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IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 16 OF 2009 ASCJ
(FORMERLY CAUSE NO. 258 OF 2006)

IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)

AND IN THE MATTER OF THE SPHINX GROUP OF COMPANIES (IN OFFICIAL LIQUIDATION) AS CONSOLIDATED BY THE ORDER THIS COURT DATED 6TH JUNE 2007

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
Heard on the 3RD JUNE 2010

Appearances:

Mr. Thomas Lowe QC instructed by Ms. Cherry Bridges of Ritch and Conolly for the Joint Official Liquidators of the SPhinX Group of Companies ("the JOLs")

Mr. Mark Phillips QC instructed by Mr. Mark Goodman of Turner & Roulstone for the Liquidation Committee of the SPhinX Group of Companies ("the LC")

Mr. William Trower QC instructed by Mr. Graham Ritchie QC and Mr. David Collier of Charles Adams Ritchie and Duckworth for the Deutsche Bank – member of the Liquidation Committee.

Mr. Aristos Galatopolous and Ms. Rachel Millen of Maples and Calder for the Rotary Foundation of Rotary International (on a watching brief only)

Ms. Sarah Dobbyn of Harneys for Contrarian/HFC Limited

Mr. Nigel Meeson QC instructed by Conyers Dill & Pearman for Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse Aktiengesellschaft, an investor

Mr. Alistair Walters and Mr. Guy Manning of Campbells for DPM Mellon, LLC and DPM Mellon Ltd, , PWC Cayman and PWC LLP, indemnity claimants

RULING

1. On this application the JOLs seek orders for the following matters:

   (i) The appointment of representative parties of the classes of investors of the SPhinX Companies who are interested in the resolution of certain issues which have been identified for resolution by the Court ("the Issues").

   (ii) Pre-emptive costs orders to cover the reasonable legal costs to be incurred by the representative parties in the argument of the Issues before the Court.

   (iii) Other procedural directions for the determination of the Issues specifically as such directions relate to:

      a. Assets and Liabilities

      b. Ranking of claims

      c. Distribution of Assets

The Issues

2. The Issues were first identified in a Summons of the JOLs (taken out in June 2007) as questions which need to be resolved by the Court in aid of the proper administration of the estate. They have been, as at 26 May 2010, identified as involving some 23 distinct questions (albeit within three broad categories), more specifically detailed in a Position Paper of the JOLs which was made available to the parties and to the Court in advance of this hearing.

3. The three broad categories, headed Sections A, B and C, give some insight into the complex nature of the Issues:

Section A. Ownership of Assets and Responsibility for Liabilities.

(i) Has there been co-mingling of the assets and liabilities of the SPhinX Companies (excluding assets and liabilities arising as a consequence of any litigation instituted by the JOLs, the SPhinX Companies or the Trustee of the SPhinX Trust)?

(ii) Treatment of assets and liabilities for the purposes of claims in the liquidation.

(iii) The incidence of litigation costs, expenses and liabilities.

Section B. Ranking of claims in the liquidations: S Shares and Redemptions ("Ranking Issues")

(i) Status of S Shares

(ii) Suspension of Redemptions on 14 June 2005

(iii) Redemption of shares and NAV calculations

(iv) Validity of Redemption Requests

(v) Do misrepresentation claims by investors rank as creditor claims?

Section C. Monies available for interim payments or distributions: how much and can there be a declaration of interim dividends?

4. Broadly speaking, the Section A issues have arisen because of alleged misconduct – mismanagement, gross negligence or fraud – in relation to the dealings with the assets and liabilities of the various SPhinX Companies. There were 22 SPhinX Companies some of which invested in or through some 68 segregated portfolios.

5. This alleged misconduct is now the subject of an action underway in consolidated multi-district proceedings in the Southern District Court of New York (The "NYMDL"). In the NYMDL, the JOLs (also acting qua U.S. Court-appointed

Trustee) seek damages against the former investment manager of the SPhinX Companies PlusFunds Group Inc. ("PlusFunds") and others; as well as recovery of some USD263 million which belonged to but was misappropriated away from the SPhinX Managed Futures Fund SPC ("SMFF") and its underlying segregated portfolio entities.

