Cause No: FSD 0056 of 2024 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF KINGKEY FINANCIAL INTERNATIONAL (HOLDINGS) LIMITED

Appearances:	**Mr Alex Potts KC and Mr Erik Bodden instructed by Conyers Dill & Pearman for the petitioner**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**6 March 2024**
Judgment:	**12 April 2024**

CASE SUMMARY

(not part of judgment)

Appointment of provisional liquidators or restructuring officer—whether "light touch" provisional liquidators preferable in circumstances—whether power to appoint provisional liquidators broader under s.104(3) of Companies Act as amended than under previous statutory language.

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JUDGMENT

A. Introduction

1. On 6 March 2024, I appointed provisional liquidators in respect of Kingkey Financial International (Holdings) Limited for the purpose of facilitating a potential restructuring of the company, which I shall refer to as Kingkey. The application to appoint provisional liquidators came before me on a summons dated 28 February 2024 issued by Kingkey. The summons was issued in connection with a winding up petition, also presented by Kingkey, on 23 February 2024, which was due to be heard on 19 April 2024.[1] Kingkey sought to make use of the "light touch" provisional liquidation approach that has been a feature of insolvency practice within the Cayman Islands for many years in preference to the appointment of a restructuring officer under s.91B of the Companies Act that came into force on 31 August 2022.

2. The application involved some discussion of the comparative merits of the "light touch" provisional liquidation and the use of the new restructuring officer regime, and the test for appointing provisional liquidators under the amended version of s.104(3) of the Companies Act introduced in 2022. Counsel for Kingkey requested that, in those circumstances, I should deliver a fully reasoned judgment.

3. Kingkey was represented by Mr Erik Bodden of Conyers, Dill & Perman led by Mr Alex Potts KC. I was shown evidence that Kingkey's directors, including Mr Chen Jiajun who has the main ownership interest in Kingkey, were notified of the hearing. I was also shown notices published via the Hong Kong Stock Exchange on 25 February 2024 confirming the fact of the petition and intention to issue the summons, and on 1 March 2024 indicating the date and time of the hearing. Nevertheless, there was no appearance by anyone other than the company.

4. In support of the summons, Kingkey primarily relied on an affirmation dated 23 February 2024 signed by Chan Ting Fung and two affirmations of Hung Wai Che signed on 26 February and 1 March 2024. The following summary of the facts is drawn from the filed evidence.

[1] Subsequently adjourned to a date in June 2024.

B. Factual background

B.1 The Company

5. Kingkey was incorporated in the Cayman Islands on 31 March 2011 as an exempted limited liability company, with a registered office in the Cayman Islands. Kingkey's principal place of business is Hong Kong and it has been listed on the Hong Kong Stock Exchange since 20 March 2015.

6. Kingkey is a holding company for a number of subsidiaries carrying on various different businesses in Hong Kong, the People's Republic of China and Denmark. For present purposes, it is unnecessary to set out the nature of those businesses save to record that several of Kingkey's subsidiaries operate in business sectors that are regulated under the Securities and Futures Ordinance (Cap. 571 of the laws of Hong Kong) and are therefore subject to, amongst other things, minimum capital sufficiency requirements.

7. At the date of the hearing before me, Kingkey's board of directors comprised two executive directors and four independent non-executive directors, as follows:

   a) Mr Chen Jiajun, an executive director and ultimate beneficial owner of approximately 37.18% of Kingkey's issued shares;

   b) Mr Mong Cheuk Wai, an executive director;

   c) Ms Mak Yun Chu, an independent non-executive director;

   d) Mr Chan Ting Fung, an independent non-executive director;

   e) Mr Leung Siu Kee, an independent non-executive director; and

   f) Mr Hung Wai Che, an independent non-executive director.

8. However, since 12 February 2024, key management decisions regarding Kingkey have been made by a Special Committee comprising the four independent non-executive directors, with Mr Leung as chairman, in light of conflicts that have arisen amongst members of Kingkey's board of directors, as summarised below.

