



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 21 OF 2014ASCJ

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
IN THE MATTER OF THE SPHINX GROUP OF COMPANIES (IN OFFICIAL
LIQUIDATION)

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 1ST AND 2ND MAY 2014 AND 10TH JUNE 2014

APPEARANCES: Ms. Ceri Bryant QC and Mr. Thomas Lowe QC instructed by Ms Cherry Bridges of Ritch and Conolly, Attorneys-at-Law for the Joint Official Liquidators ("JOLs") of the SPHinX Group of Companies.

Ms. Felicity Toubé QC instructed by Mr. Aristos Galatopoulos and Mr. Marc Kish of Maples and Calder, Attorneys-at-Law for the Petitioners.

Mr. Alan Turner and Ms. Charlotte Hoffman of Turners, Attorneys-at-Law for the Liquidation Committee; (appearing at the convening hearing); and Ms. Andrea Dunsby of Turners appearing alone at the sanction hearing).

Mr. David Dinner of Dinner Martin, Attorneys-at-Law for Beus Gilbert (appearing at both hearings);

Ms. Sarah Dobbyn, Attorney-at-Law of Sinclairs for hfc Ltd. (appearing on a watching brief only at both hearings);

Mr. Guy Cowan of Campbells for DPM (appearing on a limited watching brief only at both hearings);

Ms. Hilary Brooks (appearing at the convening hearing) and Mr. Ben Hobden (at the sanction hearing) both of Conyers Dill & Pearman; (both appearing on a watching brief only for other interested parties);

Proposed amendments to existing scheme of arrangement – whether court has jurisdiction to sanction where scheme (as amended) would involve liquidators relinquishing certain fiduciary powers to scheme supervisors – whether amendment scheme would involve an impermissible departure from the statutory liquidation regime.

JUDGMENT

1. The SPhinX Group of companies has been in liquidation since 2006, and on 22 November 2013, a Scheme of Arrangement for the compromise of investor claims was sanctioned by this Court (“the Original Scheme¹”).
2. There is now a proposal to amend the Original Scheme and the immediate question is whether the Court should direct the convening of meetings of shareholders for the consideration of the proposed Amendment Scheme. The Amendment Scheme is proposed by certain investors who hold a very significant percentage of the shares in the SPhinX Group and who, for reasons they would wish to present to the Court if the Amendment Scheme does not proceed, have filed an application for the removal of the JOLs (“Removal Application”). If approved, the Amendment Scheme would avoid the need for a decision of the Court on the removal of the JOLs, as it would propose a compromise in terms which are discussed below.
3. Four questions, described as jurisdictional or quasi-jurisdictional in nature, have arisen and been identified for resolution now and about which I must be satisfied before I might direct the convening of meetings for consideration of the Amendment Scheme. As some of the issues to be compromised under the



¹The Original Scheme is more fully explained in a written judgment delivered on 18 October 2013 in this Cause.

Amendment Scheme would operate to alter the effect of the insolvency regime as imposed by the Companies Law (2013 Revision), (“the Law”); the issue ultimately becomes whether the court has jurisdiction to sanction a scheme that departs from the principles of that regime. This judgment seeks to resolve these questions of jurisdiction.

4. The **first question** is whether those proposing the Amendment Scheme, “the Petitioners” – as opposed to only the JOLs – have standing to apply to the Court for the convening of the meetings at which the Amendment Scheme would be considered (“Court Meetings”). Their application must meet with the requirements of section 86(1) of the Law which governs the subject and which provides:

“Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or where a company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.”

5. As mentioned above, the Petitioners have, since filing their Removal Application, come to the terms of a compromise with the JOLs which would avoid the need for their Removal Application to be heard and they seek to give effect to the terms of the compromise by way of the Amendment Scheme. Thus, although the Amendment Scheme and the present application for the direction of meetings have the full support of the JOLs, strictly speaking the present application is brought not by the JOLs, but by the Petitioners. On the face of the wording in section 86 (1), it would seem that where a company is being wound up the Court



may direct the convening of a scheme meeting only “*on the application ...of the liquidators*”. No reference is made to a power to direct Court meetings on the application of a creditor or member where a company is already being wound up, as here.

