CP 2008/94

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CHANCERY DIVISION

IN THE MATTER of **THE COMPANIES ACT 1931**

and

IN THE MATTER of **KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED ("KSFIOM")**

and

IN THE MATTER of **THE JOINT PETITION** of **KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED** and the **FINANCIAL SUPERVISION COMMISSION** dated 9th October 2008 (the "Winding Up Petition")

Transcript of judgment delivered by
His Honour the Deputy Deemster Corlett at Douglas
on the 29th day of January 2009

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[1] I will give a decision now on the application which has been made to adjourn this matter. It may just be appropriate for me to briefly refer to the relevant law and at a previous hearing there was submitted to me the case of Re Demaglass Holdings Limited, a judgment of Mr. Justice Neuberger, which deals with the situation where a party is seeking what is called a "breathing space" which is, to some extent, similar to what we have here today.

[2] What the judgment tells us is that in the absence of good reason, a creditor of a company who has not been paid is entitled to a Winding Up Order virtually as of right and ordinarily it is the duty of the Court to direct a

winding up and, prima facie, there is a right to a Winding Up Order *ex debito justitiae.*

[3] Section 270 of the Companies Act 1931 provides that the Court must have regard to the wishes of creditors or contributories as to all matters relating to the winding up of a company and in the case of creditors, regard shall be had to the value of each creditor's debt.

[4] In the judgment there is reference to various propositions which the Court should have regard to when dealing with an application to adjourn a Winding Up Petition and the sixth proposition set out by Mr. Justice Neuberger is at page 639 and he says there:-

> *"It is not enough if the majority of creditors oppose the making of a winding up order in the normal case. The court must also be satisfied that they have good reason for refusing to wind up the company."*

[5] He refers to the fact that the Court, in those circumstances, still clearly maintains a discretion even if the majority of creditors oppose the making of an Order and the key passage so far as this Court is concerned is at page 640 of the judgment where he says:-

> *"Seventhly, where the court is satisfied that the opposition to the making of a winding up order is supported by a majority and is justified but that the desire of the petitioning creditor to have a winding up order made is also justified, it has to carry out a balancing exercise.*

Once one gets to that point it is impossible to lay down any general principles as to the correct approach. It must inevitably depend on all the circumstances of and arguments in relation to a particular case. However I would suggest that the court should in every case of this sort, bear in mind the principle expounded by Lord Cranworth, will also ask itself whether there are any other procedures by which the petitioner or the opposers could be adequately protected rather than by having the petition respectively dismissed or granted."

[6] So that judgment it seems to me is dealing with a situation rather similar to this where there are good grounds for a Winding Up Order to be made (and in this case it is clear that this company is unable to pay its debts) but there may be other procedures by which the Petitioner or the opposers could be adequately protected and in this case we are, or the Court is, presented with a situation where a Scheme of Arrangement has been proposed and which it is said, once it comes into play, will provide significant advantages to the creditors.

[7] Can I also refer to Palmers Company Law very briefly at paragraph 15.247 which tells me that:-

"In situations of this type the Court takes account of numerical majority as well as majority in value but the latter carry greater weight. Ultimately, however, the Court will proceed to exercise an unfettered discretion and the views of the majority of creditors will not necessarily be decisive."

[8] I should also mention that at paragraph 15.249 of that work it is said that:-

> *"In exercising its discretion whether to make an order or not the court will also have regard to the wider interests of commercial morality. If the facts reveal strong evidence of matters which would warrant further investigation regarding the formation or promotion or running of the company, the court will override creditors' opposition and make a compulsory order as the best means of ensuring a thorough inquiry into all aspects of the case."*

[9] Now in this particular case, the matter I am dealing with today, a common theme is that really neither the parties nor I do not think really the Court, have necessarily had sufficient time to give the papers before us all, the necessary detailed scrutiny and submission although I must say I have been very greatly helped by the submissions I have heard this morning and this afternoon.

[10] The application before me is to adjourn the Winding Up Petition so that the Scheme of Arrangement, which is set out in outline in the papers before me, can be perfected and presented under section 152. There is no, if I can call it this way, no appreciable constituency of creditors who are actually pressing for a Winding Up Order to be granted today. Having said that, in light of the legal points which I have just referred to, the burden is clearly on those who seek an adjournment to satisfy me that that would be the correct course of

action to take. It is clear that the vast majority of those making submissions to me today support an adjournment and the question is for how long and on what terms?

[11] The Scheme which has been outlined in the papers before me may well be advantageous to the creditors. It is said that it will be quicker, or at least payments will be quicker, and there is, as the Attorney has just emphasised to us, the ability to prefer small depositors in the sense that payments under the Scheme would not be pari passu payments as they would be under the Depositors' Compensation Scheme and under the Rules of Liquidation. The Scheme proposes that payments would be made, or first payments would be made, to small depositors in July and August (approximately) as opposed to November under the Depositors' Compensation Scheme.

[12] It is important to emphasise however that there is no better final outcome guaranteed for creditors under the Scheme of Arrangement. There is perhaps a rather unfortunate statement in one of Mr. Lovett's documents which I am sure was an error, Mr. Gough I think accepted that, he says at page 5 of his third affidavit:-

> *"The objective is to provide higher repayments."*

Well that is not in fact the case as we have heard.

