the Chapter 11 proceedings is to enable a

financial restructuring of the Group to take place. However, the Companies are not the subject of any insolvency proceedings in the United States, nor, so far as I am aware, in any other court than this Court. In substance opposition to the making of winding up orders in the cases before me centred upon the possibility of a global, group restructuring which it was said would be irretrievably damaged were I to make the winding up orders sought by the Bank of America and supported by other creditors appearing before me.

The course of the proceedings before me

[9] Each of the applications now before me was issued on 26 September 2016. They were returnable on 7 November 2016 each with a time estimate of one hour.

[10] On 26 October 2016, Pacific Andes, then represented by Mr Nader, unsuccessfully applied to set aside statutory demands filed by American Seafoods LLC and Icicle Seafoods Inc, trade creditors of Pacific Andes. Those trade creditors are owed respectively US$2,122, 647.50 and US$2,069,393.61. They appeared before me, by Mr Samuel, who supported the making of a winding up order against Pacific Andes.

[11] On 28 October 2016, the Companies applied to this Court on an urgent basis to seek the adjournment of the hearings listed for 7 November 2016. Among the matters urged were that the Companies were not ready to file their evidence and contest the proceedings, not least, because they had recently instructed lawyers within the jurisdiction (not Mr Nader's firm), as well as Queen's Counsel in England, who needed time to grapple with the complicated Group position and the history of the matter. For the reasons given at that time I dismissed those applications. I should add that it was not at that time made plain to me by the Companies that there had been extensive evidence on large numbers of issues raised in these proceedings in the Chapter 11 proceedings.

[12] At the opening of the hearing on 7 November 2016, I was invited to adjourn the three matters for a short period, there being fast moving developments in other jurisdictions which it was considered might have an effect on the applications before me. A number of short adjournments were granted.

[13] On 8 November 2016 it became clear that Bank of America and a number of other creditors wished to press ahead with the applications for winding up orders. Mr Hardwick QC for the Companies sought a lengthy adjournment to file more evidence as a question of case management and/or to await further developments and in particular the passing of the date of 6 January 2017. The latter date is the date to which the relevant US Bankruptcy Court, dealing with the Chapter 11 proceedings, had expressed an intention to extend the period of exclusivity for the relevant Chapter 11 debtors to present a plan of reorganisation. For the reasons given at that time, I adjourned the applications to come on before me on 18 November with directions for the filing of evidence, on the basis that the question of whether such evidence should be admitted would be dealt with by application at the resumed hearing.

[14] At the resumed hearing the Companies sought to put before me certain written evidence which included confidential annexures which they were not prepared for the other parties to see, but only their BVI advocates, and then on terms of confidentiality such that the advocates could not share the information or take instructions on it from their clients. The annexures in question, "the Outlines" were exhibited to two affidavits of Mr David Prager. Mr David Prager is the managing director of Goldin Associates, LLC, a financial advisory and consulting firm specialising in the provision of restructuring advice and related services in distressed and other special situations. In his affidavits he says that he has been retained by (a) Klestadt, Winters, Jureller, Southard & Stevens, LLP, counsel to

PARD and (b) Meyer, Suozzi, English & Klein, P.C., counsel to the other Chapter 11 debtors, as financial adviser to the Chapter 11 debtors.

[15] The first annexure in question was described as being "*a strictly confidential copy of a summary of an outline of a plan of reorganisation".* This outline (the "Outline") was described as forming "*the foundation and basis on which I will be presenting the structure of a plan of reorganisation to various creditors of the Pacific And is Group at various levels of the capital structure*." Mr Prager asserted that publicly disclosing the Outline at that juncture would not only "*impede negotiations*" , but could lead to creditors pre-judging the Outline and refusing to agree to meet properly to consider and fully understand the rationale and implications of any plan based on the Outline, and the variations that could be considered and discussed. He went on to say that "*in order to facilitate (and not destroy) the process of negotiating the plan of reorganisation in the coming weeks, in my opinion, it is imperative that the Outline remains confidential at this stage and not be prematurely disclosed. To facilitate a full and open discussion with creditors, it is critical that I be able to present the Outline in the context of negotiations*". He then said that, in any event, the Outline (or similar document) would be shared with key creditors within "*the next approximately 10 days*". This affidavit was made on 6 November 2016.

[16] In his third affidavit, made on 15 November 2016 to "*provide an update with respect to the reorganisation process that is ongoing*", Mr Prager produced a second outline and sought to explain "*why the Plan Structure must remain confidential and cannot be disclosed any creditors of the Pacific Andes Group and can only be disclosed to the BVI Council of creditors pursuant to a confidentially undertaking solely for the purpose of showing that extensive efforts were made to put such plan together prior to the appointment of a Chapter 11 trustee for CFG Peru Investments Pte. Limited*." The latter company ("CFG Peru Singapore") is one within the China Fisheries Group and subject to the Chapter 11 proceedings I

have referred to. It is, as I understand matters, the 100% direct and indirect owner of the Peruvian operating companies within the China Fisheries Group.

