IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION (ASCJ)

2-3-12

FSD NO. 0015/2010

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF SAAD CAYMAN LIMITED
(IN OFFICIAL LIQUIDATION)

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE
THE 30TH MAY 2011 AND 2ND MARCH 2012

APPEARANCES: **Mr. Hayden and Mr. Keightley of Mourant Ozannes for AHAB**

Mr. Crystal QC instructed by Ms. Wilkins of Walkers for the Joint Official Liquidators of SICL

RULING

1. This is the ruling in respect of an application by Ahmad Hamad Algosaibi and Brother Company Limited ("AHAB"), the Plaintiff in Cause FSD 54 OF 2009 seeking the following relief:

   "1) That the basis of remuneration adopted by the Joint Official Liquidators (the JOLs) of Saad Investments Company Limited ("SICL") be varied (with retrospective effect) on the grounds that it is unreasonable and/or does not comply with the requirements of the Insolvency Practitioners Regulations 2008 (as amended) (the "IPR").

   2) Such consequential or further orders as may appear appropriate to the Court."

2. This summons was brought against the following background:

3. On 27 July 2009, AHAB commenced proceedings in this Court against SICL and forty-two other defendant entities within the Saad Group in Cause No. FSD 54 OF 2009.

4. On 5th August 2009, the JOLs were appointed as SICL's joint provisional liquidators on the petition to this Court of a syndicate of banks claiming a combined debt of USD2.815 billion.

5. On 18th September 2009, SICL was ordered to be wound up and the JOLs were then appointed in their capacity as official liquidators.

6. Excluding AHAB's claim against the SAAD Group entities for $9.2 billion, the JOLs' estimated value of unsecured claims against SICL (including those of the petitioning banks) is some USD3.598 billion. The JOLs' estimate (as at April 2011) of total realisations is USD1 billion.

7. According to one of the JOLs (Mr. Akers in his 9th Affidavit), the affairs of SICL have been found to extend, among other places, to this jurisdiction, the United Kingdom, Saudi Arabia, Bahrain, Switzerland, Bermuda, The Bahamas, Australia, France, Dubai, Malta, Panama, The United States of America and Jersey. SICL's liquidation is therefore a complex and international undertaking. Apart from AHAB, the majority of the creditors of SICL are financial institutions.

8. A liquidation committee ("the LC") was formed at a meeting of creditors of SICL held on 5th November 2009. It comprises five members. Each member is an international financial institution whose representatives on the LC are said to act routinely in supervisory/advisory capacities in relation to formal insolvencies and/or restructurings. Mr. Akers also describes them as being sophisticated purchasers of

professional services and practised in assessing the reasonableness of remuneration arrangements and charges for such services.

9. In keeping with the requirements of the IPR, the JOLs presented a proposal to the LC as the basis for the JOLs' remuneration. At a meeting on 4th March 2010, the proposal was considered and the LC agreed and resolved that:

    (1) the JOLs and their Cayman Islands staff should be remunerated at 80% of the maximum hourly rates plus 20% of the maximum percentage scale rates of net asset realisation, all as prescribed by the IPR.

    (2) SICL, acting by the JOLs, will contract Grant Thornton UK LLP ("GTUK") for the provision of services by both the Recovery and Reorganization ("R & R") and Forensic Investigation Services ("FIS") practices of GTUK and GTUK will invoice the liquidation estate for those services. The amount invoiced will be calculated on a time spent basis, using the hourly rates charged by GTUK for work of this nature, as amended from time to time, plus out of pocket expenses. Those invoices will be paid as a disbursement in the liquidation estate.

10. Against that background the JOLs have had approval of the LC of their remuneration (including the invoices for disbursements to GTUK fees) for six quarterly fee periods covering 5th August 2009 to 31 March 2011.

11. The JOLs have also issued three applications, as required by the IPR, seeking the final court approval of their fees. The first application was heard on 18th May 2010 and the second on 12th November 2010. Court approval was granted on both applications without any opposition from any interested party, including AHAB.