6. A consequence of the alleged misconduct has been the co-mingling of funds as between the SMFF and other SPhinX entities including funds which were invested in segregated portfolios and which, by virtue of the requirements of the Companies Law and the respective offering Memoranda and Articles ("the Constitution") of the SPhinX entities, should have been kept segregated.

7. A major accounting issue arises over the correct allocation of the USD263 million loss of SMFF and its underlying segregated portfolios. Are the liabilities owed to investors in those portfolios to be ascribed strictly only to those portfolios or, because the funds of those portfolios may have become co-mingled with the funds of others, are such liabilities to be ascribable more broadly across the entire SPhinX liquidation estate?

8. If there is to be strict accounting for assets and liabilities as against segregated portfolios, can there be the strict tracing of assets to enable that exercise notwithstanding the apparent co-mingling of assets that occurred? If not, must there be pooling of assets to enable some fair and equitable basis for meeting investor (or where they exist, creditor) claims?

9. In the same vein, how are the costs or other liabilities incurred in litigation to be allocated? Strictly pro rata to segregated portfolios or broadly across the estate?

10. Again, broadly speaking, these are some of the Issues arising under Section A which the JOLs have presented as requiring of answers from the Court to enable the proper administration of the SPhinX estate and for which purposes the appointment of representatives should be made so that they may be fully and fairly argued. The immediate objective in the administration is the payment of an interim dividend. The JOLs have USD525 million in hand but as yet, more than four years into the liquidation, there has not been a distribution of dividends. It is plain, however, that that may not happen until the Issues are resolved.

11. As to the Section B issues, these involve the status and ranking of a class of shares (deemed "S Shares") which were issued to some investors in the special situation of them having given notice to redeem their investments in certain of the SPhinX Companies. Although their notices were accepted, they were not completely redeemed by payment out and cancellation of their shares because redemptions were subsequently suspended by the directors purporting to act in keeping with the Constitution of the Funds.

12. A question therefore arises as to the status of those investors: are they still shareholders in the respective SPhinX Companies or are they to be regarded as creditors to the extent of the value of their redemptions as allocated by Net Asset Value calculations ("NAVs") sought to have been applied at the time of redemption? The calculation and declaration of NAVs were also subsequently suspended.

13. Another obvious question that arises in relation to S Share holders is the ranking of their claims: do they rank with ordinary shareholders as investors; as redeemed

investors ahead of ordinary shareholders and behind third party creditors or alongside third party creditors?

14. Within this group of Issues an overarching question will therefore be: was the suspension of redemptions and the suspension of NAV calculations valid?

15. From that summary of the Section B Issues (taken at risk of over-simplification) it will be readily apparent that these too will need to be resolved before there can be a declaration and payment of an interim dividend. And there is an obvious overlap with the Section A Issues in the areas where questions of co-mingling of assets within segregated portfolios or pooling of assets must be resolved.

16. As to Section C issues, a main question will be just how much of the USD525 million now in hand should be regarded as available for interim distribution.

17. This question arises, I am told, to a large extent because of the setting by this Court of a monetary indemnity reserve of USD117 million to meet the potential claims that indemnity claimants may have against the SPhinX liquidation estate.

18. That reserve and the concerns which propelled it are the subject of a written judgment delivered herein on 12th February 2010.

19. The reserve, at roughly a fifth of the presently available assets, gives rise to an obvious concern before any interim distribution may be made; it is this: how is the liability of the indemnity reserve to be allocated as against the various SPhinX entities? Should they be strictly allocated as against the entities having strict regard to liabilities for the respective grants of indemnities? Or should they be allocated more generally on the basis that the SPhinX estate as a whole should be responsible for honouring all indemnities granted to indemnity claimants?

20. Here too, much will depend on whether there can be a disentangling and tracing of respective assets and liabilities or whether assets and liabilities across the SPhinX estate must be pooled.