[17] In his third affidavit, Mr Prager also confirmed that on 29 October 2016 an order for the appointment of a Trustee of CFG Peru, the immediate shareholder of the Peruvian fish meal operating companies, was entered by the learned Judge with oversight of the Chapter 11 proceedings, the Honorable James L Garrity Jnr. The Chapter 11 Trustee so appointed was William A. Brandt ("Mr Brandt"). Mr Brandt, said Mr Prager, required time independently to "*evaluate the facts and circumstances of the Chapter 11 cases*" and "*had indicated his belief that the Chapter 11 Debtors' proceeding with a proposal of a structure of a plan of reorganisation for the Pacific Andes Group is premature. Accordingly, he has understandably requested that neither I nor any of the Chapter 11 Debtors, put forward any structure of a plan of reorganisation to the various creditor constituencies at this time."* Accordingly, said Mr Prager, he had cancelled the earlier envisaged trip to Asia to "interact" with creditors and present the plan structure that he had developed with management. This second outline was said to be produced to "*show that extensive time, efforts and thought have gone into developing this Plan Structure that I originally intended to present to creditors during this week*". He said that he was prepared to make a confidential copy of the second Outline to BVI Council of creditors "*who are prepared to sign a confidentiality undertaking, in order to show the extensive good faith efforts that have gone into developing the plan of reorganisation over the past months*."

[18] The imperative that the two Outlines could not be shown by counsel to their clients was repeated in the second affidavit of Stephen Chiang, Senior Legal Counsel for the Pacific Andes group of companies.

[19] BVI counsel for the various creditors refused to give the personal confidentiality undertakings required by the Companies.

[20] At the hearing on 18 November 2016, it was submitted that I should look at the confidential annexures even though they had not been seen by a number of the parties. I expressed concern at the proposition put forward that in the circumstances the court should be shown, confidentially, material not available to certain of the parties to the proceedings and that this should follow because, as I understood the submission, in effect, it was unreasonable for counsel for the creditors to have refused to give the undertakings requested. In this respect, reliance was placed upon the case of ***Libyan Investment Authority v Societe Generale SA*** at the stage that that case was before Hamblen J regarding "confidentiality clubs".[1] That case was however of limited assistance in the circumstances before me. As stated by Hamblen J at paragraph [23], "*The provision of protection by the use of confidentiality rings or clubs in appropriate cases, including confidentiality clubs to which the parties' lawyers alone are admitted at least during the interlocutory stage of litigation, is well recognised- see for example* ***A L Rawi v The Security Service[2] per Lord Dyson.***" (emphasis supplied). However, when the question of a confidentiality club arises it is usually in the context of disclosure, at an interlocutory stage of the proceedings and when, in the absence of agreement, the Court asked to impose the same has to decide whether or not to impose such a club and if so on what terms and what members should constitute it. As Hamblen J made clear, the basis of the imposition of such a club and the terms which should apply to it is worked out on the basis that disclosure should not be used for a collateral purpose. The proponent of the club must establish there is a real risk, either deliberate or inadvertent, of a party using his right to inspection for a collateral purpose. Where there is such a risk, whether for example resulting in potential damage to commercial confidences or property or, as in the ***Libyan Investment*** case, to life and limb, any restrictions should go no further than is necessary for the protection of the right in question. At paragraph [34] of his judgment Hamblen J, having explained that the imposition of

[1] [2015] EWHC 550 (QB).
[2] [2011] UKSC 34; [2012] 1 AC 531 at 64, [2012] 1 All ER 1.

a confidentiality club and, if so, its terms, generally involves a balancing exercise, set out a number of factors likely to be relevant to the court's exercise of discretion. These included matters such as the court's assessment of the degree and severity of the identified risk; the threat posed by the inclusion or exclusion of particular individuals within the club; the inherent desirability of including at least one duly appointed representative of each party; the importance of the information to the issues in the case; the nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge and practical considerations, such as the degree of disruption if only part of a legal team is entitled to review and discuss and act upon the confidential information.

[21] The question of confidentiality clubs in the context of disclosure, being a compelled process, is a different, though doubtless related area, to the question of how the court should protect commercial confidences in circumstances where a party wishes, voluntarily, to deploy material at a trial but without the other parties having full access to that material. Doubtless many of the factors considered by Hamblen J may in practice intrude in that area, though the balancing exercise will be different.

[22] However, in this case, a confidentiality club or some exercise of discretion exercised by the court on a balancing basis, taking into account the sort of factors put forward by Hamblen J was not what was proposed. The evidence filed, and indeed the relevant correspondence, asserted the proposition that the only form of protection that would be countenanced by the Companies was one where only the BVI advocates (and not even their firms) could be given access to the relevant information and if they were not prepared to agree that then they would not be given access to the information, but the court would. The evidence singularly failed to justify, as opposed to simply assert, overriding need for the confidentiality club proposed or to justify the very restricted one proposed and did not recognise

that there could be factors for and against such a course that might need to be weighed by the Court were agreement not possible.