This was although AHAB had received notice of the applications (with supporting documentation) and was entitled, in keeping with a judgment and order of the Court of 10th February 2010 ***[2010(1) CILR 553***)], to make written submissions to the Court upon any of the JOLs' applications to the Court for approval of their remuneration. In fact, written submissions which AHAB made were ultimately withdrawn.

12. By the time of the JOLs' third application to the Court on the 29th March 2011, AHAB's position changed. Mourant then appeared before the Court and made written and oral submissions in opposition to the JOLs' fee approval application in terms similar to those now raised on AHAB's summons.

13. Given the nature of AHAB's objections, including the application that the JOLs' fees should be retroactively disapproved, I required that an application on notice, setting out the factual and legal basis of AHAB's claim, be made. Hence the present summons.

14. AHAB is a creditor of SICL (having been admitted to the nominal amount of one dollar (USD1) and has advanced a number of claims against SICL, including proprietary, restitutionary, and damages claims in Grand Court Cause No. FSD 54 OF 2009.

15. While AHAB is not a member of the LC, as a condition of the grant to the JOLs of ***Berkeley Applegate*** relief (***[1989] 3 All. E.R. 71***) by way of the order of 10th February 2010; AHAB is entitled to receive information relating to the JOLs' fees and to make written submissions to the Court, as already mentioned.

16. Thus, as a creditor whose claims are contingent upon securing judgment in FSD 54 of 2009, AHAB has an interest in the extent to which the JOLs fees and expenses might

deplete the assets of SICL and so in the level of fees charged by the JOLs and for which they must seek the sanction of the Court.

17. AHAB's summons now challenges the basis of remuneration adopted by the JOLs on the grounds that it is unreasonable and/or does not comply with the requirements of the IPR.

18. The first concern relates to the basis upon which GTUK's fees are being charged to the SICL liquidation estate as a disbursement of the JOLs'. AHAB's argument is that as two of the three JOLs, Messrs. Akers and Byers are partners of GTUK, it is unreasonable, disingenuous and in breach of the IPR to allow them qua JOLs of SICL to charge the estate for the services of their staff at GTUK as disbursements and so above the rates allowed by the IPR for charging liquidators' fees.

19. The second concern goes to the basis upon which the JOLs would charge the liquidation estate not only on the time spent hourly basis as measured against the hourly rate prescribed by the IPR, but also by reference to a percentage of the recoveries achieved for the estate.

20. So far as applicable to the present matter, the IPR provide as follows.

21. By regulation 2(2) and (3), the IPR apply to every appointment of an official liquidator made by the Court on or after the date the IPR came into effect on 22nd January 2009 and to every application to the Court for approval of payment of an official liquidator's remuneration made after that date. The IPR therefore apply to the JOLs' remuneration.

22. By regulation 11(1), an official liquidator may be remunerated on the basis of (a) time spent <u>by him and his staff</u> upon the affairs of the liquidation; or (b) a percentage of

the amount distributed to creditors and members of the company; or (c) a percentage of the amount realised upon the sale of the company's assets (net after deduction of the direct costs of realisation); or (d) a fixed fee; or (e) a combination of some or all of the above (emphasis supplied).

23. By Regulation 12, an official liquidator may not make an application for court approval of his remuneration without first seeking the approval of the liquidation committee of the basis of his remuneration and, on each occasion the amount of the remuneration for which he intends to seek the Court's approval. By regulation 12(1) (b), the liquidator must have first convened a meeting of creditors and/or shareholders in accordance with Company Winding Up Rules (CWR) Order 8 at which he presents for approval by resolution, the basis upon which he proposes to be remunerated.

24. The liquidator is required to provide to the meeting of creditors, a report and accounts containing all the information reasonably required to enable a creditor or contributory to make an informed decision about the reasonableness of the proposed basis of remuneration.

25. This is what the JOLs' claim to have done in securing the LC's approval at the meeting of 4th March 2010 and in securing the subsequent court approvals on the 18th May 2010 and 12th November 2010.