6. I am however satisfied, on the authority of case law – *Re Savoy Hotel Ltd. [1981] 1 Ch. 351* in particular – that as the present application has the essential support of the JOLs speaking on behalf of the SPhinX companies themselves, the Petitioners in their capacity as investors (whether in actuality to be regarded as shareholders or creditors) do have standing to apply to the Court to convene meetings at which all investors will be asked to consider the Amendment Scheme.

7. As was explained by Nourse J (as he then was) in *Re Savoy Hotel*, the rights and obligations existing between the company and its members (or creditors as the case might be) must be “sufficiently affected” by a proposed scheme for it to constitute an “arrangement between the company” and its creditors (or members) for the purposes of section 86 of the Law². Further, that the approval of the company of the scheme of arrangement is therefore essential and, therefore, the Court would have no jurisdiction to sanction the proposed scheme without such approval³. Here, the company being in liquidation, the approval of the JOLs as the representatives of the company is what is required. This is also as section 86(1) itself recognises.



² The equivalent of section 206 of the Companies Act 1948 – which was considered in *Re Savoy Hotel* (above).

³ Following and applying *In re International Contract Co. (Hankey's Case) (1872) 26 L.T. 358*; and *In re Oceanic Steam Navigation Co. Ltd. [1939] Ch. 41*.

8. Thus, the JOLs' approval of the proposed Amendment Scheme, speaking on behalf of the SPhinX Companies themselves, in my view addresses concerns about the standing of the proponents to invoke the jurisdiction of the Court towards the same ends. The jurisdiction of the Court to convene Court Meetings for the consideration of the Amendment Scheme is properly invoked by the approval of the JOLs on behalf of the SPhinX Companies, even though the JOLs are not themselves the applicants for the convening of the meetings.
9. The **second question** is whether the proposed Amendment Scheme may properly be regarded as "a compromise or arrangement" between the SPhinX Companies and the would-be Scheme participants within the meaning of section 86 of the Law.
10. I hold that it is clear enough that there is an issue to be compromised as to whether the JOLs should be removed and there is an arrangement (by way of the Amendment Scheme itself) to be put in place by which the compromise would be effected.
11. It must be recognized in this context, though, that the nature of the arrangement would be unusual as it would require the JOLs to cede certain of their important fiduciary responsibilities to Scheme Supervisors as more fully explained below. Nonetheless, the Courts have never sought categorically to define the term "*compromise or arrangement*" and the two concepts are not to be regarded simply as being synonymous.



12. As long ago as 1917, in *Re Guardian Ass. Co.*⁴, the English Court of Appeal declared as follows, per Laurence LJ:

“I do not think that there is any sufficient ground for limiting the meaning of the word “arrangement” in this section. To my mind, any risk is sufficiently guarded against by the fact that the sanction of the court must be obtained. This section is not meant to be limited merely to a compromise; it is to apply also to something that is an arrangement. This proposal seems fairly to come within the word “arrangement” and I do not see any object in limiting its meaning so as to exclude a scheme which is admittedly beneficial to all parties concerned.”

13. This principle has been reaffirmed in more recent cases before this Court and the English Courts. In *SIIC Medical Science and Technology (Group) Limited*⁵, Levers J stated at paragraph 12:

“The courts have construed “arrangement” as a word of very wide import, covering almost every type of legal transaction so long as there is some element of give and take and it has the approval of the company concerned, either through its board or through the members in a general meeting.”

14. Levers J was there reflecting upon the earlier observations of Brightman J. from *Re NFU Development Trust Limited*⁶ to the same effect, where he observed that a compromise implies some element of accommodation on each side and that an arrangement implies some element of give and take. Total surrender or confiscation was not within either of them. For that reason, Brightman J. held that the proposed scheme in that case which did no more than expropriate the interest of a member or creditor would not be a compromise or arrangement.