[23] My concern was heightened when it was suggested in oral submissions on behalf of the Companies that counsel for the various creditors could (and effectively should) have reverted to the Companies' lawyers and put forward counter proposals which could have resulted in a better negotiated position for their clients, for example that the Outlines would be capable of being shown to certain employees or officers of the creditors, for example their internal legal teams. This, as I understood it, was a position that Leading Counsel for the companies seemed to view with equanimity. This seemed to me to demonstrate an unacceptable attitude on the part of the Companies. In effect it showed that the sworn evidence of more than one person that the Companies had put before the court was simply false. There clearly was no overriding need that the relevant Outlines should only be shown to BVI counsel on the terms of the proposed confidentiality undertakings and not to their clients and yet this was what was stated on oath as being necessary. I considered that it was improper to present sworn evidence to the court stating that, what in effect emerged as being an "opening negotiating position", was, in the deponents' belief, the only possible circumstance in which information could be made available without irremediable harm.. As I indicated at the time, I was not prepared for the court's process, and for evidence deployed before it, to be used as some form of negotiating tactic. The position put to me by the Companies, as I understood it, was that whereas the creditors (or some of them) had not reverted with a counter-offer widening the proposed members of the confidentiality club (which could have been acceptable to the Companies), their failure to understand that this was the Companies' position and to negotiate meant that I should now read the relevant material, take it into account but not disclose it to the relevant creditors.

[24] I was satisfied that it was inappropriate for me to consider the Outlines on a confidential basis, without the information being made available to all the creditors before me. The information would mean little to me if it could not be properly debated before me. Furthermore, its significance was limited, being directed at showing that there had been serious efforts to prepare a restructuring plan rather than that the Outlines necessarily contained the restructuring plan that would be put to creditors or that there were reasonable prospects that the restructuring plan set out in the Outlines would succeed or that such plan would have a specific beneficial effect for creditors of the three Companies, contrasted with their position on liquidation. The Companies not being prepared to make the Outlines available to the creditors before me, I accordingly admitted into evidence the relevant affidavits, but not the confidential exhibits which I had specifically not read.

[25] I also allowed in certain updating evidence of the creditors seeking the making of winding up orders.

Parkmond

[26] The second matter that immediately arose at the resumed hearing was that Mr Hardwick QC informed me that he no longer acted for Parkmond.

[27] The position regarding Parkmond was that there was an undisputed debt of US$14,853,576.41 owed to the applicant, the Bank of America, as at 20 June 2016, and at least that amount owed as at 18 November 2016. The same had been outstanding since at least November 2015. There was now no appearance by the Company (which had formerly opposed the application, not on the grounds that it was not insolvent or that Bank of America's debt was disputed but on the grounds that there should be an adjournment to permit the Group restructuring to proceed). There were no creditors who had given notice of their intention to

oppose the application or who appeared before me to oppose the application. There were supporting creditors as set out below:

Rabobank	US$22,215,499.74
Malayan Banking Berhad ("May Bank")	US$63,228.892.11

[28] In those circumstances and in the absence of any opposition, either of the company or of any creditor, I immediately made an order winding up Parkmond. I appointed as liquidators the three gentlemen whom I had earlier appointed as joint provisional liquidators of Pacific Andes mentioned in paragraph [1] above, for the reasons set out further below in relation to Pacific Andes.

Pacific Andes and Pard Trading

[29] As regards these two companies, Mr Hardwick QC explained to me that whereas on 8 November he had, as set out in his written submissions, put forward three alternatives: (1) an adjournment with directions enabling full evidence to be filed by all parties; (2) an adjournment beyond 6 January 2017 (being the expiry of the exclusivity period for the debtors to present proposals for a plane of re-organisation under the Chapter 11 Procedure) which would provide "*a sensible window for the parties to complete their evidence*" and "*a relatively short further period for assessing progress in the restructuring*" or (3) dismissal of the applications, he was now pressing only the second option.

Grounds of the applications

[30] The submissions of Mr Hardwick QC contained in his skeleton argument for the hearing on 7 November, arose against a background where the applications of Bank of America were based on two grounds, first that each of the Companies

was insolvent in that it could not pay its debts as and when they fell due ("cash flow solvency") (see Insolvency Act, 2003 s8(1)(c)(ii)) and thus the ground for winding up under s162(1)(b) was made out) and secondly, on the just and equitable ground (see s167(1)(b)). As regards the latter, the originating application referred solely to the insolvency ground but the affidavit in support, referred to in the originating application, specifically referred to both the insolvency ground and the just and equitable ground. The affidavit in support, in addition to relying on cash flow insolvency, also asserted net asset insolvency. The matters relied on in support of the just and equitable ground included allegations such as the following (which were asserted in relation to Pacific Andes):

(1) the Company and PARD (which was also liable in respect of the Bank of America debt) had made various preferential payments to various creditors in January to March 2016 while Bank of America remained unpaid;