26. Regulation 14 prescribes that it is the responsibility of the liquidation committee and the liquidator to negotiate and agree the basis upon which he and his firm will be remunerated and the applicable scale of hourly rates, percentage rates or fixed fees, as the case may be. In negotiating the remuneration on the time spent basis, it is provided by Regulation 15 that the liquidator and his firm shall not be obliged to

accept less than the minimum hourly rates prescribed by Part A Schedule to the IPR and the liquidation committees shall not be authorised to agree to pay more than the maximum rates so prescribed.

27. Regulation 15(4) allows a liquidator to apply to the Court for an order approving his proposed remuneration agreement in the event he is unable to reach agreement with a liquidation committee.

28. In this case, having secured the agreement of the LC, the JOLs did not need to bring such an application and have been required only to seek final court approval of the actual amounts billed, having secured prior approvals of the LC for those as well.

29. Mr. Hayden's arguments in support of AHAB's summons identify the issues and are as follows:

> *The IPR are in the form of a statutory instrument made by the Insolvency Rules Committee pursuant to section 155 of The Companies (Amendment) Law (2007). A provision of delegated legislation has statutory force and its effect is as if it were contained in a statute. The Court has a duty to implement legislation and must aid its operation and enforcement. The Court has no discretion not to apply the provisions of the IPR as a result of any alleged improper motive or delay on AHAB's part in the bringing of an application.*
>
> *The issue for the Court, therefore, is whether or not GT can lawfully claim remuneration on the basis they have put forward, under the terms of the IPR. If remuneration is not permitted by the IPR and is therefore unlawful, it must be disallowed by the Court. For the reasons set out*

below, the current basis of remuneration is unlawful in that it does not comply with the IPR and also unreasonable.

Applicability of the IPR

The position under the IPR is clear. Regulation 2 makes it clear that the rules apply to every appointment of an official liquidator and to every application to the Court for an order approving payment of fees. Regulation 8(1) permits foreign practitioners to be appointed as official liquidators, provided that they are appointed jointly with a local insolvency practitioner. In terms of permitted remuneration, the rules make no distinction between a foreign practitioner and a local practitioner.

In fact, the rules expressly provide that they apply not only to the remuneration of the official liquidator but also the remuneration of their staff:

- *Regulation 11(1)(a) states "An official liquidator may be remunerated on the basis of the time spent by him and his staff upon the affairs of the liquidation" (emphasis added).*
- *Regulation 14(1) states "It is the responsibility of the liquidation committee and the official liquidator to negotiate and agree the basis upon which he and his firm will be remunerated and the applicable scale of hourly rates ..." (emphasis added).*
- *Regulation 15(1) states "In the event that an official liquidator agrees to be remunerated upon a time spent basis, it shall be a term of the remuneration agreement that – (a) the official liquidator and his firm shall not be obliged to accept less than the minimum hourly rates prescribed in Part A of the Schedule; and (b) the liquidation committee shall not be authorised to agree*

to pay more than the maximum hourly rates prescribed in Part A ..." (emphasis added).

- *The Schedule is headed "Prescribed Rates of Remuneration for Official Liquidators" and sets out different rates for various grades of staff. A range of rates is set out, with the maximum rate typically being significantly higher than the standard rates charged by firms based in the Cayman Islands.*

The foreign Liquidators (Mr Akers and Mr Byers) appear to accept that they are subject to the rates prescribed by the IPR but claim that their staff in the UK are not. This interpretation is inconsistent with the express language of the IPR.

At paragraph 57 of his Affidavit [Hearing Bundle, Tab 2], Mr Akers seeks to characterize the firm in which all the Liquidators are partners as an "external service provider" when it is clearly nothing of the sort. If the IPR could be circumvented in this way, its ambit would be significantly curtailed. Liquidators would have a commercial incentive to carry out as much Cayman Islands liquidation work as possible outside the Cayman Islands, to avoid any restriction on the fees they could charge. This would be perverse and defeat the purpose of the IPR (to ensure that the fees charged by liquidators in Cayman Islands liquidations are reasonable). It would result in liquidation work, revenue stream and related government charges (e.g. for work permit fees) being removed from the Cayman Islands. It would also be contrary to the established principle in the Cayman Islands that creditors and shareholders have a legitimate expectation that a company domiciled in the Cayman Islands should be

wound up in the Cayman Islands. It is difficult to see why the fact that GT appear to find it more convenient to carry out liquidation work from London rather than George Town should override existing law, the express language and intention of the IPR, and the wider public policy considerations.