⁴ In *Re Guardian Assurance Co.* [1917] 1 Ch. 431.

⁵ [2003] CILR 355

⁶ [1972] 1 WLR 1548.

15. In commenting on this decision in *Re Savoy Hotel* (above) Nourse J. held⁷ that the word “arrangement” is one of very wide import, a proposition which was by no means diminished by Brightman J’s judgment: *“All that that case shows is that there must be some element of give and take. Beyond that, it is not necessary nor desirable to attempt a definition of arrangement”*.
16. In *Re SPhinX Group 2010(1)* CILR 452, this court affirmed its jurisdiction to sanction a scheme of arrangement⁸ on the basis that it involved essential “give and take” between the companies and their creditors/members, notwithstanding that the arrangement would involve compromises with third parties as well.
17. By way of still further illustration, in *Re T & N Limited (No. 3)*⁹ the word “arrangement” was regarded by David Richards J. as having *“a very broad meaning”*; following his review of the earlier case law.
18. Of course, the question whether the arrangement would be beneficial to the scheme participants in this case is not the issue for my consideration now. That is best left for them to consider at the Court Meetings, as it is their interests in the SPhinX estate which could be affected. Indeed, that would be the purpose of convening the meetings (as is more fully explained below in this judgment). I am satisfied that it is sufficiently clear for the resolution of the present question of jurisdiction that what is proposed under the Amendment Scheme by way of resolving the issue of the removal of the JOLs is a “compromise” or “arrangement” that could well be beneficial to the scheme participants.



⁷At p.359

⁸An earlier attempt to pass a scheme proposed for the resolution of the disparate positions of investors, contingent creditors and potential third party claimants which, in the end, had not been approved by the necessary majority of the Scheme Claimants at the court meetings.

⁹[2007] 1 BCLC 563

19. All that said, the unusual nature of what the Amendment Scheme proposes, and for which no direct or even close precedent has been cited, must be recognised. As already noted, among other things, it would involve the JOLs relinquishing to other fiduciaries to be nominated as Scheme Supervisors, important aspects of their fiduciary responsibilities. This relinquishing of fiduciary powers would occur even while the JOLs would remain in office and so remain vested with the statutory powers and duties reposed by the Law upon the commencement of the liquidation for the purposes of a compulsory winding up¹⁰.
20. The Amendment Scheme therefore invites the further and third question, whether the JOLs can agree to relinquish those fiduciary powers and duties by way of a scheme of compromise or arrangement with investors, even while the JOLs must and will retain certain of their powers and duties, including as they relate to contingent creditors whose interests are not to be affected by the Amendment Scheme (because they are already protected by a reserve created under the Original Scheme).
21. Novel though this proposition seems, I am satisfied that there is no legal reason why what is proposed may not be regarded as coming within the meaning of an “arrangement”, as contemplated by section 86 of the Law.
22. As leading counsel argued during this hearing – what is proposed is a compromise and/or arrangement for the purposes of section 86(1) of the Law for the following reasons:
- (1) The Amendment Scheme compromises the Removal Application, which is currently exposing the assets of the Scheme Companies to the risk of costs



¹⁰ See especially section 110 and schedule 3 of the Law.

orders in favour of the JOLs. This risk arises immediately because the JOLs have applied for a pre-emptive costs order which would entitle them to take their costs of the Removal Application from the estate if they succeed in resisting it. The Amendment Scheme is an arrangement by which the Scheme Claimants agree to the compromise of the Removal Application.