(2) there were a number of suspicious payments within the Group which had been identified by FTI Consulting (Hong Kong) Limited (with other FTI entities, "FTI Consulting") at the request of HSBC, another creditor of various Group companies. Put briefly they involved purported "pre-payments" by Group companies (primarily Pacific Andes) to companies described as suppliers, with no apparent commercial justification and which concerned the apparent circular flow of funds to a supplier and then onwards to other companies and finally back to entities within the Group, occurring within a few days of each other and which did not appear to reflect genuine commercial transactions. It was said that (a) no adequate explanations had been given for such payments; (b) PricewaterhouseCoopers Limited ("PwC"), the well-known accounting firm, had been appointed by PAIH and PARD to act as independent reporting accountants to the creditors of those entities in accordance with undertakings entered into in the context of obtaining the dismissal of winding up proceedings against members of the Group in Hong Kong and

the Cayman Islands but their work had been suspended prior to completion; (c) replacement accountants had been appointed who had yet to make any report due to (among other things) poor record keeping, delay in receiving information from Group entities and the departure of key staff; and (d) PARD and the Company had filed no formal collective insolvency proceedings, instead seeking solely moratoria on proceedings against them, and that there was a concern that formal investigation was being avoided.

(3) other information had come to light raising doubts about the actions of management within the Group and whether the management of companies within the Group was being run in the best interests of creditors including (a) debts of US$155, owed to PARD by unknown minority shareholders of another group entity for rights issues paid on their behalf by PARD; (b) the purported "prepayments" referred to in (2) above which were not the subject of any written agreement and where there was unlikely to be any recovery; (c) a number of loans made to and guaranteed by a number of Group companies. The company who lent such sums had successfully applied to the High Court in this jurisdiction for the appointment of joint liquidators over Richtown, Richtown having consented to such application. The appointment had later been terminated, again with both companies acting together.

(4) the undertakings given by the relevant Group companies (to the relevant courts as well as certain creditors) in connection with the dismissal of winding up proceedings in the Cayman Islands and Hong Kong (as referred to above) had also involved the appointment of a chief restructuring officer and the sale of the Group's Peruvian fishmeal operations to repay certain Group debt by 20 July 2016 (or a later date as agreed). Within days of confirming support at board level within the Group for the sale, a number of companies within the Group had entered the Chapter 11 process and subsequently announced the sale would not be

proceeding. This was done without warning either to the creditors or the chief restructuring officer, who accordingly resigned. The following day to the Chapter 11 filings, proceedings were filed in Singapore in which a worldwide moratorium was successfully obtained under the jurisdiction enabling schemes of arrangement to be put forward. The moratorium applied to claims against a number of companies including Pacific Andes. The moratorium was eventually lifted against (inter alia) Pacific Andes on the basis there was no sufficient nexus with Singapore.

[31] As I have said, the learned Judge dealing with the Chapter 11 proceedings in New York, the Honorable James L Garrity Jnr. determined on 28 October 2016, on the application of a number of creditors, that a trustee should be appointed in relation to the Chapter 11 proceedings. He decided that it was only necessary to appoint a trustee in relation to one of the sets of proceedings: but that was primarily because a number of the companies were dormant or non-operating or mere holding companies and there were questions about overseas' recognition. He also determined that the movants had failed to establish that management's actions signalled an unwillingness or inability to understand proceedings or abide by court orders with which they disagree, and accordingly had failed to establish that existing management of the relevant group companies was not trustworthy. However, he did determine that the movants had good reason to question the trustworthiness of the Debtors and that they had justifiable lost confidence in management. There having been testimony at an evidentiary hearing he found that such loss of confidence was justified by:

(1) management's deliberate and premeditated breach of the undertakings I have referred to above;

(2) management's surreptitious planning of global bankruptcy and insolvency filings;

(3) management's attempt to protect real estate holdings by transferring them to related parties;

(4) several billion dollars of unexplained inter-company transactions;

(5) hundreds of millions of unexplained purported prepayments to Russian entities;

(6) hopelessly conflicted advisers to the Independent Review Committee charged with investigating those suspicious prepayments;

(7) admitted misrepresentation regarding the receipt of US$31 million of LSA termination payments;

(8) the removal of all agreed-to oversight by independent third parties;

(9) conflicts of interest of management;

(10) management's large investments in the Debtors that have motivated management to oppose a sale of the Peruvian business;

(11) management's ties to outsiders reaching into lower levels of the Debtors and their affiliates; and

(12) the uncertainty surrounding the Ng families ability to control the Pruvian business.

As he concluded, "*Based on the foregoing, the Movants' lack of confidence in management is both justified and understandable*". This factor was one weighing in favour of the appointment of a Chapter 11 trustee.

[32] Mr Mays' position was that he did not need to rely on the just and equitable ground, or even on net asset insolvency. In the case of each company he could simply rely on an inability to pay debts as they fell due. He accepted that it would not be possible for me on a hearing of the applications to determine whether or not the just and equitable grounds were factually made out. Indeed, it was largely on the basis that matters were to be presented in this manner and that the just and equitable ground was not going to be relied upon that had caused me to refuse the earlier adjournment sought by the Companies prior to 7 November. The question

marks regarding such matters had however been relevant to the question of the appointment of joint provisional liquidators. Furthermore, and as I explain below, to the extent it is appropriate to look at the reasons for the creditors seeking a winding up, the extent to which they have a justified lack of confidence in management and in leaving management in control of the Companies while formulating a restructuring plan which may affect them as creditors of the company in question, may become relevant.