21. Even from the foregoing brief summary of the Issues, it will be apparent that several of the 23 distinct questions comprising the Issues will require complex legal and factual issues to be resolved.

22. Some, perhaps of first impression, will likely end up on appeal all the way to the Privy Council, given the relatively large sums at stake.

23. Against that background, I raised with counsel before the start of this hearing as an obvious concern; the question why not await the outcome of litigation (in particular the NYMDL) before embarking upon the costly and time-consuming exercise of having the Issues resolved through the Court. For one thing, it is obvious that should the SMFF claim succeed, the single biggest loss – USD263 million – may be recovered. If so, much of the concerns about co-mingling of funds would be resolved because many of the segregated portfolios falling under SMFF would be restored. Moreover, damages recoverable for the SPhinX estate as a whole if the PlusFund action is successful, could also run into the hundreds of millions.

24. I was, however, advised by the JOLs' and the LCs' counsel that any hope of full or near full recovery of losses in the NYMDL would be overly optimistic. Further, that when all the JOLs' costs of litigation and the contingency fees of *Beus Gilbert LLP* (the JOLs' lawyers presenting the case in the NYMDL) as well as indemnity claims are factored in, something well in excess of USD 500 million in recoveries will likely be required before the SPhinX estates can be made entirely whole.

25. A significant shortfall must therefore be anticipated in any event and so many of the difficult issues of segregation, co-mingling, tracing or pooling of assets and status and ranking of claims, will have to be resolved by this Court.

26. Nonetheless, I felt obliged to press the concerns about litigating the Issues. Afterall, if there are to be significant recoveries in the NYMDL, such that all claims may be substantially met so as to engender a reasonable compromise of the Issues by a global pooling of assets and liabilities, embarking now upon the costly exercise of resolving some of these complex Issues through litigation might yet prove to have been unnecessary and to be the kind of "treacherous shortcuts" which the trial of preliminary issues can become and which practice is so firmly discountenanced in the case law. See for example ***Tilling v Whiteman [1987] A.C. 1***

27. I was then made to understand, however, that the Beus Gilbert "best estimate" for the resolution of the NYMDL is three more years; compounded by the fact that Deutche Bank, while being the single biggest investor in the SPhinX Funds (still having the single largest stake in equity) has been recently joined as a defendant to the NYMDL. Deutche Bank is also a potential indemnity claimant and so claims under the indemnity reserve.

28. So, the end to litigation is nowhere in sight and, in the meantime, investors are due and expect an interim dividend.

29. In eventually accepting these concerns as a basis for proceeding with the Issues, I must nonetheless note a lingering skepticism about the attainment of this objective of an interim dividend before the NYMDL action is resolved. This skepticism arises from the fact that the indemnity reserve of USD117 million must be retained at least

until then. The reserve is itself, as yet, an incomplete assessment of what the full liability for indemnity claims could become. The rest of the provision in that regard is intended to be covered instead, not by a further monetary reserve, but by releases from potential investor claims which could, if they materialise, enlarge the risks of liability of indemnity claimants. Such releases for the benefit of indemnity claimants were meant (among other things) to be the subject of Schemes of Arrangements between the JOLs and the investors, but the Schemes have faltered for want of consensus with certain investors whose holdings are large enough to afford them "blocking" positions – positions which they have taken. (The proposed Schemes are the subject of a judgment given herein on 5th May 2010).

30. In the current state of affairs, with the potential liability to indemnity claimants being unquantified and unquantifiable until the outcome of litigation (particularly the NYMDL) is known, Mr. Phillips QC, on behalf of the LC openly voiced the concern that even an interim dividend may not be declared and paid until litigation, at least in the NYMDL is resolved – the very skepticism which I raised at the outset of the directions hearing.

31. This hearing devolved on the following footing therefore, in the end agreed by everyone in attendance: that whatever the recoveries may be after the outcome of the NYMDL, there will likely still be the need to resolve the co-mingling/asset tracing issues and certainly the status/ranking S Share issues; and that those at least should be addressed by this Court in the meantime. In that event, when the NYMDL will have concluded, there will be no further delay on account of those of the Issues being still left to be resolved and thus the JOLs may then more readily proceed to adjudication

of claims and declaration and distribution of dividends. This should all thus inure to the better administration of the estate and the ultimate proper winding up of the SPhinX Companies.