From paragraph 62 of his Affidavit, Mr Akers seeks to suggest that it is not possible or practical to conduct this liquidation from the Cayman Islands. That is a startling proposition. Other firms do not appear to share Mr Akers' views on the practicality of dealing with large liquidations from the Cayman Islands. Some very large liquidations have previously been and are being conducted here. Those liquidations almost invariably require action to be taken in other jurisdictions. If what Mr Akers means is that GT do not have the resources in the Cayman Islands to conduct this liquidation, questions must be asked as to why they took on this work in the first place and why in the almost two years since the liquidation began they have not built up such resources. At paragraph 63, Mr Akers suggests that there may be currency issues, but other liquidators have no difficulties dealing with currency conversion and any foreign exchange risk could be hedged if that was thought to be appropriate.

<u>*Hourly rates*</u>

Regulation 14(2) provides that "the terms of every remuneration agreement shall comply with the requirements of these Regulations". Regulation 15(1)(b) states that "the liquidation committee shall not be authorised to

agree to pay more than the maximum hourly rates prescribed in Part A of the Schedule". The table below sets out a comparison of the rates being charged by GTUK against the maximum permissible under the IPR.

Grade	GT Rate (£)	GT Rate ($)*	IPR MAX	
			2009	2010
Partner	590	944	775	900
Director	520	832	650	680
Senior Manager	465	744	550	575
Manager	400	640	425	475
Assistant Manager	345	552	425	475
Senior Accountant	315	504	300	350
Accountant	275	440	225	350
Administrator	165-235	264-376	125	200
Treasurer	180	-	-	-
Support Staff	150	-	-	-

*Assuming an exchange rate of £1 = US$1.6

It should be noted that the rates being charged by GTUK considerably exceed the maximum rates prescribed by the IPR. For example, the GTUK Director rate exceeded the IPR maximum by US$182 an hour in 2009 and US$152 an hour in 2010, the Senior Manager rates exceeded the IPR maximum by US$194 an hour in 2009 and US$169 an hour in 2010 and the Manager rates exceeded the IPR maximum by US$215 an hour in 2009 and US$165 an hour in 2010. Accordingly, the Liquidation Committee had no authority to agree to the rates of GTUK and any such agreement is void and of no effect.

It is AHAB's submission that the attempt by GT to treat staff based in the UK as a disbursement is an improper attempt to circumvent the provisions

of the IPR. The Court should reject this attempt and direct the Liquidators to review the hourly rates that are being charged to ensure that they comply with the IPR.

Percentage of services

The hourly rates being charged by GT Cayman have been set at 80% of the maximum rates prescribed by the IPR. It is suggested that this means that GT Cayman are only receiving 80% of their overall remuneration on a time charge basis and that it is therefore also appropriate to charge a percentage of recoveries. However, the hourly rates being charged by GT Cayman exceed 100% of their standard rates. The tables below set out a comparison of their standard rates against the hourly rates being charged in this liquidation.

	GT Cayman standard rates		Rates charged	
Grade	1 July 2010 – 30 June 2011	1 July 2010 – 30 June 2011	2009	2010
OL*/Partner	625	675	620	720
Consultant	-	-	620	720
Director/Principal	450-495	475-550	520	544
Senior Manager	395-425	450	440	460
Manager	295	350	340	380
Senior Accountant	250	260	240	280
Staff Accountant	-	-	180	-
Administrator	105	-	100	160

**Official Liquidator*

It can be seen from the table that in 2009 the rates actually charged exceeded 100% of GT Cayman's standard rates for the period from 1 July 2010 to 30 June 2011 (AHAB does not have details of their standard rates

for the prior period) at every grade save for OL/Partner (US$5 less), Senior Accountant (US$10 less) and Administrator (US$5 less).