- (2) The Amendment Scheme involves the appointment of new Scheme Supervisors in place of the JOLs who are currently acting as scheme supervisors under the terms of the Original Scheme. Accordingly, the Scheme Claimants could no longer complain in respect of the JOLs' conduct and would be bound by this arrangement in respect of the continuing administration of the finances of and affairs of the Scheme Companies in accordance with the terms of the Amendment Scheme.
- (3) Pursuant to the Amendment Scheme, the Scheme Supervisors will obtain new powers and the responsibilities of the Scheme Committee to be set up to replace the Liquidation Committee will be expanded. One effect of the Amendment Scheme will be to bind the Scheme Claimants to the terms of these arrangements for the future conduct of the liquidation.
- (4) The Amendment Scheme will establish (from funds currently held in the General Expenses Reserve) a new reserve known as the "Scheme Supervisors' Reserve", which will provide funds for the Scheme Supervisors to carry out their roles as set out in the Amendment Scheme. These roles will include the management of litigation in New York, about



which more below. The existence of this new reserve has the capability to affect the ultimate level of distributions payable to the Scheme Claimants. Pursuant to the Amendment Scheme, the Scheme Claimants will be bound by these arrangements, although they may affect their economic interests.

- (5) The Amendment Scheme provides for the Scheme Companies and the Scheme Claimants to provide the JOLs and their advisors with a release from liability for their conduct up to date. This is another element of the arrangement between the Scheme Companies (acting by the JOLs), the JOLs in their personal capacities and the Scheme Claimants involved in the Amendment Scheme.
- (6) The Amendment Scheme also provides for the Liquidation Committee to be disbanded and for its functions to be assumed, among others, by a Scheme Committee which would be established. This is another matter between the Scheme Companies and the Scheme Claimants, which constitutes a further element of the arrangement.

23. It is manifest that the Amendment Scheme will involve a significant departure from the statutory regime insofar as it would divest from the JOLs powers and duties which are vested in them by the Law¹¹ and repose them in the Scheme Supervisors as fiduciaries chosen by the scheme participants.

24. The JOLs, in support of the proposition that the Court will have jurisdiction to sanction the Amendment Scheme notwithstanding that it will implement a compromise or arrangement that is inconsistent with the statutory regime, cited the case of *Anglo-American Insurance Co. (2001) 1 BCLC 755*.



¹¹ See again Section 110 and Schedule 3 of the Law.

25. In that case the English Court was asked to find jurisdiction to approve a scheme which, in the event of a subsequent liquidation, would impose on the liquidator provisions which differed from the statutory scheme governing a liquidation or which differed from Rule 4.90 of the Insolvency Rules 1986 (which provided for mutual dealings and set-offs to be taken into account before a creditor proved his debt in a liquidation).
26. Neuberger J. (as he then was) held that there was jurisdiction, delivering his conclusion in these terms (at p.765 e)

“The second issue is whether the court has jurisdiction to impose a scheme, in effect, on a liquidator which is in any way different from the statutory scheme which applies on liquidation.

In general, while I believe that the court should be very careful before making an order which would involve approving a scheme which differs in any way from the statutory scheme appropriate to liquidation in terms which would carry over and be binding on a subsequent liquidator, I do consider that the court has jurisdiction to make such an order.”

27. The proposition here is that I should be reassured of the jurisdiction to sanction the Amendment Scheme, as it would have the necessary approval of the majority of those having the economic interests in the liquidation estate, as required by section 86 of the Law.
28. A further important point to note for all purposes, is that the Amendment Scheme will not alter the rights of investors, including their entitlements to distributions or any other substantive rights of the investors, as among themselves.
29. Rather a most significant difference between the Original Scheme and the Amendment Scheme will be the transfer from the JOLs to the new Scheme Supervisors of the right to conduct litigation which has been ongoing in New



York for several years. All claims in the New York action have either been settled or discontinued except that against DPM which is the only remaining defendant. DPM is the former administrator of the SPhinX funds and is sued for breach of fiduciary duty.

30. It was the manner of the conduct of the New York litigation by the JOLs that was said by the Petitioners most immediately to have brought about their loss of confidence in the JOLs and prompted their Removal Application.
31. Their central concern that the JOLs should no longer be in charge of the New York action would be recognized by the transfer of that responsibility to the Scheme Supervisors if the arrangement in the Amendment Scheme is approved by the Court Meetings and ultimately sanctioned by the Court.
32. And so, instead of the JOLs having direct control over the conduct of that litigation, the Scheme Supervisors would take over conduct acting on behalf of the investors as the people who have the economic interest in the outcome of the litigation, but which litigation is to be maintained in the names of the JOLs on behalf of the SPhinX Companies.
33. This then takes me to a further issue (arising as part of the third question), which is whether the Court has jurisdiction to allow the proposed Scheme Supervisors instead of the JOLs to conduct litigation and, as part and parcel of that conduct of litigation, to settle claims on behalf of the Scheme Companies. For the following further reasons, I am also satisfied that this can properly be allowed under a scheme of arrangement.