B.2 Management attempts to address the deterioration in Kingkey's financial position

9. Kingkey's businesses have suffered in recent years due to the economic challenges generated by the COVID-19 pandemic, the war between Russia and Ukraine and rises in interest rates. The evidence is that, as at 30 September 2023, the Kingkey group's current liabilities totalled more than HK $388 million, with Kingkey's own current liabilities being nearly HK $116 million.

10. During 2023, Kingkey's management sought to explore options for raising funds and settled on a proposal to issue convertible bonds. In September 2023, Kingkey concluded an agreement with DC Universe Investment Ltd to subscribe for the bond issue. Kingkey's share price then suffered a significant unexpected fall, and DC Universe tried to renegotiate the terms of the bond issue. Kingkey's share price had not improved by 4 December 2023, and Kingkey and DC Universe agreed to treat the agreement as void.

11. Kingkey still had a pressing need to improve its short-term liquidity and long-term working capital but struggled to secure new financing from other sources. Kingkey therefore re-opened discussions with DC Universe at the end of December 2023 on the basis of a potential share subscription, which Kingkey's management believed would be a less costly and more efficient method to raise further capital than a bond issue. In its final form, the transaction was intended to raise approximately HK $179.7 million to cover the Kingkey group's then current liabilities of HK $125.7 million and to provide working capital and capital reserves of approximately HK $54.0 million.

12. Kingkey's board, with the exception of Mr Chen, considered it was necessary to conclude a deal with DC Universe before share trading resumed on 15 January 2024 after the Chinese New Year holiday season. The board therefore met on 14 January 2024 and approved the proposed share subscription by DC Universe, with Mr Chen dissenting. Mr Chen appears to have taken the view that Kingkey did not need to raise outside finance and that it had sufficient resources to meet its outgoings, but that if additional funding were required then the deal with DC Universe was not the way forward and Kingkey could raise money in other ways, for example, from him.

13. Following the approval by the majority of Kingkey's board, the share subscription agreement was concluded on 15 January 2024. However, on 22 January 2024, Mr Chen instigated proceedings in Hong Kong to restrain Kingkey and the other board members from completing the share subscription and obtained an interim injunction on 26 January 2024, with the return date fixed for 8 April 2024. The share subscription agreement included an expiry clause of 5 February 2024, so that the effect of the extended return date for the injunction was that the share subscription could not be completed within the specified time and the agreement lapsed.

14. In parallel with this, since 15 January 2024 the board has received several anonymous complaints making various allegations about Mr Chen, including that he engaged in market manipulation or insider trading, which Mr Chen has strenuously denied. The other board members considered that the allegations required notification to the HKSE and that Kingkey should suspend trading in its shares pending an investigation.

15. On 25 January 2024, Mr Chen (through his corporate vehicle) requisitioned Kingkey's board to convene an EGM to approve resolutions removing all directors except Mr Chen and to appoint certain new directors. On 7 February 2024, the board received a rival requisition from another shareholder requesting an EGM to consider a resolution to remove Mr Chen as a director of Kingkey. The EGM was fixed for 8 March 2024 to consider both resolutions.

16. As at 2 February 2024, more than HK $39.6 million was overdue at group level and payment by Kingkey of HK $25 million was overdue. Demands for payment by creditors started in earnest on about 17 January 2024 and accelerated during February 2024, including service of a statutory demand on 8 February 2024 by one creditor seeking payment of HK $1 million.

B.3 Kingkey's Current Financial Position

17. Kingkey accepted before me that debts totalling approximately HK $30 million were due and owing and that it was unable to pay those debts. Kingkey's financial position at the time of the application was as follows:

    a) Almost all of the group's cash at bank, approximately HK $44.4 million, was required to be retained to satisfy minimum liquid capital sufficiency requirements of the regulated parts of the group's businesses.

b) Against that, Kingkey was liable to pay the following sums during February 2024:

i) approximately HK $44.7 million in respect of loan and bond repayments;

ii) approximately HK $14.7 million in respect of license fees for one of its business sectors; and

iii) approximately HK $8.8 million in respect of commission, referral fees and operating expenses.

c) In addition, Kingkey forecasted future payments for March 2024 to December 2024 of approximately HK $61.9 million for loan and bond repayments.