The creditor position

[33] The creditor position of Pacific Andes regarding support and opposition to the making of winding up orders was as follows:

Pacific Andes

Creditor			Opposing w-up In US$ '000s	Supporting w-up In US$ '000s
Bank of America (applicant)				14,854
May Bank				62,817
SCB				27,719
Rabobank				22,215
Icicle Seafoods Inc				2,069
American Seafoods Company				2,123
Richtown			461,278	
China CTIC Bank International Bank++			59,458	

			520,736	131,797

Note: ++ Letter in evidence from CTIC Bank but no formal notice of intention to appear given.

[34] I should add that a schedule put forward by the Companies suggested that Taipei Fubon Commercial Bank Co. Ltd ("*Taipei Fubon*"), as agent for certain Finance Parties, as defined in a facility agreement between inter- alia Pacific Andes and Taipei was a creditor for some US$72million which opposed the making of a winding up order. An e-mail was provided to me from White & Case solicitors dated the morning of the resumed hearing confirming that they acted for Taipei Fubon and that it had at all times been, and remained, neutral.

[35] There were no creditors who had given notice of intention to appear and either of support or opposition to Bank of America's application for the winding up of Pard Trade. Bank of America's application is based on the outstanding debt which as of 20 June 2016 stood at US$14,853,576.41.

[36] The Company accepted that the debt owed to Bank of America was due and payable and that on the face of things each of Pard Trade and Pacific Andes were then insolvent in that they could not then pay their debts as they fell due.

The Law: a creditor's application to wind up on insolvency grounds

[37] Where a creditor applies to the Court for the making of a winding up order on the basis that the Company is unable to pay its debts as and when they fall due, it may find that the company raises challenges on one or more of a number of grounds, these include matters such as the following (which is not to be taken as being a complete list):

(1) the application may be said to be an abuse on the grounds that it is brought for an illegitimate collateral purpose (see e.g. discussion in *Re Ebbvale Limited v Hosking*[3]);

(2) the application may be said to be an abuse on the ground that there is a bona fide and substantial dispute that there is a debt (or at least in a sum over and above the required minimum) and accordingly that the "creditor" has locus to present the application (see e.g. *Mann v Goldstein*[4]);

(3) the application may be challenged on the ground that there is no benefit at all flowing from the winding up order (see e.g. *In Re Crigglestone Coal Company, Limited*[5]).

There was no challenge of any of these types regarding the current applications against Pard Trade and Pacific Andes. [6]

[38] Absent challenges of this nature, the Court has a discretion to adjourn an application. At the company's behest, it will usually be prepared to adjourn an application for a short period on the basis that there are reasonable prospects of payment of the application debt in full within a reasonable period (see e.g. *Sekhon v Edginton*[7] and *In the matter of Glen Maud*[8]). That is not this case.

[39] Subject to this, as between the creditor and the Company, the creditor is entitled to a winding up order, as it has been said, "*ex debito justitiae*" (see e.g. Buckley J in *Re Crigglestone Coal Co Ltd*). It may not be possible to say that, in a case where the application is not otherwise opposed by other creditors, there are no circumstances at all in which the court might refuse to make a winding up order, but such cases are likely to be very, very rare and wholly exceptional. In the two

[3] [2013] UKPC 1.
[4] [1968] 1 WLR 1091.
[5] [1906] 2 Ch 327.
[6] [1906] 2 Ch 327.
[7] [2015] 1 WLR 4435 at [15]-[19].
[8] [2016] EWHC 2175 (Ch).

cases before me it seems to me that there is nothing to displace the usual principle.

[40] However, where there are opposing creditors the landscape completely changes. That is because winding up proceedings are a class remedy or, in modern parlance, a "collective insolvency proceeding" or a process for the collective enforcement of debts (see e.g. discussion in *In Re Maud*[9] at paragraphs [77] to [78]).

[41] In those circumstances the Court will listen to the views of the "class". Where the views on each side are proper views that can properly be taken, the Court is likely to go with the majority view, on the basis that the majority are the best able to identify their interests. However, it is not simply a question of taking a head or value count. As Upjohn LJ pointed out in *Re P&J Macrae* at pages 238-9, it is not a simple question of number and value of creditors expressing wishes.

(1) Assuming the creditors are to be treated as on an equal footing: (a) where the proportions are very close then it may be that the weight to be given to a small or bare majority should be negligible; (b) where the overwhelming creditors in number and value oppose the applicant, who is virtually alone, the weight to be given to the opposing creditors, unless there is a reason for disregarding them, will be very great and in the ordinary case in the absence of special circumstances will be decisive; (c) between these two extremes, the weight to be given to opposing creditors will depend on all the circumstances but, other things being equal, will increase in the mind of the judge as the majority of opposing creditors increases;

(2) It is not merely a matter of calculating percentages of value. Apart from prospective and contingent creditors, which may give rise to difficulties in

[9] [2016] EWHC 2175 (Ch).

assessment, it may be that a greater weight should be given to the wishes of a large number of small creditors against the wishes of one or two very large creditors, even though the latter are larger in amount in the aggregate;

(3) There may be differences in the quality of the creditors. The Court may be suspicious of opposing creditors and the motives actuating them. In such a case their reasons for opposition may be required to be taken into account and if not provided may be required to be given.