34. The concept of shareholders litigating on behalf of a company is not new. There is, of course, the well-known, if exceptional, right of a minority shareholder to bring a derivative action where those against whom he is complaining remain in charge of the company¹². But where a company is in liquidation, it is well established that the right to bring litigation in its name vests in the liquidator. And the Law so provides in Schedule 3, where it identifies the right to pursue litigation as one of those powers of liquidators which may be exercised with the approval of the Court. There is, however, a long line of cases going back more than 150 years, which appears to establish that the Court also has jurisdiction in a compulsory winding-up to authorise any person having a proven interest in the liquidation estate to pursue a claim in the name of the company in liquidation.
35. It seems from the available research, that the existence of this jurisdiction was first established in the *Bank of Gibraltar and Malta (1865) LR 1 Ch. App. 69* and in *Re Imperial Bank of China, India and Japan (1866) LR 1 Ch. App 339* per Turner LJ.
36. In both of these cases Lord Justice Turner, speaking on behalf of the Court of Appeal, regarded the jurisdiction as derived from the broad discretion vested by the Companies Act 1862 in the Court for the purposes of a compulsory winding up under the aegis of the Court.
37. *In Bank of Gibraltar and Malta*, while accepting that the contributories had raised sufficient grounds of complaint for there to be an inquiry into whether the



¹² An exception to the so called rule in *Foss v Harbottle (1843) 67 E.R. 189*; where the leave of the court to sue may be obtained where a fraud on the minority committed by those in control of the company can be shown.

directors had misapplied moneys belonging to the company, the discretion was exercised to allow them to sue in the name of the company. Turner LJ expressed the reasoning in these terms:

“Upon the facts of the case, as they stand upon the evidence before us, I am satisfied that no order can properly be made on this part of the prayer of the Petition without further enquiry and investigation. I think that the evidence would not justify any immediate order against the parties whose conduct is impeached by the Petition, but I am not prepared to say that there are not questions to be tried with these parties if the Appellants desire to try them.

...

My opinion therefore is that if the Appellants intend to try these questions, they should proceed by bill [writ]: but I think we ought, so far as we can, to remove any possible difficulty there may be in the way of their taking that course, and that leave ought therefore to be given to them to use the name of the company. I am of the opinion however, that if the Appellants desire to use the name of the company, they must indemnify them against the consequences....”

38. In *Re Imperial Bank of China, India and Japan* dissentient shareholders who opposed a resolution passed at an extraordinary general meeting for the amalgamation of that banking company with another banking company, were allowed to use the name of their company or of the liquidators to set aside the amalgamation. Turner LJ expressed the decision of the Court of Appeal as being taken in exercise of the discretionary powers in this way¹³:

“As to the fourth and remaining point [whether leave to sue in the name of the company or liquidator should be given], I think that the Petitioners should have liberty to use the name of the company or of the liquidators. In the case of the Bank of Gibraltar & Malta we thought that this liberty should be given only upon the terms of



¹³ (1866) L.R. 1 Ch. App. 339, at p.348.

an indemnity being given by the Petitioners; but looking to the facts of this case, I am not disposed to go further than to put the Petitioners upon an undertaking to submit to any order which the Court may make as to the costs of any proceedings which they may institute.”