32. As it was put on behalf of the JOLs by Mr. LoweQC: *"The JOLs seek answers to the various Issues...not simply as a prelude to obtaining sanction for distribution but fundamentally to ensure that potential areas of dispute are resolved once and for all as between all those interested in the SPhinX estates."*

33. I accept this premise and so, with an eye both to the timely resolution of those of the Issues which must be resolved by the Court and at the same time to avoid expense on those which may be postponed; I am now required to identify those which are to be resolved and to appoint the representative parties who will argue both sides of the Issues to ensure that they are fully and fairly argued.

The Issues which are to be resolved now

34. Again, with the benefit of discussion, these were winnowed out from the 23 down to questions 1 – 4 and 8 in Section A, of which 1 and 2 can first be resolved on the present state of the evidence (3, 4 and 8 requiring of further financial information from the JOLs) and 11-19 in Section B.

35. It was recognised and agreed that questions 5-10 in Section A and the questions in Section C all relate to the eventual treatment of assets and liabilities for distribution purposes and so must await the resolution of the earlier questions.

36. Question 20 (the last in Section B) uniquely raises an issue of potential liability of the SPhinX Companies to certain investors who invested after the SMFF and PlusFund

losses were allegedly known to SPhinX management and who were not informed about those losses. In other words, potential investor misrepresentation claims. The issue raised by question 20 is therefore whether such potential misrepresentation claims should be regarded as ranking as creditor claims. No such claims have yet been brought or are any longer likely to be brought and so there is no perceived need at the moment to incur the costs of having that question answered through the Court.

37. No such claims are likely to be brought because there appears moreover, to be an obvious answer to them.

38. On the longstanding authority of the House of Lords' decision in ***Houldsworth v City of Glasgow Bank and Liquidators*** *[1880] H.L. 317;* the SPhinX companies having been placed into liquidation, an investor seeking rescission of his share purchase contract and *restitutio in integrum* on the grounds of misrepresentation, may well no longer have available to him such remedies. The SPhinX Companies having long since been placed in liquidation and all their assets and liabilities subject to the liquidation regime through the Courts, such remedies are no longer possible. Investors must therefore resort only to such rights as their shares might afford them in the context of the liquidation of the SPhinX estates.

39. The 23 questions, in all their detail, are set out in the JOLs' position paper as at 26 May 2010.

Representation orders

40. From the foregoing summary it will be apparent that there are distinct groups or classes of investors or creditors who may properly be regarded as sharing the same interests on one side or the other of the Issues.

41. Thus there are parties who together can be identified as having a common interest in seeking relief by way of the determination of the Issues which may be beneficial to all. This circumstance makes the appointment of representative parties on the basis of the case authority to be discussed below, entirely appropriate. The reason is that it would be a waste of costs for there to be appointed more than one representative to argue on each side of the Issues so identified.

42. There is however, a question of the jurisdiction of the Court to make representation orders in these proceedings to be first resolved.

43. While there is clear provision in Grand Court Rules ("GCR") Order 14 Rule 12 for the making of representation orders (and such orders have been made before especially in the context of family discretionary trusts disputes), GCR Order 1(2)(5) operates to disapply Order 15 Rule 12 to companies winding up proceedings such as the present.

44. The Companies Winding Up Rules 2008 promulgated under the Companies Law, are themselves silent on the subject.

45. As the following discussion explains, I am nonetheless satisfied that representation orders can be made in proceedings such as these proceedings in exercise of the inherent jurisdiction of the Court.