[42] It seemed to me that the above analysis was consistent with the cases cited to me by Mr Hardwick QC. He relied on a number of cases where the court had permitted time for a reconstruction to go ahead or had dismissed the application for a winding up order in the circumstances where there was a reconstruction underway. These are simply examples of the Court exercising a discretion. There is no general proposition, principle or presumption that where there is a restructuring an adjournment will be allowed. The cases show that the court will consider all the circumstances, as per Upjohn LJ in the *Macrae* case. The relevant numbers and value of creditors and the reasons put forward by the creditors on both sides will be among those factors.

(1) In *Re UDL Holdings Ltd*[10] Le Pichon J was faced with a situation where there was a proposed reconstruction by way of court scheme. Various creditors opposed the reconstruction and sought an immediate winding up order; others supported the proposed scheme. She applied the principles stated in *Re P & J Macrae* and the dicta that "*before a majority can override the wishes of the minority they must at least show some good reason for their attitude*". In the case before her the majority had relied upon an Ernst & Young letter and made a commercial decision, weighing the prospect of receiving practically nothing on a liquidation as opposed to something under

[10] [1999] 2 HKLRD 81.

the proposed scheme. There was a reasonable prospect of the scheme being voted through.

(2) In *Southern World Airlines Ltd v Auckland International Airport Ltd*[11] , the Court of Appeal in New Zealand allowed an appeal and in effect adjourned a winding up application while a restructuring was underway. By the time of the Court of Appeal hearing the creditors opposing an immediate winding up were a majority in number and close to the three fourths in value required to approve a scheme proposal under the relevant legislation. Before the master the position had been that there were two creditors with claims of $786,000 pushing for immediate winding up and 21 creditors with claims of $4.688 million opposed to that course. There was no indication of fraud or anything of the sort indicating the need for an immediate investigation by a court appointed official in liquidation. The proposal being put forward would have produced, it was estimated, some $1.5million more for creditors than the $600,000 estimated on a forced liquidation. It was, said the court, for the creditors, not the court, to determine whether that was worthwhile.

(3) In *Re DTX Australia Limited* a winding up petition was adjourned to enable a proposed reconstruction to proceed. The majority of creditors supported the adjournment but the court accepted that it would not simply blindly follow the majority but rather consider all relevant factors. On the face of things the majority in that case had made a commercial decision that an adjournment was in their best interests. On a winding up they were likely to fare badly whereas an adjournment raised the prospect of funds being raised which if successful would result in all creditors being paid.

[43] It follows in this case, that the views of the Companies should have no real weight as such. However, given that the arguments put forward by Pacific Andes are adopted by Richtown, an opposing creditor, I did not prevent Mr Hardwick putting forward a position that might be said to be one that was really only appropriately put

[11] [1992] MCLR 210.

forward by an opposing creditor(s). Similarly, in the absence of any opposing creditors in the case of Pard Trade, it seemed to me that I could simply wind the company up on the basis that that was Bank of America's right against the company, *ex debito justitiae* and there was no creditor opposing such a course. Given that I had to hear argument anyway I decided not to wind up Pard Trade there and then on that ground, but to take into account all the relevant factors.

The grounds of opposition to the winding up

[44] The opposition mounted by Mr Hardwick was on the basis that the global restructuring of the group that was to be proposed was such that a short adjournment until the end of the exclusivity period referred to (at least in the first instance) was appropriate and would do no harm whereas, it was said, the making of winding up orders at this stage would seriously damage and possibly prevent the global restructuring proceeding. In this respect he relied upon the evidence of Mr Prager.

(1) In his first affidavit, Mr Prager asserted that the commencement of a winding up of Pacific Andes would harm "*the progress to a holistic reorganisation of the Pacific Andes Group that maximize recoveries to all creditors, including the creditors of* [Pacific Andes]." However, the only explanation given for this view is that the appointment of liquidators into the US restructuring process "*is likely to delay, hinder and/or impede negotiations of a restructuring plan*". It is wholly unclear why this should be the case. The liquidators that are put forward are professional men well able to negotiate effectively in the best interests of all of the creditors whose interests they primarily represent. True it is that the liquidators would have to get to grips with the relevant Company's financial affairs but given the proposed restructuring is one that, even on Mr Hardwick's submission, is not going to completed very speedily, I am not impressed by any argument of delay.

(2) Mr Durasevich, a director of the recently appointed corporate director of Pacific Andes, Fading Cape Limited, asserts in his first affidavit that there are a number of co-borrowing and guarantee arrangements against the group and that the winding up of Pacific Andes is likely to trigger these. This is just assertion and not particularised. The overwhelming likelihood is that, as in the case of the major bank facilities whose creditors are largely represented before me, any triggering has already taken place.

