IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 16 OF 2009

(ORIGINALLY CAUSE NO: 258 OF 2006)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

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

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 27TH DAY OF NOVEMBER 2013

APPEARANCES: Cherry Bridges of Ritch & Conolly for the Joint Official Liquidators ("the ("JOLs") of the SPhinX Group of Companies on the JOLs' application for directions relating to the requisitioned meetings ("the Requisitions Application") and on the Removal Applicants' application for directions ("the Removal Application")

Sarah Dobbyn of Sinclairs for hfc Limited (an investor) on the Requisitions Application

Felicity Toube QC (via videolink from London) instructed by Marc Kish of Maples and Calder on behalf of Refco Public Commodity Fund, Deutsche Bank and hfc Limited (investors) on the Removal Application and Refco Public Commodity Fund and Deutsche Bank (investors) on the Requisitions Application

Alan Turner and Charlotte Hoffman of Turners for the Liquidation Committee (the "LC") on the Requisitions Application

Liquidators requisitioned to convene meeting for their removal without being given reasons, whether liquidators entitled to their costs of seeking directions from the court.

RULING

1. There is now a draft consent order presented for the Court's approval ("the Consent Order") which would direct that the JOLs convene a requisitioned meeting to take place

in London on 14th January 2014 and at which the views of investors as to the removal of the JOLs would be canvassed (the "Requisitioned Meeting"). All parties agree that the Court has the power to direct such a meeting and this is well settled by English authority[1].

2. The Consent Order arises against the background of requisitions from a large majority of investors sent to the JOLs on 9th August 2013, for a meeting to be convened by the JOLs at which the question of their resignation was to be put to investors. The JOLs refused to convene such a meeting themselves, saying that they were not satisfied it would be in the interests of the estate to do so, and stating that they would instead be filing an application for directions from the Court as to how to respond to the investors' requisition.

3. The JOLs subsequently filed such a summons (the "Requisition Directions Summons") and it came on for hearing today. But with the terms of the Consent Order having been agreed, the only issue remaining for me now is whether – as the LC and the requisitioning investors propose - I should order that the JOLs shall pay personally the costs of all sides of the Requisition Directions Summons up to today's hearing; alternatively, that those costs be reserved to be resolved at the same time as the removal application which the requisitioning investors anticipate will take place in about May of next year, following from the Requisitioned Meeting.

4. The first proposed alternative form of costs order would involve me being satisfied now that the JOLs have acted "unreasonably" in failing to agree to the Requisitioned Meeting and in bringing their Requisition Directions Summons instead.

[1] ***Re Barings plc (No. 6) [2007] 2 BCLC 159***; ***Re T & N Ltd. [2004] EWHC 2361 (Ch)***; ***Carman v Cronos Group SA [2006] EWHC 2170 (Ch)*** and ***Fielding v Seery [2004] EWHC 2170 (Ch)***.

5. The second alternative form of costs order would involve me at least implicitly doubting the reasonableness of the JOLs' conduct in those regards, such that the question of the costs should be reserved to be decided upon the outcome of the removal application. That the test is whether the JOLs have acted reasonably is not in issue between the parties. Indeed, the Companies Winding Up Rules Order 24, rule 9 makes it clear that the only circumstance in which the liquidators shall not have their costs of proceedings taken in the context of a liquidation is where they have acted unreasonably.

6. It does not appear to me to be arguable that the JOLs, in refusing to convene the Requisitioned Meeting at the time and under the circumstances that it was requisitioned, acted unreasonably in the sense contemplated by Order 24, rule 9. Nor, to my mind, does it appear seriously arguable that in issuing their Requisition Directions Summons seeking the directions of the Court, as officers of the Court having been involved in this liquidation for 7 years, the JOLs can be said to have acted unreasonably. The argument relied upon now to the contrary – which is that the JOLs should have immediately acceded to their request coming as it did from investors who had expressed their discontent – is insufficient reason for concluding that the JOLs acted unreasonably in refusing at first to convene the Requisitioned Meeting.

7. My reasoning is as follows. Apart from a general expression of discontent with the performance of the JOLs, the requisitionists gave no reasons at first for seeking their removal. Discontent amongst the SPhinX investors is nothing new and the mere expression of discontent by certain investors could not in and of itself have created an obligation on the part of the JOLs to convene the Requisitioned Meeting. The difficulty confronting the JOLs presented by the requisition and about which they were left to

speculate and resolve for themselves, was whether there had been such a fundamental breakdown in the crucial relationship of trust and confidence between themselves and the investors as to warrant the convening of a meeting for that issue to be seriously debated and resolved. That is a most difficult and troubling proposition with which any liquidator can be faced, let alone court-appointed officials who have been carrying out their functions under the aegis of the Court for several years.