18. The wider group companies owed further sums totalling approximately HK $110 million that were already due at the time of the hearing.

19. Unsurprisingly, Kingkey's Special Committee had concluded that Kingkey was or was likely to become unable to pay its debts within the meaning of s.93 of the Companies Act.

C. Application to wind up the company and to appoint provisional liquidators

20. The evidence was that in these circumstances, the Special Committee was aware of the need to treat the interests of Kingkey's creditors as being paramount and had determined that a restructuring was likely to provide a better outcome for creditors, and also for Kingkey's members, than insolvency. The Special Committee therefore wished to try to develop a restructuring plan as quickly as possible.

21. In addition, in light of the ongoing management disagreements between Mr Chen and the other members of Kingkey's board, the Hong Kong proceedings commenced by Mr Chen, the imminent EGM at which the resolutions to replace the directors were to be considered, and the unresolved allegations against Mr Chen, the Special Committee considered that there was merit in the involvement of neutral and independent third parties to take a role in Kingkey's management until those matters were resolved.

22. The Special Committee therefore considered it appropriate to seek the appointment of provisional liquidators and caused the winding up petition and summons to appoint provisional liquidators to be issued on 23 February and 28 February 2024 respectively.

23. Mr Potts' submission was that in many similar cases the appointment of a restructuring officer under the new s.91B of the Companies Act might now be appropriate. However, the internal management disputes between Mr Chen and the other members of Kingkey's board and the Hong Kong proceedings instigated by Mr Chen pointed towards provisional liquidators as being of more utility than a restructuring officer because of the wider powers to take over management that are available to provisional liquidators. In addition, Mr. Potts suggested that the appointment of a restructuring officer may come with challenges, such as seeking recognition by foreign courts and making requests for assistance – difficulties which would not arise for liquidators.

24. Mr Potts' submissions that I should appoint provisional liquidators were in essence that:

a) Kingkey is currently unable (or is likely to be unable) to pay its debts while also satisfying its working capital, capital maintenance and funding obligations;

b) there are ongoing disputes between Kingkey's shareholders and directors, as well as the pending litigation in Hong Kong between Mr Chen, Kingkey and the other board members personally, making it difficult for Kingkey's current board of directors to function effectively; and

c) Kingkey is unable itself to raise capital given that the recent attempt to do so by share subscription, approved by the majority of its board of directors, was frustrated by the interim injunction obtained at Mr Chen's instigation.

25. Mr Potts submitted that the evidence showed that Kingkey considered that there would be a real and tangible benefit from the appointment of provisional liquidators and that it would be in the best interests of the body of creditors, and also of shareholders. The appointment of provisional liquidators would also help to maintain Kingkey's listing status, thereby preserving value for creditors and members.

26. He continued that the appointment of provisional liquidators would enable the development of a plan to restructure Kingkey's debt, which would facilitate Kingkey and the wider group continuing as a viable going concern. It would also provide stability for the corporate group,

while allowing the pending disputes amongst Kingkey's shareholders and directors to be addressed.

27. Mr Potts noted that the Special Committee intended that a restructuring should be pursued but there were difficulties in Kingkey advancing matters itself due to the internal management disagreements. Further, there were letters of support for the appointment of provisional liquidators from three creditors and there was no appearance by anyone, including Mr Chen, to oppose or to suggest provisional liquidators other than the individuals put forward by Kingkey. Mr Potts relied on these factors to support a decision to appoint the provisional liquidators nominated by Kingkey.

28. Kingkey argued that the application to appoint provisional liquidators was urgent for three reasons. First, because of the benefit of the statutory moratorium on other proceedings by creditors that would result, which was needed in light of the statutory demand served on Kingkey in Hong Kong. Secondly, because someone independent was needed to manage the company's position regarding Mr Chen's proceedings in Hong Kong, which were to be excluded from the moratorium. Thirdly, independent management was needed to conduct and deal with the outcome of the EGM (fixed for the week following the hearing), and to develop a plan to raise capital.