(3) In his second affidavit, Mr Durasevich asserts that the winding up of Pacific Andes is "*not in the best interests of its creditors and stakeholders given the adverse domino effect it will have on the Group's global restructuring process*." Leaving aside what he says about provisional liquidators creating uncertainty, he appears to suggest that "*Any person* [and therefore presumably liquidators] who exercises control over [Pacific Andes] *and pursues…receivables due to Pacific Andes in an isolated manner, without regard to the holistic reorganisation efforts of the Pacific Andes Group will inevitably derail the group-wide restructuring process and lead to a much less meaningful recovery for all creditors including the creditors of Pacific Andes*". Again, it is difficult to see why this should happen. As the joint provisional liquidators say in their report to the court: they are well experienced in this area. If a proposed restructuring is likely to be beneficial to the creditors whose interests they represent then they are likely to support the same rather than taking the course identified by Mr Durasevich as being the destructive one of simply insisting on legal rights without exploring and, if appropriate, recommending a restructuring and, if appropriate, joining in it.

(4) In his third affidavit Mr Durasevich gives a further (or expands upon the earlier) reason why, so he says, liquidation will cause serious prejudice to the proposed restructuring. That is, he says, because the proposed reconstruction is dependent upon (as I understand him) simply ignoring all inter-group balances. However, he suggests, liquidators of companies would pursue the inter group balances due to the company over which they are

appointed and in turn other group companies would counter-claim against them for inter-company balances running the other way (i.e. where Pacific Andes is the inter-company debtor). This would result in "*shifting value from creditors of one entity to another unfairly given that these intercompany claims are supposed to be meaningless from value allocation exercised and are supposed to be reconciled and netted off as a whole*". I regret to say that I find the companies' evidence as to the factual position to be very unclear in this area. Mr Hardwick was not really able to assist me. At points it seems to be saying it is in all creditors' interests that the intra-group debt position is ignored, at other points it seems to suggest that to do so would shift value between different groups of creditors. However, so far as it is said that the liquidators would be an added obstacle to any worthwhile restructuring because they would insist on the strict legal rights of the companies that they are appointed over and not be prepared to look at a restructuring plan that would carry greater benefit to the creditors of such entities, this is not borne out by the evidence.

(5) All that Mr Durasevich says about the intra group position is against a background where, according to Mr Prager's evidence to the court overseeing the Chapter 11 proceedings, namely the United States Bankruptcy Court Southern District of New York, there is a job yet to be done of analysing intercompany claims for their "*bona fides, nature and origin*." This exercise, apparently, may result in certain intercompany claims being restated or reclassified as equity contributions/dividends. As is clear from his report the intercompany position is unclear and may be wrongly stated in the relevant entities' accounting records. This process of review is supposedly going to go on outside the Chapter 11 proceedings, though creditors will be informed about the status of intercompany claims on a monthly basis. That evidence was from August of this year but there is no relevant update provided to this court.

(6) Not only am I not satisfied that the appointment of liquidators will in any way damage any restructuring plan, I am wholly persuaded that the creditors who wish liquidators to be appointed have a perfectly reasonable commercial rationale for so doing to ensure that the companies in question are managed and controlled by independent professionals who can investigate the position and come to a view as to what is best for creditors, whether ultimately their view is relayed by recommendation to creditors or by way of proposed action by them which is subject to oversight of the court. It is noticeable that the limited controls over a debtor in possession under Chapter 11 are not available to the companies before me which are outside the Chapter 11 process.

(7) I should add that I did not understand Mr Hardwick to rely upon the mere fact of liquidation itself as creating problems, that is of damaging the solvency reputation of the Group and, for example, creating a fire sale situation. In any event, such an argument would be difficult to sustain in the light of (a) the Group effectively abandoning opposition to the liquidation of Parkmond and the winding up order that I had made and (b) the consensual appointment of joint provisional liquidators over Richtown in this jurisdiction, referred to above and (c) the previous appointments of joint provisional liquidators in the Cayman Islands and Hong Kong and (d) the current insolvency proceedings in the United States and Peru.

[45] The proposed restructuring is wholly unclear, even in outline, and it is unclear whether it will or may benefit the creditors of the companies that I am considering (and their creditors) or not compared with the position on liquidation. Further there is no real indication of what support there may be for any such restructuring. Although it is submitted that the extension to the period of exclusivity within which the Debtors in the Chapter 11 proceedings may present a plan shows that the United States court considers that the same has real prospects of success I have

no evidence that that was the basis of that Court's decision or even as to the evidence put forward to the United States Court presumably supporting such a position. Indeed, given the comparatively recent appointment of a Trustee, and his understandable attitude summarised above, I can understand that the Court might well have been prepared to extend the period in large part because of that appointment. Be that as it may, it is clear that as at August the position as found by the United States judge was as follows:

