

# THE CAYMAN ISLANDS' NEW RESTRUCTURING OFFICER REGIME - REFLECTIONS ON THE FIRST YEAR



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"... the main factors..." that will determine the usefulness of the Cayman [Restructuring Officer] regime are likely to be how overseas courts will respond to... the [worldwide] automatic stay... and the first applications for recognition and assistance of [Restructuring Officers]"

Just over a year has passed since the new Cayman Restructuring Officer regime came into force on 31 August 2022. As we know<sup>1</sup>, it ushered in a number of significant improvements to the Cayman Islands restructuring toolkit, including:

- an immediate automatic global moratorium on claims against the company, which commences as soon as a RO Petition is filed;
- a cleared path for directors to cause their company to present an RO petition, without the need for enabling provisions in that company's Articles of Association, or a shareholder resolution; and
- removing the 'headcount test' for shareholders' schemes of arrangement.

It also preserved and built upon the strengths of the previous regime, including:

- retaining the threshold tests required to appoint ROs (which is the same test that previously governed applications for light-touch provisional liquidators for restructuring purposes), namely that the company:
  - o must be, or likely to become cash-flow insolvent<sup>2</sup>; and
  - o intends to present a compromise or arrangement to some or all of its creditors; and
- retaining a huge amount of flexibility as to what powers and duties will be given to ROs and the manner in which their appointment will impact upon the powers and functions of the company's Board.

## Statistics

It's been a busy year for the new regime. Six RO Petitions have been filed since 31 August 2022.

Of those six: ROs were appointed in two cases<sup>3</sup>, petitions were not proceeded with in two cases<sup>4</sup>, and dismissed in a third<sup>5</sup>; and one recently filed Petition has yet to be determined<sup>6</sup>. Happily, two of these cases led to successful restructurings.

## Cases involving RO appointments

*Oriente Group Limited* was the first Cayman ROs appointment. In that case, the ROs were subsequently discharged. *Oriente* was also the first RO decision in which a reported judgment was produced. The key take-aways from that judgment are:

- that the previous caselaw dealing with the identical threshold test to obtain the appointment of light-touch PLs, remains both relevant and persuasive;
- that a RO petition can be presented, even when there is a winding-up petition on foot in Cayman. In such cases, the automatic stay will then mean that no further steps can be taken to progress the winding-up petition, unless the Court directs otherwise; and
- to provide some helpful guidance as to advertising, which can be challenging logistically, given the short 21-day deadline for all RO petitions to be heard in Cayman (unless the Court otherwise directs). The Court helpfully confirmed that, even if technical breaches of the rules occur, it will adopt a sensible and pragmatic approach to such issues, with its primary focus on ensuring that the petition was brought to the attention of as many creditors as possible.

*Rockley Photonics Holdings Limited* was the second Cayman case in which ROs were appointed. In *Rockley*, the company filed a Chapter 11 petition in the US Bankruptcy Court for the Southern District of New York, together with a prepackaged plan of reorganization (which was later supplemented). It followed this, a day later, by filing a RO petition in Cayman. ROs were quickly appointed and

1 And as has been made clear in various articles, including those published in INSOL World in Q1 2023 (Full Steam Ahead - The Cayman Islands Restructuring Officer Regime in Motion); and Q3 2023 (Great (Restructuring) Expectations: where to next for Asia?).

2 A test that involves considering debts falling due both presently and in the reasonably near future.

3 *Oriente Group Limited* and *Rockley Photonics Holdings Limited*.

4 *Differ Group Auto Limited* and *Carbon Holdings Limited*.

5 *Aubit International*.

6 *Holt Fund SPC*.

within two months of those initial filings, the company's board, under the oversight and supervision of the Cayman ROs, succeeded in having a plan of restructuring approved by the US and Cayman Courts consecutively, on the same day. That restructuring took place successfully and the ROs' are likely to be discharged soon.

### Cases where no appointment was made

In *Differ Group*, the RO Petition was withdrawn after the company struck a deal with an investor who agreed to fund a restructuring.

*Carbon Holdings Limited* was, like *Oriente*, a case involving a RO petition filed after a winding-up petition was already on foot. In *Carbon Holdings*, the Court gave permission for the pre-existing winding-up petition to continue, and for both petitions to be heard back-to-back on the same day. After that, it appears that neither petition proceeded to final order.

### Aubit International

*Aubit International* is the second reported RO judgment and the first one in which a petition seeking the appointment of ROs has been dismissed. It involved an application that the Company itself conceded was 'unusual, if not unique', namely a proposed restructuring that would contain two stages:

- an asset and information gathering phase;
- followed by a more typical restructuring stage

It is clear from the judgment that the Cayman Court was unconvinced (without having to decide the point) that such a two-stage proposal would ever satisfy the second limb of the threshold test for appointing ROs, namely that the company "intends to present a compromise or arrangement to some or all of its creditors".

The Court explained that the intention to present a restructuring plan must be a realistic, genuine, *bona fide* held intention on adequate grounds and the Court will need to be persuaded that there is a rational and credible restructuring plan, even if only provided in outline.

The Court went on to emphasize that:

- it is only in cases where it is satisfied that both limbs of the statutory test are met, that it then has a discretion as to whether to go on to appoint ROs;
- when exercising that discretion, the Court's main considerations will be whether:
  - o the restructuring is likely to be more beneficial to creditors than a winding up petition;
  - o there is a real prospect of a restructuring being effected for the benefit of the general body of creditors; and
  - o that in all circumstances, it is in the best interests of the creditors to try and achieve a restructuring.

- such petitions should be supported by sufficient evidence, including: (a) of engagement with creditors; (b) preferably independent evidence on the benefits of restructuring as against a winding-up order; and (c) accurate, ideally independently verified evidence of the company's financial and creditor position.

In dismissing the petition, the Court emphasized its vigilance in guarding the new RO regime against potential abuse, clearly signaling that:

*"Jurisdictions around the world can have confidence in the judiciary of the Cayman Islands to appropriately consider and balance the interests of all concerned in respect of applications for the appointment of ROs..."*

*They may rest assured that Cayman judgments... will be vigilant to guard against any potential abuse of the Restructuring Officer regime."*

This case clearly demonstrates, lest there were any doubt as to the matter, that ROs will only be appointed in appropriate cases, off the back of clear evidence that a restructuring is a real prospect and that creditors will benefit from such an appointment.

### Looking ahead

The next RO petition to be heard (in November 2023), that of *Holt Fund SPC*, seeks the appointment of ROs over specific portfolios of a SPC. It will be interesting to see how the Court approaches that novel issue.

Looking further ahead, the main factors that will determine the usefulness of the Cayman RO regime are likely to be how overseas courts will respond to:

- the automatic stay, which expressly has a worldwide effect; and
- the first applications for recognition and assistance of Cayman ROs.

There is every reason to be optimistic on both fronts. Especially in light of the clear signalling from the Cayman Court that its primary motivation in dealing with these cases is the safeguarding of interests of all creditors globally, and that it will be vigilant to guard against any potential abuse of the new RO regime.