The table also shows that in 2010 the rates actually charged exceeded 100% of GT Cayman's standard rates for the relevant period at every grade, save possibly Director/Principal (where they are US$6 less than the top of the range given for the period from 1 July 2010 to 30 June 2011). In some cases they considerably exceeded the standard rates (e.g. US$45/hour for OL/Partner, US$30 an hour for a Manager and US$60 an hour for an Administrator).

It is notable that, in seeking approval of the basis of their remuneration from the Liquidation Committee, GT do not appear to have disclosed their standard Cayman rates, instead simply referring to the maximum rates prescribed by the IPR.

It is AHAB's submission that, since GT Cayman are recovering more than their standard hourly rates, it is misleading to say that they are only receiving 80% of their remuneration on a time charge basis and should also be entitled to claim a percentage of recoveries.

GT's position appears to be that Regulation 11(1)(e) allows liquidators to base their remuneration on a combination of the permitted bases. It seems to be suggested that, because Regulation 11 does not expressly limit the way in which the bases can be combined, there is nothing to prevent GT charging more than 100% by combining different bases. This cannot be right. Otherwise, it would be open to liquidators to charge on all bases

and claim grossly excessive remuneration. In referring to a combination, it must be implicit that it is intended that liquidators can seek different proportions of their remuneration on different bases but that the total cannot exceed 100%. Indeed, this is the approach commonly adopted by other liquidators.

At paragraph 51 of his Affidavit, Mr Akers appears to suggest that the basis of remuneration disclosed to the Court is not in fact the basis on which GT are recovering their costs. If so, even if the Liquidation Committee were aware of this, it raises questions as to why GT have not been transparent with the Court and why they have sought approval of their remuneration on a different basis.

Further, as regards taking a percentage of recoveries, it seems that GT were able to recover large amounts of cash at the outset of this liquidation with very little effort. By 2 November 2009, the Liquidators had recovered US$40 million from bank accounts. This was before GT put together their proposed basis of remuneration. At least in relation to these sums, there was no element of risk and a percentage of recoveries based on them simply represents a windfall for GT."

30. Paragraph 54 of Mr. Akers affidavit referenced about and criticised by Mr. Hayden is in these terms:

> *"The JOLs have always been careful to ensure that their remuneration does not significantly exceed or fall below what the (LC) and the JOLs would consider commercially acceptable for a liquidation of this size*

and nature, particularly given the uncertainties relating to assets realisation and duration of the liquidation. Accordingly, the JOLs have assured the (LC) that, notwithstanding the level of remuneration approved from time to time, the remuneration drawn by the JOLs and their Cayman Islands staff will equate to no more than would be charged at their usual hourly rates for work of this nature."

31. It is to be assumed that this agreed cap on fees would have been offered by way of a response to the obvious subsequent concerns of the LC, that the combination of hourly fees and percentage recoveries forming the basis of the JOLs' remuneration, could result in a windfall to the JOLs, well beyond what they could have expected to earn had they been required to charge at their normal commercial rates. This is a reasonable assumption because the agreed cap did not form a part of the original submissions by the JOLs to the LC nor did it appear in the remuneration agreement.

32. Mr. Akers goes further in paragraph 52 of his affidavit to explain that the LC, by a delegated function to one of its members, reviews on a regular basis, whether the JOLs' remuneration has been drawn in accordance with the assurances given on the cap. The review has resulted in reports back to the LC vouchsafing that the remuneration drawn by the JOLs and their Cayman Islands staff was equivalent to no more than their usual hourly rates for work of this nature, in accordance with the assurance given by the JOLs.

33. I regard the cap as also necessarily giving the assurance that the JOLs' usual hourly rates may not exceed the IPR's maximum hourly rates.

34. On the basis of those assurances which I will recognise and adopt for present purposes, I do not think I need be concerned any further with the fact that the JOLs' remuneration package includes the element of a percentage of realisation.

35. The absence of risk to the JOLs, afforded by so liquid an estate as this is and so one which affords them the immediate ability to draw their remuneration, makes it difficult to see why the JOLs should be entitled to a percentage of recoveries in addition to their hourly fees.