46. The starting point is section 18(2) of the Grand Court Law which applies where there is an apparent gap in local practice and procedure and reads as follows:

> *"In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the court may give in any particular case."*

47. Resort to section 18(2) of the Grand Court Law is not the same thing as resort to the inherent jurisdiction of the Court, but section 18(2) operates in its terms, as a form of statutory recognition that the inherent jurisdiction exists. This is so if for no other reason than the fact that the practice and procedure in the High Court in England is derived from the inherent jurisdiction of that Court. Superior Courts of Record have always had such jurisdiction defined as:

> *"...the reserve or fund of powers, a residual source of powers which the Court may call upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them...."*
>
> (Quoted from The Supreme Court Practice 1999 para 20A – 183, at 1612; citing various English and Canadian cases).

48. See also ***In Re Basis Yield Alpha Fund 2008 CILR 50, 57-63*** where, in invoking the inherent jurisdiction, this Court held that the objective of securing that court – appointed liquidators are enabled properly to fulfill the duties of their office, is an objective that justifies the use of the inherent residual source of powers "*which the Court may call upon as necessary to ensure the observance of the due process of the law.*"

49. The particular jurisdiction being invoked here – that by which the Court makes representative orders – (so that the parties who are required to be present and represented as being respectively interested in the Issues, will be bound by the outcome in order that there is a final end to all controversy) – "*is an old Chancery*

rule which the Rules of the Supreme Court later made statutory" per Megarry J in ***John v Lees** [1970] 1 Ch. 345 at 369 G-H.*

50. Having accepted that the jurisdiction exists, I am also satisfied, on the basis of the tests laid down recently by the Court of Appeal in ***HSH Cayman I GP Ltd. v ABN Bank NV London Branch*** (written judgment delivered on 9th December 2009) that it may be applied in the circumstances presented here where there are no prescribed Rules of Court already governing the situation.

51. Being satisfied that the Issues need to be resolved in an orderly sequence to enable the proper administration of the liquidation, it also becomes necessary to ensure that interested parties (investors/shareholders and creditors) who will be affected and bound by the Court's determination on the Issues, are made respondents to the respective Issues so that they can be heard on the arguments.

52. It is ultimately to this end, that it is necessary and suitable that representative parties be appointed to represent parties having that commonality of interest.

53. Where the number of parties is so large as to make a hearing involving them all impracticable, the Court will appoint representatives. Jessel MR in ***Commisisoner of Sewers v Gellatly** (1876) LR 3 Ch. D. 610 at 615* expressed the concept in these terms:

> ***"...where one multitude of persons were interested in a right and another multitude of persons interested in contesting that right, and that right was a general right – and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number – some individuals out of one multitude***

might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so contested."

54. The critical requirement for the appointment of a representative, it must be emphasised, is that a number of persons have common interests and will benefit in common from the relief sought. As Lord McNaughton said in ***Duke of Bedford v Ellis [1901] A.C. 1 (at P. 10)***:

"Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

55. The power to make representation orders is a flexible power to be used as the interests of justice may properly require. As Lord Lynley said in ***Taff Vale Ry. Co. v Amalgamated Society of Railway Servants [1901] A.C. 424 at 443:***

"The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires."

56. This is a sentiment more recently repeated by Megarry J in ***John v Rees*** (above) in these terms:

"...the rule is to be treated as being not a rigid matter of principle but a flexible tool of convenience in the administration of justice." (p 370. E)

57. The jurisdiction for the making of representation orders was also recently reviewed and explained by the High Court of Australia in ***Carnie v Esanda finance Corp*** [1995] 127 A.C.R. 76. There it was reaffirmed that the Court had jurisdiction to allow a representative action to proceed where represented parties were in "the same interests" and that the rule should not be restrictively interpreted.

58. As an alternative to the approach of appointing representative parties, it has been suggested by some Blocking Investors, that the JOLs should take a position in relation to each of the Issues and dissenting investors would then be at liberty to challenge that position at their own risk as to costs.

59. For among the obvious disadvantages that that approach would force the JOLs to take an adversarial position on one side or the other of the Issues, it was not, to my mind, an acceptable approach. Another obvious disadvantage which that approach would create compared to the appointment of representative parties, is that the proponents of the side opposite the JOLs would bear the risks of costs even while speaking for the benefit of all sharing the same interests. By contrast, it is accepted by all parties, that representatives would have their costs of arguing the Issues on the pre-emptive basis from the liquidation estate as a whole.