39. Subsequently, in *Cape Breton Co v Fenn (1881) LR 17 Ch. D 198*, it was held that an order vesting the right to conduct litigation in the name of a company in liquidation could only be made in favour of a creditor or shareholder of the company: see in particular, at p.207 per Jessel MR; p.208 per Cotton LJ and p.209 per Lush LJ. There is to be no departure from that principle here. In the present case, what is proposed is that the Scheme Supervisors will act as the representatives of the shareholders as a single body.
40. The existence of the jurisdiction was more recently confirmed in *Fargro v Godfroy [1986] 1 WLR 1134 p.1136* per Walton J. even while deciding on the facts of the case, that the action should proceed as reconstituted in the name of the liquidator.
41. The headnote of the reported judgment neatly captures both the facts and the principles:

“The plaintiff, a minority shareholder in a company that was a deadlock company, wished to bring a derivative action alleging that the opposing director and the other equal shareholder of the company had diverted assets and opportunities belonging to the company to their own use. Before the writ was issued the company went into liquidation. The plaintiff issued the writ naming the company as the fourth defendant.

On the application by the defendants for an order that the action was improperly constituted and be struck out, it was held, allowing the reconstitution of the action, that had the company not been in liquidation, a minority shareholders’ action would have been appropriate as the only possible method of proceeding; but that once the company was in liquidation the proper plaintiff was the



liquidator, who should, if willing, sue in the name of the company subject to proper indemnities for any costs which he might incur in bringing the action, or, if unwilling, the aggrieved shareholder should sue in the name of the company subject to the approval of the court and satisfactory indemnities for costs; that, since the liquidator was willing to permit the action to proceed, the action would be reconstituted so that it was brought by the liquidator in the name of the company."

42. Walton J. recognized the clear pronouncements of the Privy Council in *Ferguson v Wallbridge* [1935] 3 D.L.R. 66 as to the vast distinction between the position where the company is a going concern and a minority shareholder derivative action can be brought and the position where the Company is in liquidation. In the latter context, where the company goes into liquidation, there is no longer any necessity for bringing a minority shareholders' action because the liquidator can sue directly in the name of the company on behalf of all shareholders, after obtaining leave of the court if necessary.
43. Thus, in the latter context, there typically would be no need to allow minority shareholders to sue in the name of the company: any earlier wrongdoing by those in charge of the company could be vindicated by an action brought by the liquidator.
44. As the headnote discloses, Walton J. was nonetheless prepared to contemplate the aggrieved shareholder being allowed to sue in the name of the company, upon suitable indemnities as to costs being given, if the liquidator refused to sue. The case has been cited with apparent approval in *Barrett v Duckett* [1995] 1 BCLC 243 at p. 251 per Peter Gibson LJ. It has also recently been confirmed by an Australian Court that when determining whether to give a member leave to institute proceedings in the name of a company in liquidation, the Court should



apply the same principles as applied to an application to institute proceedings against a company in liquidation. Those principles require that a creditor or shareholder seeking permission to bring proceedings in the name of an insolvent company must satisfy the Court that the claim has a solid foundation and that it gives rise to a serious issue to be tried: *Eros Cinema Pty Ltd. V Nassair* (1996) 14 ACLC 1374 at p.1378, per Simos J.

45. From this line of cases, Ms. Toubé QC submits, supported by Ms. Byrant QC for the JOLs, that this court can take comfort that there would be nothing unusual in an arrangement under section 86 of the Law that would authorise Scheme Supervisors to conduct litigation on behalf of the Scheme Companies.
46. I recognize that here we do not have the classic situation where the alleged wrongdoers remain in charge of the company as a going concern such that would give rise to the need for a minority shareholder's derivative action. What we do have is litigation on behalf of the company which is already underway in the name of the JOLs, the management or conduct of which is to be transferred to the Scheme Supervisors. The litigation (at least now as against DPM) would be expected to continue in the name of the JOLs on behalf of the company but would be managed by the Scheme Supervisors.
47. The "arrangement" proposed by way of the Amendment Scheme would therefore be only a practical matter not one, strictly speaking, of substantive standing to sue.
48. As, from the line of authorities just examined, it would appear that even a substantive issue of standing to sue by shareholders could be accommodated by



the Court in a suitable case where a liquidator refuses to take action, I can see no reason why the practical arrangement presented here could not properly receive the approval of the Court. I therefore regard it as a matter suitable for consideration at the Court Meetings as part of the proposed Amendment Scheme.