36. The assurance of the cap of their fees is therefore appropriate. It is difficult to imagine circumstances in which the court would approve a remuneration package that includes a percentage of recoveries as well as hourly fees and which together would reward liquidators at levels in excess of the maximum hourly rates approved by the IPR. Such approval would be even less likely to be given where, as here, there is no element of risk of non-payment of the liquidators' fees.

37. It is worth noting in this context, that in the related liquidation of Singularis Holdings Limited (another SAAD entity) the JOLs who are also the official liquidators there, agreed to relinquish any right to a percentage of recoveries as an aspect of their remuneration package. That was on the similar basis as explained to Singularis creditors on the 30th May 2011 that:

    (i) The Liquidators have already realised the majority of assets likely to be recovered, other than the possible recoveries from the potential, but as yet, undetermined recoveries from causes of action;

    (ii) The fees attributable to asset realisation, when taken in conjunction with the time-based fees proposed, resulted in a total fee higher than that which the

Liquidators considered to compensate them, notwithstanding that one of the two committee member's opinion on fees had indicated their consent.

38. I will now turn to deal with the remaining issue of contention: the charging of GTUK's remuneration as a disbursement of the liquidation estate rather than as fees of the JOLs.

39. The explanation for this was offered to the LC during the JOLs negotiations with them in the following terms (as recounted in Mr. Akers' affidavit) and resulted in the resolution of the LC on 4th March 2010 (as set out above at paragraph 9):

"Grant Thornton UK LLP (GTUK)

The committee is aware that work on the liquidation is being carried out by the Liquidators and their staff in the Cayman Islands and also by staff of GTUK in London. Staff in the Cayman Islands are employed by Grant Thornton Specialist Services (Cayman) Limited (GTSSCL) and staff in London are employed by GTUK.

It is proposed that the Company, acting by the Liquidators, will contract with GTUK in the provision of services by both the Recovery and Reorganisation and Forensic and Investigation Services practices of GTUK and GTUK will invoice the liquidation estate for those services. The amount invoiced will be calculated on a time spent basis, using the hourly rate charged by GTUK for work of this nature, as amended from time to time, plus out of pocket expenses. Those invoices will be paid as a disbursement in the liquidation estate.

The hourly rates currently charged by GTUK are set out below:

GRADE OF STAFF	£
Partner	590
Director	520
Associate Director	465
Manager	400
Assistant Manager	345
Executive 2	315
Executive 1	275
Administrator 2	235
Administrator 1	165
Treasury	189
Support Staff	150

As a disbursement, those invoices fall outside of the specific Committee and Court approval requirements for Liquidators' remuneration. Notwithstanding this, the Liquidators are concerned to provide the Committee with an appropriate level of transparency and also to comply with the spirit of the Order made by the Court on 10 February 2010 in relation to the provision of information in relation to the costs of the liquidation.

For those reasons, the Liquidators propose to provide the same level of information to the Committee (and to AHAB) in relation to the time charges invoiced to the estate by GTUK as would be the case if those charges represented time spent directly in the liquidation and seek the Committee's approval of those invoices.

The Liquidators propose that GTUK's invoices are paid on account from time to time at a rate of 80%, in the same manner as is proposed for the Liquidators' remuneration. The balance of 20% will be paid following Committee and AHAB approval, or sanction by the Court in the event that

AHAB or another party makes an application for the Court to review the Liquidators' disbursements.

In the event that AHAB has an objection to the time charges covered by GTUK's invoices, it will be open to it to make written submissions to the Court and, with the leave of the Court, appear at any hearing."

40. The separation of corporate identity as between Grant Thornton Specialist Services (Cayman) Ltd. ("GTSS") and GTUK is germaine to the JOLs' response to AHAB's argument.

41. Notwithstanding that the JOLs are principals of both entities; the JOLs maintain that GTUK staff is not their staff qua their capacities as JOLs of SICL.

42. Whatever the practical realities may be, I must regard this as strictly correct. In light of the open disclosure and explanation of the relationships given by the JOLs to the LC and accepted by them as the basis for the JOLs remuneration agreement, I do not consider that I could properly seek to look behind that explanation now. AHAB was, moreover, aware of it but did not seek to challenge it on the occasions of the two earlier court applications, which resulted in the JOLs' fees and expenses, including disbursements to GTUK, being approved.