60. I am persuaded that the circumstances presented here justify the making of representation orders.

Pre-emptive costs

61. It was the common view expressed by the JOLs and by all the other parties on this hearing, that in the circumstances of this case an order not just for their costs, but for

the pre-emptive costs of the representative parties should be paid from the liquidation estate and that such orders should be made now.

62. It was said as justification that it is in the interests of the proper administration of the estate as a whole – not just of the respective parties arraigned on one side or the other of the Issues – that the Issues are properly and fully ventilated in order that they may be finally determined.

63. I accepted this argument for pre-emptive costs as well.

64. It was developed by analogy with the equitable discretion as to costs which has emerged from the trust cases, still classically explained by Justice Kekewich's three categories in ***Re Buckton, Buckton v Buckton [1907] 2 Ch. 406***.

65. The circumstances of this case are, in my view, appropriate for the application by analogy with the **Re Buckton** principles but, before turning to set them out, I am reminded of Justice Kekewich's important prefatory words from his judgment in the case:

> ***"Uniformity in practice is of the highest importance, and it is especially important in that department of practice which is concerned with costs. On the other hand, costs are so largely in the discretion of the judge that it is more difficult to secure uniformity in that department than in any other, and it is well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases. But when an opportunity occurs, it is well to enunciate rules for the guidance of***

opportunity occurs, it is well to enunciate rules for the guidance of the profession, and a question arising in this case affords an opportunity which I think it right not to neglect."

66. I proceed with the same sentiments in mind.

67. The practice in the department of costs in trust cases has benefited over the years from the guidance provided in ***Re Buckton*** and, as the cases show, the quest for uniformity has extended into related fields where the practice can be adopted by analogy, by virtue of the application of relevant principles of equity.

68. The liquidation field, where statute mandates the application of equitable principles to the treatment of a class or classes of persons who claim benefits under a single liquidation estate, is one such (see ***Ayerst v C.K. Construction Ltd. [1976] A.C. 167; 179-180)***. Here, by the exercise of the broad discretionary jurisdiction on costs, it seems entirely appropriate that the guidance to be found in the **Re Buckton** principles should be taken.

69. The three categories of circumstances identified in **Re Buckton** as requiring of the Court's exercise of discretion as to pre-emptive costs are described by Kekewich J as follows (pp414-415):

"In a large proportion of the summonses adjourned into Court for argument the applicants are trustees of a will or settlement who ask the Court to construe the instrument of trust for their guidance, and in order to ascertain the interests of the beneficiaries, or else ask to have some question determined which has arisen in the administration of the trusts. In cases of this character I regard the costs of all parties as

necessarily incurred for the benefit of the estate, and direct them to be taxed as between solicitor and client and paid out of the estate."

....

"There is the second class of cases differing in form, but not in substance, from the first. In these cases it is admitted on all hands, or it is apparent from the proceedings, that although the application is made, not by trustees (who are respondents), but by some of the beneficiaries, yet it is made by reason of some difficulty of construction, or administration, which would have justified an application by the trustees, and it is made by them only because, for some reason or other, a different course has been deemed more convenient. To cases of this class I extend the operation of the same rule as is observed in cases of the first class.

The application is necessary of the administration of the trust, and the costs of all parties are necessarily incurred for the benefit of the estate regarded as a whole.

....

There is yet a third class of cases differing in form and substance from the first, and in substance, though not in form, from the second. In this class the application is made by a beneficiary who makes a claim adverse to other beneficiaries, and really takes advantage of the convenient procedure by originating summons to get a question determined which, but for this procedure, would be the subject of an

action commenced by writ, and would strictly fall within the description of litigation….

Whether he ought to be ordered to pay the costs of the trustees, who are, of course, respondents, or not, is sometimes open to question, but with this possible exception the unsuccessful party bears the costs of all whom he has brought before the Court."

70. In the present context, it is on the application of the liquidators that those interested in the liquidation estate are brought before the Court "*to ask to have some question(s) determined which have arisen in the administration of the estate*" and "*in order to determine the interests of the beneficiaries*" inter se.