8. Implicit in the requisitionists' argument of unreasonableness on the part of the JOLs, is the notion that so soon as a majority of investors wish to convene a meeting for their removal, liquidators are obliged to comply. But that notion, as a matter of Cayman Islands law, is misconceived. It is a notion that would ignore section 107 of the Companies Law which provides that an order of the Court is required for the removal of an official liquidator, whether removal is proposed by shareholders (such as the investor requisitionists here) or creditors. This is unlike the position under the Insolvency Act 1986 in England and Wales, where creditors entitled to at least 10% in value of a company's debt have the right to requisition a meeting to consider the removal of official liquidators without an order of the Court[2]. And arising at such a meeting; by section 172(2) of the Insolvency Act 1986, a liquidator may be removed from office without court intervention by a resolution of the majority.

9. In all the circumstances of this complex and difficult liquidation, the implicit notion that the JOLs must resign at the behest of requisitioning investors, becomes all the more misplaced when regard is had to the interests of the contingent creditors of the SPhinX estate. In that regard, the reality is that the JOLs were obliged, in deciding how to respond to the requisitionists, to consider that not only their interests but also those of

[2] Section 168(2) of the Insolvency Act 1986.

contingent creditors could be impacted by their removal. Such concerns were highly pertinent at the stage that the JOLs' removal was first proposed.

10. There is the further concern that the JOLs may themselves have an interest in ensuring that any personal liability for which they might be exposed but for which they may be entitled to indemnity are provisioned before stepping aside. I make no comment about this other than to note that as an additional factor that, not unreasonably, would have weighed on the JOLs when the requisition for a meeting to propose their removal was raised without any explanation for their removal being given.

11. With the foregoing considerations in mind, I am unable to conclude that the JOLs have acted unreasonably or that an order should be made either that the JOLs personally pay the costs of their Requisition Directions Summons or that those costs be reserved to the anticipated removal application.

12. I am satisfied that the test to be applied here should be the same as would be applied when the Court is considering – pursuant to Grand Court Rules Order 62 – whether a party should be ordered to pay indemnity costs for having acted unreasonably. As was recently recognised by this Court[3], conduct deserving of such treatment would need to be *"unreasonable to a high degree; unreasonable in this context does not mean (merely) wrong or misguided in hindsight..."*

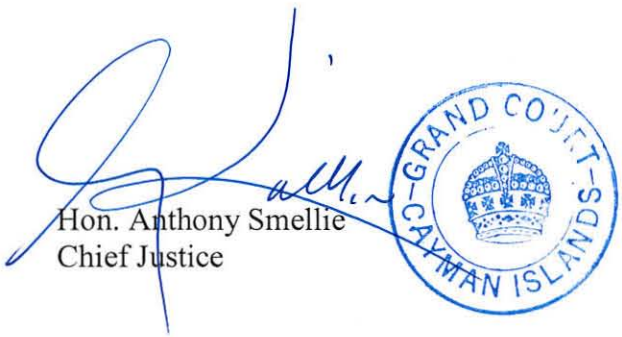
13. Yet that is how this application for indemnity costs against the JOLs is premised. It is based on the notion that because the JOLs have now come around to accepting that the Requisitioned Meeting should be convened, they were unreasonable not to have immediately so agreed in the first place and also unreasonable in their application seeking

[3] In AHAB v SICL, SIFCO5 and Others, FSD 14 OF 2010 (ASCJ), written judgment delivered on 16th October 2013, at page 5 of 21, paragraph 7 – citing ***Simms v The Law Society [2005] EWCA, Civ 849*** and ***Kiam v MGN No. 2 [2002] 2 All E.R. 242, 246.***

the Court's directions before agreeing. I emphasise that in my view, a change of mind with the benefit of reflection is not, without more, evidence of the necessary high degree of unreasonableness on the part of the JOLs, especially given that they were required to respond in the absence of specific reasons being given for their removal.

14. While it is correct – as Ms. Toube QC submits – that the JOLs and this Court itself has an obligation in considering the question of the removal of liquidators, to give due deference to the views of those having the real financial interest in the liquidation estate[4]; that proposition begs the real question, which is whether the JOLs acted unreasonably in wishing to get the views of the Court. The requisitioning of a meeting, at which the resignation or removal of the JOLs was to be discussed, was itself a matter about which the requisitionists were obliged but neglected to offer an explanation in the first place.

15. The order I make is that in the ordinary way, the JOLs shall be entitled to the recovery of their costs of the Requisition Directions Summons from the estate for up to today's hearing – in the same way that it has been recognised that the LC should be entitled to its costs. The costs of removal application, if one is brought, will be reserved to be decided according to the outcome of that application.



Hon. Anthony Smellie
Chief Justice

Decision delivered ex tempore on the 27th November 2013 and issued in writing on 12th February 2014.

[4] ***Johnson and Dinan v Deloitte and Touche A.G. 1997 CILR 120***