49. The fourth jurisdictional question is whether the court may sanction a scheme in which a liquidation committee is disbanded. As already explained, what is proposed as a term of the Amendment Scheme is that the existing Liquidation Committee be disbanded and replaced by a Scheme Committee.

50. I accept, as has been submitted, that a liquidation committee is not a mandatory requirement either of the Law itself (where no mention at all is made of liquidation committees) or of the Company Winding Up Rules (“CWR”) where mention is made.

51. In this respect, the current version of CWR Order 9 r.1 provides:

“Unless the Court otherwise directs, a liquidation committee shall be established in respect of every company which is being wound up by the Court.” (Emphasis added.)

52. The words in emphasis clearly admit of a discretion in the Court to dispense with a liquidation committee where it is appropriate to do so.

53. It is noted that the current wording of CWR O.9 r.1 is different in this regard from the former version¹⁴ which simply provided that:

“A liquidation committee shall be established in respect of every company which is being wound up by the Court.”



¹⁴ Considered in *Re Saad Investment and Finance Company Limited* (No. 5) 2010(2) CILR 63.

54. The addition of the words in emphasis in the current version of the rule shows the clear intention of the Rules Committee – the body delegated the legislative authority in this regard – to introduce the discretion.
55. While the discretion is not fettered in any way, it must of course be exercised by the Court having due regard to the interests and wishes of interested parties, but there should be, I accept, no preconception as to the type of a case in which the power to dispense with a liquidation committee might be exercised. The power is a flexible one which may need to be exercised in a wide variety of circumstances.
56. Consequently, I am satisfied that when the Court considers whether to sanction the Amendment Scheme, the Court will have jurisdiction to make an Order directing that the liquidation committee be disbanded. There is therefore no jurisdictional issue now arising for the convening of the Court Meetings, in this regard.
57. Ms. Toubé QC on behalf of the Petitioners/Scheme Proponents submits that there are very good reasons for disbanding the current Liquidation Committee on the sanctioning of the Amendment Scheme; and to the extent that any residual functions of the Liquidation Committee remain to be performed, the Amendment Scheme provides for the Scheme Committee to be deemed to be the liquidation committee for the purposes of the CWR and the Insolvency Practitioners Regulations 2008 (as amended) (the "IPRs") (the latter dealing, among other things, with the regulation of the fees and expenses of liquidators).



58. The principal role of the Liquidation Committee under the CWR relates to the approval of the JOLs' fees. However, the Amendment Scheme will put in place a different mechanism for the approval of the JOLs' fees (which it is accepted will remain subject to the approval of the Court in the usual manner in keeping with the IPRs). I accept that there are no jurisdictional issues raised by having the fees approved in a different way as proposed under the Amendment Scheme.
59. Liquidation committees also have statutory rights to be consulted and to request documentation or information (CWR O.9 r.4) and to appoint counsel (CWR O.9 r.6). It is proposed that the Scheme Committee will retain these same rights under the Amendment Scheme, as would any liquidation committee.
60. Insofar as the Amendment Scheme will require the Scheme Committee to discharge functions that might otherwise be expected of a liquidation committee (although not required by any statutory provision to be so discharged), the Amendment Scheme provides for the members of the Scheme Committee to owe duties of confidentiality, fiduciary duties and duties of skill and care to the Scheme Companies.
61. For the foregoing reasons, I am satisfied that the four jurisdictional questions are resolved in each instance in recognition of the existence of jurisdiction to direct the Court Meetings, and ultimately for the Court to be able to sanction the Amendment Scheme.



CLASSES

62. The second matter to be determined now is the composition of classes for the Court Meetings. I record my acceptance of Ms. Toube QC's very helpful submissions in this regard as follows.