71. The analogy with ***Re Buckton*** category one is therefore a good one and the award of the representative parties' costs from the estate on the pre-emptive basis can thus be justified.

I am persuaded however, that the award of those costs should not be on the "*solicitor and own client*" or full indemnity basis.

72. Instead, I am persuaded that the limits on costs as proposed by the JOLs should apply in this cases as follows by reference to maximum hourly rates:

(i)	Queen's Counsel	CI$ 700.00
(ii)	Partner	CI$ 500.00
(iii)	Associate	CI$ 400.00
(iv)	Paralegals or Trainee attorneys	CI$ 200.00

73. These limits are acceptable to most of the representative parties and do not preclude a representative party engaging Counsel of its choice and agreeing to pay the difference between these limits and any fees thereby agreed from its own funds.

74. The imposition of these limits in the exercise of discretion though a modification of the ***Re Buckton*** category one approach, is justified in this case by all the circumstances which have attended and will continue to attend the resolution of the many involved questions which are to be taken up in the JOLs' application.

75. Already tens of millions of dollars have been expended in the search, as yet inconclusive, for answers to these and related questions since they were first identified in the summons filed by the JOLs in June 2007. Having the many involved questions answered by the Court through litigation could readily add to the costs in a wasteful and counter-productive way, unless some effort is made by the Court to contain costs.

76. In seeking to adopt the ***Re Buckton*** approach to the practice in liquidation cases; Kekewich J's prefatory remarks as to the need to apply judicial discretion in the quest for uniformity of practice nonetheless remains apposite.

77. Nonetheless, as was said by Sir Nicholas Browne-Wilkinson V.C. in ***Re Westdock Realisation Ltd. v Another*** *[1888] BCLC 354 at 357;* it is now clear that the Court in the context of liquidation proceedings, can make pre-emptive orders as to the ultimate incidence of costs in the proceedings.

78. The other jurisdictional point addressed by the Vice Chancellor in that case (at page 358) was whether the court has jurisdiction to make an order for payment of costs out of a fund which may at the end of the day be found not to belong to the applicant.

79. His starting point for the resolution of that question was to recognise that such orders are often made in the context of an express trust fund for the purpose of determining who is ultimately beneficially entitled to the trust fund.

80. Many such examples have emerged among the local trust cases; the most authoritative of which being ***Lemos v Coutts & Co. 1992-93 CILR 460*** in the Court of Appeal. In that case the Court of Appeal discussed the principles and noted, among other things, that pre-emptive cost orders to be met from the trust fund would not be made in the context of hostile litigation where the applicant could not be said to be acting in a representative capacity in the interests of a group of beneficiaries or of the trust as a whole and where it could not be said that at the end of the litigation a judge would be likely to award costs to the applicant. Among the cases cited was ***Re Westdock Realisations Ltd. and Another*** (above).

81. Further dictum from ***Re Westdock Realisations Ltd. and Another*** makes it clear however, that that prohibition against the award of pre-emptive costs would not necessarily apply where there is not hostile litigation but where, as here, there is contemplated proceedings which are to be truly regarded as being representative in nature and therefore, in respect of which, there is to be no need to anticipate what order as to costs a trial judge would likely make at the end. In other words, proceedings falling into ***Re Buckton*** category one by analogy, rather than into ***Re Buckton*** category three.

82. The Vice Chancellor addressed this latter category of cases in the context of practice before the *English Companies Court* in these terms (at 357-358):

"...there are many cases in which it is essential for the due administration of the liquidator's or receiver's duties to obtain a decision from the court. In such cases, there are often large classes of creditors, contributories or other claimants, the exact membership of which class is often not readily established or even known, who will be affected by such decision.