43. This is not to say, however, that AHAB's concerns are spurious and should not be shared and recognised by the Court, as well.

44. Shareholders and creditors of Cayman Islands companies are entitled to expect that their claims in the liquidation of such companies will be resolved so far as reasonably practicable, on the basis of costs which appertain in the Cayman jurisdiction; not

substantially, as appears to be the case with SICL, on the basis of the greater costs which may appertain in other places such as London, England.

45. In this case, the explanation offered to the LC and apparently accepted by them was set out in Mr. Hugh Dickson's second Affidavit.

46. It posits that the work being carried out in London is the result of a considered decision of the JOLs based on the economies and practicalities and is not related to any issues of lack of expertise or capacity or a desire to shift the work to a higher cost jurisdiction.

47. That explanation also was implicitly accepted by the LC.

48. But there are concerns which I feel obliged to express notwithstanding the practical or commercial reasons given to the LC by the JOLs for wishing to engage the services of GTUK. They are concerns I express notwithstanding the well-known dictum from ***In Re Edennote Ltd; Tottenham Hotspur plc -v- Ryman*** ***[1996] 2 BCLC 389 at 394***, that the court will normally only intervene in the exercise of discretion by a liquidator, if it is shown that the liquidator is acting fraudulently, in bad faith or has acted or proposes to act in a manifestly unreasonable manner. That dictum, to my mind, admits of the Court's intervention also where there are potential concerns for a liquidator appearing to act in a position of conflict of interest, such as might appear in circumstances where he engages a related firm, in which he has a commercial interest, to undertake work for his liquidation estate on terms which may be criticised as being less favourable to the estate than should otherwise be expected.

49. My concern is that the potential for such a criticism arises here from the very fact of the JOLs having engaged GTUK at rates which GTUK are at liberty to set entirely at their discretion as being their own maximum hourly charge-out rates.

50. For these reasons, I consider it appropriate to require the JOLs to revisit their working arrangements to ensure that as far as is reasonably practicable, work for the liquidation estate is done through GTSS and to report specifically to the LC and the Court on their efforts in that regard as a condition of obtaining approval for their fees and expenses in the future.

51. I must also express my surprise that the LC itself does not appear (from the minutes of its meetings that I have seen) to have insisted upon a discount from GTUK's maximum hourly charge out rates. It is quite unusual in a liquidation that generates fees on the scale of this one, that professionals engaged should expect to be able to charge for their services at whatever rates they may deem and declare to be their "usual charge out rates". The JOLs and the LC will seek to revisit this issue with GTUK. These are directions which I consider it is open to me to give in light of Regulation 10(1) of the IPR which delimits the JOLs' entitlement to remuneration from the estate only to such remuneration as the Court may approve from time to time.

52. But what is past is past. I do not accept Mr. Hayden's argument that it is now open to me to review the past approvals of fees given by the Court, so as to disallow any payments to GTUK in excess of the IPR rates – payments already approved and drawn by the JOLs on the basis of the prior approval by the LC as well.

53. And while, as the insolvency judge in charge of this case, I have from the outset expressed my reservations about the remuneration agreement reflecting the concerns discussed here, I have granted approval of the quanta of fees on the occasions of the two applications mentioned above in the absence of objection by AHAB.

54. The correct argument that the IPR are mandatory and must be complied with is ineffectual where the issue is whether GTUK's fees are disbursements of the estate, rather than liquidators' fees.

55. The JOLs' remuneration agreement having been approved by the LC which comprises the overwhelming majority of the admitted and proven creditors of the SICL estate and the agreement not being found to be out of strict compliance with the IPR, I am obliged to reject AHAB's application. This is quite apart from the JOLs' objections, as framed by Mr. Crystal QC, that the CWR contain no power (equivalent to rule 7.47 of the English Insolvency Rules 1986) which allows the Court to review, rescind or vary an order made by it.

56. I would venture that had AHAB been found to be correct in its argument that the JOLs' remuneration agreement was in breach of the IPR, the Court would not have been powerless to act in exercise of its inherent jurisdiction.