[13] As I think is accepted by all parties, the devil will be very much in the detail when it comes to looking at this Scheme and that stage may be reached

later. However, it seems to me that there are certain fundamental issues which must be addressed as a matter of urgency now and it seems to me that if those matters cannot be adequately addressed as a matter of urgency then it will be better, it will be as well, to press on with the well-known and well-trodden path of a liquidation rather than prolong matters unduly by going into enormous work on a Scheme of Arrangement which may well simply not work.

[14] Mr Wright's First Affidavit raises an important issue – I will just find that and read it out very briefly – it says at paragraph 22 of his Affidavit, sworn I think yesterday that:-

> *"the proposed scheme removes a clear well-trodden legal and accounting process of liquidation. Depositors are extremely concerned that rights of legal redress which will be available in the liquidation process against parties which may prove to be culpable in the collapse of the Bank may be lost in the Scheme. This might be the only hope that depositors still have of their stated aim of recovering 100% of their deposits. Depositors would ask the Court to ensure that all such legal avenues be left open to depositors and to the scheme administrator."*

[15] It seems to me that from the submissions I have had today that an issue does arise as to how, if at all, claims against third parties, for example, regulators, directors, other governments, might be dealt with. A liquidation has a well established process of investigation and recovery. It has the powers of a liquidator and, as has just been said by the Attorney, it may well be that in this case, despite what is said in the papers, on reflection it may be that the

matter would proceed with the liquidators perhaps still in place. On the other hand it is said that if a liquidation is in place and a Scheme of Arrangement is proposed on the back of that liquidation (which is certainly something envisaged by section 152 of the Act), that will trigger the Depositors' Compensation Scheme and is not desirable for that reason. It seems to me that this is a fundamental matter which does need to be resolved as a matter of urgency, namely how third party claims are to be dealt with, who is to conduct them? Will the scheme administrator have the same powers as a liquidator? Because I think that is a matter that must legitimately concern the creditors.

[16] The provisional liquidator, Mr Simpson, has also submitted an Affidavit raising certain concerns concerning the holding of meetings, whether there should be different meetings for different classes of creditors, whether UK court approval is necessary, all these I think are legitimate points which have been made by Mr Simpson. I am sure he has thought about it as best he can in the short time available and obviously anything he says must have weight before this court. He is really questioning whether the timetable which I think everyone accepts as ambitious, is going to be achievable and the key point here is, if there is to be slippage in the timetable, then the one clearly identified advantage of the Scheme seems to me to disappear. So unless the court and the creditors have assurances that this timetable is achievable and that there will be no hitches as there nearly always are with these Schemes of Arrangement, then that will simply remove the one identified advantage of the Scheme. It seems to me therefore to put the whole thing in doubt.

[17] A point has been raised this morning which may or may not have any substance about the financial year end of the Depositors' Compensation Scheme and that seems to me to be a point which does require some investigation so that everyone is assured on that point. It is a point that has been raised by Mr Wild and clearly needs to be dealt with.

[18] I raised earlier on whether the company could be liquidated and a Scheme promoted by the liquidator. Well that now seems to be at least a possibility.

[19] Another point which the Court would like some information on is whether there is any difference between the weight which will be accorded to the wishes of the creditors in the winding up petition as opposed to a Scheme of Arrangement. Will the small creditors be simply outvoted in relation to the Scheme of Arrangement bearing in mind the terms of section 152 and I contrast that with the section I referred to earlier which I think was section 270 where the court takes into account the size or the value of the creditors in each particular case but it is not, as I read it anyway, definitive. That is whether the sheer number of creditors can be taken more into account in a compulsory liquidation than it would be in a Scheme of Arrangement. These are all matters which I think should be addressed.

[20] Also, Mr Wright has said that there should be a more comprehensive statement of affairs produced before the creditors can come to any even provisional view as to whether they should support this Scheme of Arrangement. Well we have heard the difficulties which arise in relation to

that and I think, I am not sure I take a great deal of cognizance of that simply because, in relation to Third Party claims it would be extremely difficult to give any meaningful advice at this stage to creditors about whether there are any reasonable courses of redress against Third Parties. I think probably the statement of affairs which has already been produced by the liquidator is almost certainly the best that could be achieved.

[21] In all the circumstances, I consider that it is necessary for there to be a short adjournment of this matter in order that the court can reconvene to decide whether there is any point in taking this Scheme of Arrangement any further at all because I believe there are fundamental issues which must be addressed as a matter of urgency. Therefore I accede to Mr Wright's submission that the adjournment be shorter than 60 days because I think it necessary to bring this matter to a head as a matter of urgency and what I think, Mr Wright, you are suggesting is a 21 or 28 day period. In my view I think a 21 day period is enough to bring these issues to a head and therefore, well, I am afraid because of court availability it may not actually be 21 days as such, the date I am looking at provisionally anyway subject to what counsel have got to say is 19th February which I think is in fact three weeks from today with Affidavits the week before on 12th February. The Affidavits should address those fundamental issues, all of which I think have been flagged up in the Affidavits which have been filed by the other noticed parties and there are one or two others I have added in the course of this judgment. So the winding up petition is adjourned for further consideration to 19th February 2009 at 10.00 a.m. with Affidavits to be filed by the Treasury addressing the issues

which I have referred to and to be served on the other noticed parties by 12th February.

Approved 30th January 2009.

Deputy Deemster Corlett