In such a case the liquidator or receiver joins a representative respondent to argue the point on behalf of the class. Frequently the sum at stake for the individual respondent does not justify him incurring the costs involved in litigating the matter. As a result, in order to ensure that the matter is properly determined the costs of the representative respondent are frequently paid out of the fund. An agreement to that effect is often made before the proceedings are heard; indeed on occasion the court orders it before trial. But in my judgment those are special cases in which it is necessary for the proper execution of the duties of the receiver or liquidator to have the matter determined and a pre-emptive order as to costs is a necessary pre-requisite to that determination being obtained.

That is not a rule applicable to all cases; it is simply in my judgment the right general approach to costs in these cases."

83. That dictum is descriptive of a jurisdiction and practice which was already well established in the Companies Court in England and Wales. It is a jurisdiction which must thus be regarded as independent of the jurisdiction as developed in the trust

cases. Indeed, in ***Re Westdock Realisations Ltd.*** while Judge Kekewich's dicta from ***Re Buckton*** were cited in the arguments, no mention is made of it in the reported judgment.

84. It is not the case that a representative party automatically receives the benefit of a pre-emptive costs order (see ***Lewin on Trust*** 17th Ed. Sweet & Maxwell 2000, p597). The fact that a party is a representative is not necessarily by itself a special circumstance: ***Re Charge Card Services [1986] BCLC 316.*** It may well be that there are special circumstances to justify the making of a pre-emptive costs order but it is not a matter of course. Indeed, the normal course is that costs follow the event. In trusts cases, where the litigation is contentious as shown by reference to the ***Re Buckton*** category 3 cases, the guiding principle is that the unsuccessful party will pay the costs of the other parties. Later cases show that in that category of cases, a preemptive costs order will only be made where the Court may conclude that there is a high probability that a costs order would be made in favour of the representative party at the end of the day, usually at trial. See classically on this point: ***Alsop Wilkinson v Neary [1996] 1 W.L.R. 1220 at 1226-7.***

85. ***R v Westdock Realisations Ltd.*** (above), while recognizing that principle, was a case in which pre-emptive costs were allowed to liquidators so that a "test case" could be resolved and which would be to the benefit of the estate as a whole.

86. Although frequently made in pension case disputes where there will be a large number of under-resourced beneficiaries (eg: ***McDonald v Horn [1995]1 All.E.R. 961)*** and in exceptional circumstances of hostile trust litigation on behalf of a disadvantaged beneficiary (eg: ***Re Cotorro [1997] CILR 1);*** I accept that preemptive

costs orders should only be made in exceptional circumstances in liquidations, and especially where there may be hostile litigation.

87. I also recognise that the jurisdiction is different to indemnity costs orders sometimes made in derivative actions where a shareholder of a company pursues a remedy for the company while the wrong-doers remain in control of the company. In such cases, the jurisdiction has developed quite separately as shown in ***Wallersteiner v Moir No. 2 [1975] Q.B. 373*** and cf ***Smith v Croft [1986] 1 W.L.R. 580.***

88. With due observance of all the foregoing principles, the circumstances presented here must nonetheless be considered in their own context. The fact of the matter is that all parties regarded the resolution of the Issues through the Court as being, subject to the qualifications already discussed, for the benefit of the liquidation as a whole.

89. By analogy, it is accepted that the circumstances therefore are rather like those contemplated by ***Re Buckton*** category one and as such justifying an order for preemptive costs in favour of the representative parties.

90. In adapting the jurisdiction to the needs of the Companies Court, the judicial discretion must nonetheless be regarded as enabling of such adaptations as may be just and necessary. These may surely include the imposition of limits or caps on costs, even though to be allowed on the pre-emptive basis from the estate.

91. ***National Grid Co. Plc v Laws (Pre-emptive Costs: Court of Appeal [2001] W.T.L.R. 741*** is authority for the making of pre-emptive costs orders limited by a cap of GBP100,000; in the context of the litigation of difficult points of law which needed to be resolved for the benefit of beneficiaries of a pension fund as a whole.

92. With all the foregoing in mind, I decided to impose the caps upon the hourly rates of fees which may be charged in the course of the arguments about to be undertaken for the resolution of the Issues. The representation orders and pre-emptive costs orders were granted accordingly.

Hon. Anthony Smellie
Chief Justice

July 20 2010