57. It is accepted by Mr Crystal QC that the IPR carry the force of law and must be followed. This is trite principle: *Bennon, Statutory Interpretation Third Edition – Butterworths – page 175.*

58. Nor would acting in such circumstances to rectify the position by exercise of the inherent jurisdiction, be in contravention of the strictures laid down by the Court of Appeal in ***HSH V ABN Amro Bank NV [2010] (1) CILR 114, paras 27-28.***

59. Unlike the action discountenanced by the Court of Appeal there, by rescinding an order rendered void for non-compliance with the IPR, the Court would not be invoking its inherent jurisdiction to control its own process "to vary the scheme for the winding up of companies laid down by the Winding Up Rules."

60. The Court would rather be invoking its inherent jurisdiction in the absence of any rules preventing it from doing so, in order to enforce compliance with the Winding Up Rules. The validity of such a proposition is itself also recognised by the Court of Appeal, at the same passage last above cited.

61. With those concerns expressed, having come to the conclusion that the IPR do not prevent payments to GTUK as a disbursement from the liquidation estate, it is not necessary for me to address the JOLs' further objection taken by Mr. Crystal QC, on the basis that AHAB had no standing to bring this application.

62. This is an argument mounted by Mr. Crystal notwithstanding AHAB's admission to proof of its claim as a contingent creditor of the SICL estate in the nominal amount of $1 and notwithstanding the terms of the order of 20th February 2010. That order was issued in proceedings which included the JOLs and when AHAB's standing was unchallenged. However, as this further argument is one that could arise again where a creditor is admitted only nominally, pending actualization of a contingent claim, it should be addressed.

63. Mr. Crystal relied, for his argument, on the following dictum from Lord Millet on behalf of the Privy Council in ***Deloitte and Touche AG v Johnson*** ***[2000] 1 BCLC 485 at 491.***

"Two different kinds of cases must be distinguished when considering the question of a party's standing to make an application to the Court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the Court, for the Court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction."

64. It is clear from the Companies Law section 109; the CWR and the IPR, that the Court may grant or refuse approval of the remuneration agreement entered into between the JOLs and the LC.

65. In this case, for the reasons discussed above, the Court's approval has not yet been formally given. By operation of the statutory scheme and the order of 10 February

2010, AHAB, as a contingent creditor, was authorised to intervene in writing upon any application for approval of the JOLs' fees. AHAB's formal admission as to $1 subsequently served to confirm AHAB's standing as a creditor of the liquidation estate. The fact that it has been admitted only in the nominal amount of $1 does not affect its legal standing as a creditor, including its right to insist upon the proper economic management of the affairs of the estate.

66. AHAB therefore has legal standing to invoke the clear statutory jurisdiction of the court.

67. The further question is whether, given AHAB's nominal status as a creditor, I should have refused to hear AHAB's application as "a matter of judicial restraint" (per Lord Millet (above)).

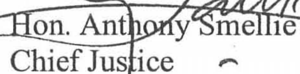
68. I can see no reason why I should have done so. As a contingent creditor for massive sums, AHAB has a legitimate interest in ensuring that the liquidation estate is not excessively charged for the JOLs' fees and expenses. Nor have AHAB's concerns been shown to be entirely misplaced or spurious.

69. In the result, while I may not accede to the specific relief sought by AHAB's summons, the Court has noted and confirmed the important limitations upon the JOLs' ability to combine both hourly fees and percentage of recoveries and has given instructions for the review of the arrangement by which GTUK are to be paid in the future by way of disbursements from the estate.

70. AHAB's summons must be dismissed for the reasons given above insofar as it seeks retrospective revision of the approvals already given and insofar as it seeks to have the GTUK disbursements treated as governed by the IPR hourly rates.

71. Given the concerns of AHAB which have otherwise nonetheless been recognised by the Court as appropriate, I will not now grant the Court's final approval of the remuneration agreement. I await the results of the revisionary exercise which has been directed. I consider that no order for costs should be made and I so order.

72. Ultimately, it is to be expected that AHAB's application will have redounded to the benefit of the liquidation estate as a whole.



Hon. Anthony Smellie
Chief Justice

2nd March 2012