29. Mr Potts conceded that there is no developed restructuring plan yet, at least in part because of the failure of Kingkey's most recent attempt to raise cash through the share subscription described earlier in this judgment. Nevertheless, he argued that the absence of a detailed or developed restructuring plan was not an impediment. He said that it is likely that a restructuring plan would be put forward and that I should infer an intention on the part of Kingkey to do so because:

    a) Kingkey has a number of valuable subsidiaries with a reasonably healthy balance sheet if the immediate cash requirement could be met, so that there should be a way to satisfy creditors and save the businesses;

    b) relying on *Re CW Group Holdings* (Parker J, unreported 3 August 2018), it is not a threshold condition that there must be a formulated restructuring plan before the court; and

c) the amended version of s.104(3) of the Companies Act, in force since 31 August 2022, arguably gives the court a broad discretion to appoint provisional liquidators that may be wider than the approach applied under the previous wording of s.104(3).

30. Mr Potts noted that the fact that the application was made by Kingkey itself is significant, relying on *Re London, Hamburg and Continental Exchange Bank* (1886) LR 2 Eq 231, *Re United Medical Protection Ltd* (2002) 41 ACSR 623, [2002] NSWSC 413, *CW Group Holdings* and *Re Oriente Group* (Kawaley J, unreported 8 December 2022).

31. Finally, Mr Potts made clear that the provisional liquidators were to be appointed at Kingkey level only, and that Kingkey's position was that their appointment should not be allowed to impact the normal operation of the subsidiary businesses: they should be allowed to continue to trade under the management and control of their existing directors and executive management teams, subject to the normal monitoring by Kingkey as parent entity, albeit through the provisional liquidators instead of through Kingkey's board.

D. Discussion and decision

32. Article 162(1) of Kingkey's Articles of Association expressly empowers its board of directors to present a winding up petition. The board passed resolutions to present the winding up petition and to make an application for the appointment of provisional liquidators at a board meeting held on 23 February 2024. The relevant Article and the minutes of that meeting were exhibited. The winding up petition was therefore validly presented on behalf of Kingkey.

33. I accept Mr Potts' submission that it is likely to be of more utility in this case to appoint provisional liquidators rather than a restructuring officer. Section 91B(4) of the Companies Act allows the court to clothe the restructuring officer with appropriate powers and functions, seemingly unlimited in scope:

> *"(4) A restructuring officer appointed by the Court under subsection (3)(a) shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company."*

34. However, this must be read in conjunction with s.91B(5)(b) and (c), as follows:

> *"(5) Where the Court makes an order under subsection (3)(a), the Court shall set out in the order —*
>
> *(a) ...*
>
> *(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and*
>
> *(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions."*

35. It seems to me to be implicit from the wording of these subsections that there is a built-in presumption in s.91B that the company's board of directors will retain at least some powers and functions to continue to control the company. This is consistent with the purpose of the restructuring officer regime being for the restructuring officer to develop a compromise or arrangement between the company and its creditors and to obtain their agreement or court approval, see ss.91I and 91J of the Companies Act. The directors of the company can, in the meantime, continue with its day to day operation.

36. In addition, I accept Mr Potts' submission that there may be difficulties in obtaining recognition in other jurisdictions of the appointment of a restructuring officer and in obtaining any assistance from a foreign court for such an office holder.

37. In this case, there are ongoing unresolved disputes within Kingkey's management which mean that it is unrealistic to proceed on the basis that the directors will be able to continue to manage the day-to-day operations of the company. The appointment of a restructuring officer is therefore likely to be inadequate to address the current issues within Kingkey.

38. Section 104 of the Companies Act (2023 Revision) provides the jurisdiction to appoint provisional liquidators and sets out the criteria for appointment as follows:

> *"104. (1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up*

> *petition but before the making of a winding up order, appoint a liquidator provisionally.*
>
> *…*
>
> *(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so."*

39. For comparison, the language of s.104(3), before 31 August 2022, was:

> *"(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company ex-parte on the grounds that —*
>
> *(a) the company is or is likely to become unable to pay its debts within the meaning of section 93; and*
>
> *(b) the company intends to present a compromise or arrangement to its creditors."*