> *"…. It is incumbent on* [the Debtors] *to articulate a cogent and viable reorganisation strategy. They have failed to do so. In his* [Mr Prager's] *report, the Debtors' financial advisor merely recites possible reorganisation outcomes that would benefit any Chapter 11 case, and no details underlie any of the possible suggested reorganisation outcomes….*
>
> *The Debtors have not articulated any course of action, any timeframe for implementing a reorganisation strategy, or any back-up plans if the Peruvian Business does not improve. Indeed, the Debtors have done little in these Chapter 11 cases to further their reorganisation efforts other than filing their petitions, certain required schedules and statements, retention applications, a few rudimentary first-day filings, and their response to the Motion. Particularly troubling is that the Debtors failed to address the fact that they lack assets and operations to reorganise and, in any event, have no funding to do so. As noted previously, the debtors are, with few exceptions, holding companies or dormant operating companies….. With no meaningful businesses to reorganise"*

In their recent evidence, the Companies assert that the position has changed since August and that much work has been done on the restructuring plan. That is as maybe but it is fairly clear that the process of negotiating at hand is likely to take some considerable time. Mr Hardwick was unable to assist me regarding the likely timetable of events after 6 January 2017, assuming a Debtors' proposal was put forward by that date.

[46] In these circumstances the views of the creditors that support the winding up are, in my view, not shown in any respect to be unreasonable. It is a question of commercial judgment as to whether a winding up is appropriate now. At this point it is necessary to look at the position of the opposing creditors.

[47] As regards opposing creditors, there are none with regard to Pard Trade. Accordingly it follows that a winding up order should be made in relation to that company and on that basis I made it.

[48] As regards opposing creditors in relation to Pacific Andes, these, as I have said are two: Richtown ($461,278) and CITIC Bank ($59,084). However, Richtown is controlled by management of the Group. It is the holding company of Pacific Andes. The explanations put forward by Pacific Andes by Mr Hardwick were effectively adopted by Mr Nader. That reasoning I have found to be unpersuasive. There is no evidence that the Richtown has received or acted upon any independent professional advice nor has it provided any. In the circumstances I completely discount its views. In this context, I was referred to the helpful case of *Lummus Agricultural Services Ltd*[12]. In that case Park J applied the principles that I have set out above. He held that where opposing creditors were not independent outsiders but associated with the company itself and with its directors (who opposed the application) their views should be discounted or at least in the Judge's discretion could be discounted. As I have said, I am satisfied in all the circumstances that the views of Richtown should be discounted.

[49] In those circumstances, the majority of creditors of Pacific Andes support the making of a winding up order. I am wholly unpersuaded that the commercial judgment of the majority is one that should not be given effect to. Further, if it were necessary so to decide, (though I do not rely upon this for my decision), I consider that the evidence before me both supports the finding of the Honorable James Garrity Jnr that creditors have justification for losing confidence in management of the Group, and that the majority creditors supporting the winding up of Pacific Andes before me have good, positive reasons for wishing Pacific

[12] [1999] BCC 953.

Andes to be placed in the hands of independent insolvency practitioners and a court controlled insolvency regime sooner rather than later.

[50] Having considered the evidence and heard full submissions with regard to Pacific Andes and Park Trade, I should add that my earlier conclusion that Parkmond should be wound up was only confirmed by the experience.

[51] Accordingly, for all these reasons I made the orders appointing joint liquidators over the three companies, Pacific Andes, Parkmond and Pard Trade and placing those companies into liquidation.

Identity of liquidators

[52] The Bank of America had originally put forward its own candidates to be appointed as liquidators. In light of the appointment of the joint provisional liquidators there was obvious common sense in those persons being appointed joint liquidators of each of the three companies. Those persons had already presented two full and helpful reports to the court and were well into the process of obtaining information and familiarising themselves about Pacific Andes' assets liabilities and affairs. Mr Mays did not press for the appointment of any other person as liquidator, whether in addition or in the alternative. No other creditor before me, save for Richtown submitted otherwise. Richtown opposed the appointment of the individuals who had acted as joint provisional liquidators on the basis that as persons from FTI consulting they would have a conflict of interest in acting. The conflict was said to be between their duties as liquidator and their self-interest in seeking to justify the preliminary FTI Consulting reports to HSBC which were used, as I understand it, as evidence for the appointment of joint provisional liquidators in the Cayman Islands and Hong Kong. I agreed with Mr Moverley Smith QC, who acted for Rabobank and SCB, on whose application the joint provisional liquidators had been appointed, that the individuals were professional men and that the objection to their appointment was ill-founded.

Costs of application on 27 October

[53] On 27 October 2016, I ordered that the relevant companies should pay the costs of Bank of America on the Companies' failed application to adjourn the hearing of the applications for winding up. I had directed that if not agreed those costs would be assessed at the hearing of the winding up petitions. In the light of the fact that liquidators are now in office it seems to me that the appropriate thing to do is to vary my order those costs can be quantified within the liquidation process. Accordingly I will vary my order accordingly. Subject to any further submission, the order will be that the costs can be assessed if not agreed with liberty to apply. I would however indicate that I would expect the matter to be dealt with through the proof process if the quantum of the debt cannot be agreed.

Malcolm Davis–White QC (Ag)
Commercial Court Judge