40. The language formerly used in s.104(3) was arguably more prescriptive as to the situations in which provisional liquidators can be appointed on the application of the company itself than the broader language in the current iteration of s.104(3). However, as I find below, the factual situation in this case is that Kingkey is or is likely to be unable to pay its debts and Kingkey intends that a restructuring plan is prepared and presented to the court. This application is therefore squarely within the terms of the previous wording of s.104(3) and would have been granted even if the more restrictive language of the former version of s.104(3) still applied. I therefore decline the invitation from counsel to address the interaction of the new regime in s.104(3) with the restructuring regime under s.91B and whether the new wording of s.104(3) expands the circumstances in which the court will be willing to appoint provisional liquidators, since it is unnecessary to do so in order to decide in this case that it is appropriate to appoint provisional liquidators. It seems to me that it is better to leave consideration of that interesting question until a case which squarely raises it and where there has been detailed argument on the point.

41. Turning then to the specifics of this case, I am completely satisfied on the evidence presented that Kingkey's financial position is perilous, and that it is facing an imminent risk of insolvency, as described earlier in this judgment. This is most obviously exemplified by the unpaid statutory demand filed during February 2024 by one of its creditors. I also find

that Kingkey is very unlikely to be able to continue as a going concern unless it is able to complete a successful restructuring, which is an easy conclusion to draw.

42. Secondly, it is easy to infer that a successful restructuring is likely to provide a better outcome for creditors and members than allowing Kingkey to become the subject of insolvency proceedings, which is likely to be value destructive.

43. Thirdly, I accept Mr Potts' submission that it is not necessary that there be a detailed restructuring plan before the court can determine that it is appropriate to appoint provisional liquidators to pursue a proposed restructuring. This was recognised by Justice Parker in *CW Group Holdings*, where he said:

> *"70. I accept Mr Allison QC's submission that it is not necessary for there to be a formulated plan at this stage for the appointment of provisional liquidators on behalf of the company. That much is clear from the language of section 104(3) of the Companies Law and the four recent authorities he referred me to: Arcapita[2], Trident[3], Suntech[4] and LDK Solar[5] ..."*

44. It is clear from the approach taken by judges in a number of other cases under the previous version of s.104(3)(b) that the existence of a restructuring plan, and the extent to which that plan has been developed, are simply pieces of evidence for the court to take into account, albeit they are important evidence, in deciding whether the court is satisfied that the company *"intends to present"* a restructuring plan.

45. In this case, I am satisfied by the evidence presented by Kingkey that, notwithstanding the current absence of a detailed restructuring plan, Kingkey does intend to present such a plan once it can be developed with the input of the intended provisional liquidators, and that it intends to do so promptly in order to save the underlying businesses. That is consistent with Kingkey's management's attempts to raise additional capital during the latter part of 2023 and by the share subscription agreement in January 2024, which was unsuccessful only because of the effect of the Hong Kong proceedings initiated by Mr Chen. In addition, as mentioned during argument, it is even possible that the provisional liquidators might take up Mr Chen's offer to be the source for the additional funding apparently required by Kingkey.

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2 *Arcapita Investment Holdings* (unreported)

3 *Trident Microsystems (Far East) Limited* [2012 (1) CILR 424]

4 *Suntech Power Holdings Co., Ltd* (unreported)

5 *LDK Solar Co Ltd* (unreported)

46. Fourthly, I also accept Mr Potts' submission that the court should give weight to the fact that the summons is on the initiative of Kingkey itself. In *Re United Medical Protection Ltd*, having decided he should appoint provisional liquidators, Justice Austin said:

> *"16. In reaching this conclusion I take into account the fact that the appointment of a provisional liquidator was approved by a resolution of the board of directors of United Medical Protection. The fact that a provisional liquidator is sought by the company is not conclusive in favour of appointment, but it is a relevant and frequently a persuasive consideration:* Re London, Hamburg and Continental Exchange Bank *(1886) LR 2 Eq 231;* Re T & L Trading (Aust) Pty Ltd*, at 389."*

47. Justice Parker endorsed that approach in the Cayman Islands, commenting in *CW Group Holdings*:

> *"31. Mr Allison QC referred me to authorities which establish that applications by the company for the appointment of JPLs will normally be subjected to less anxious consideration by the court than will creditors' applications which are opposed by the company itself: see* Re London *(1886) LR 2 Eq 231 and* Re United Medical *(2002) 41 ACSR 623. ...*
>
> *72. ... the court is prepared to accept the considered views of the board of the company, having taken advice, as to the best way forward which involves appointing provisional liquidators to provide the necessary breathing space from the actions of creditors where there is a prospect of promoting a restructuring. ..."*

48. This approach was echoed by Justice Kawaley in *Re Oriente Group*, albeit in the context of an application to appoint a restructuring officer, when he made the following preceptive comment, which applies with equal force in the context of a company's summons to appoint provisional liquidators:

> *"36. Section 91B petitioners are likely in most cases to have little difficulty in establishing this limb of their petitions. It is unlikely that management's admissions as to cash-flow or balance sheet insolvency will lack credulity. Typically, it is petitioning creditors' assertions of insolvency which are denied by overly optimistic and/or unrealistic managers. There is rarely any commercial advantage to be gained by a solvent company falsely professing its insolvency. In the present case the Company's own detailed disclosures of its financial difficulties were not only entirely credible but corroborated by the fact that, inter alia, the Creditors had presented a winding-up petition based on an unsatisfied statutory demand to this Court. The Company was accordingly deemed as a matter of law to be insolvent under section 93(a) of the Act."*

49. Fifthly, I find that:

a) there are ongoing disagreements amongst Kingkey's management as to the steps to be taken to address its precarious financial position;

b) there are wider disputes between Mr Chen and other members of Kingkey's board as demonstrated by the Hong Kong proceedings; and

c) there are unresolved allegations about Mr Chen's conduct;

and that these factors make it expedient that independent management, in the form of provisional liquidators, should become involved to manage the current situation and to provide stability to Kingkey and the wider group whilst they are resolved.

50. Sixthly, I accept that it is necessary that provisional liquidators are appointed now, both because of the urgency of addressing Kingkey's cash flow issues, to provide it with the benefit of the statutory moratorium, and so that the provisional liquidators can manage the imminent EGM and its outcome.

51. Finally, I infer that there is no active opposition to appointing provisional liquidators in light of the non-appearance of Mr Chen or any creditors, despite notice of the hearing having been publicised.

52. Accordingly, for the reasons set out in detail above, in my judgment it is appropriate to appoint provisional liquidators in respect of Kingkey.

E. Potential issue regarding identities of provisional liquidators

53. A subsidiary point arose regarding the identity of the provisional liquidators to be appointed. Mr Potts properly brought to my attention that the two proposed provisional liquidators based in Hong Kong had been the subject of trenchant criticisms by Justice Linda Chan in Hong Kong in a case in 2022. Whilst Mr Potts indicated that he did not represent the provisional liquidators, he argued that I should not allow those criticisms of them to affect my decision to appoint them. He put forward the following reasons to support that position:

a) the provisional liquidators' curricula vitae indicate that they are properly qualified and have extensive experience of acting as provisional liquidators;

b) Justice Linda Chan's judgment appears to have been based on a difference of opinion over the respective roles of the Cayman court and the Hong Kong court in respect of a cross-border insolvency;

c) Justice Linda Chan's judgment is under appeal, and judgment on the appeal is currently awaited;

d) there have been no professional conduct or disciplinary consequences for the provisional liquidators, so far as Mr Potts is aware;

e) the provisional liquidators have continued to be appointed in other cases in Hong Kong, and I was shown an example;

f) Kingkey was content to put them forward as suitable provisional liquidators and their identities had been included in the publicity regarding the hearing and no one had appeared to oppose their appointment or to propose alternatives; and

g) Mr Martin Trott, the intended Cayman-based provisional liquidator, was content to work with them.

54. I was persuaded that these considerations meant it was appropriate to appoint the provisional liquidators nominated by Kingkey. If there is any subsequent concern about them on the part of Mr Chen or creditors then they can apply to appoint alternative liquidators, if so advised.

Dated 12 April 2024

THE HONOURABLE JUSTICE ASIF KC
JUDGE OF THE GRAND COURT