The Law

63. In *Re Hawk Insurance Co. Limited* [2001] 2 BCLC 480 at paras 23 to 30, Chadwick LJ set out and explained the classic formulation of the test as to the correct constitution of classes derived from the judgment of Bowen LJ in *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573. Chadwick LJ held in para 23 that the relevant questions were as follows: "*Are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought the scheme to be regarded, on a true analysis, as a number of linked arrangements?*" He concluded in para 30:

"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied. It is in the light of that analysis that the test formulated by Bowen LJ in order to determine which creditors fall into a separate class – that is to say, that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest' – has to be applied".

64. The approach to classes was also summarised by Lord Millett in a judgment of the Court of Final Appeal in Hong Kong, *UDL Holdings Ltd* [2002] 1 HKC 172 at 184-5:

"(2) Persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common



interest must be given separate meetings. Persons whose rights are sufficiently similar that they can consult together with a view to their common interest should be summoned to a single meeting.

- (3) *The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings.*
- (4) *The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class”.*

65. This formulation is reflected in Practice Direction No. 2 of 2010 which provides:

“[3.2] In every case the Court will consider whether it is appropriate to convene class meetings and, if so, the composition of the classes so as to ensure that each meeting consists of shareholders or creditors whose rights against the company which are to be released or varied under the scheme, or the new rights which the scheme gives in their place, are not so dissimilar as to make it impossible for them to consult together with a view to their common interest”.

66. See also *Re Euro Bank Corporation (In Liquidation)* [2003] CILR 205

(Henderson, Ag. J.), in which the headnote states:

“The general rule for the determination of ‘classes’ in a scheme was that they should depend on the similarity or dissimilarity of the participants’ rights against the company and the way in which those rights were affected by the scheme. The test was not based on the similarity or dissimilarity of other private rights. Under the proposed scheme, the ‘shareholders’ clearly comprised a class whose legal rights against the company were sufficiently similar that they could consult effectively together”.



67. Henderson, Ag. J. cited *UDL Holdings Ltd [2002] 1 HKC 172* in paras 9 and 10, quoting the passage set out in para 74 above.
68. In short, therefore, it is necessary to compare the rights of a creditor or investor prior to the scheme and the rights of a creditor or investor after the scheme with those rights, before and after the scheme, of other creditors or investors. If they are sufficiently similar that they can consult together, then they should be in the same class. If they are not sufficiently similar, then they must be in different classes.
69. That requirement is subject to a proviso which was explained by Chadwick LJ in *Hawk* at paras 32 to 33:

“[32] Nevertheless, it is important to keep in mind that the underlying question, to which Bowen LJ’s test must be directed, is that posed by the statutory language: with whom is the compromise or arrangement to be made? Or, as I have put it earlier in this judgment: ‘are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?’ ...

[33] When applying Bowen LJ’s test to the question ‘are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?’ it is necessary to ensure not only that those whose rights really are so dissimilar that they cannot consult together with a view to a common interest should be treated as parties to distinct arrangements – so that they should have their own separate meetings – but also that those whose rights are sufficiently similar to the rights of others that they can properly consult together should be required to do so; lest by ordering separate meetings the court gives a veto to a minority group. The safeguard against majority oppression, as I sought to point out in the BTR case ([2000] 1 BCLC 740 at 747) is that the court is not bound by the decision of the



meeting. It is important Bowen LJ's test should not be applied in such a way that it becomes an instrument of oppression by a minority”.

70. See also Neuberger J in *Anglo-American Insurance* [2001] 1 BCLC 755 at 764 :

“Practical considerations are not irrelevant. In that connection, they obviously play a part, as they do in relation to the implementation of any principle of law in a commercial context. That point is well illustrated by the point made by Jonathan Parker J in the BTR case, and indeed by myself in Osiris, to the effect that if one gets too picky about potential different classes, one could end up with virtually as many classes as there are members of a particular group”.

71. To similar practical effect was the comment of David Richards J in *Telewest Communications plc* [2005] 1 BCLC 752 at 766F, that when considering how to resolve the class question, the court ought not to constitute Scheme Claimants in different classes if it considers, having regard to the main purpose and features of the scheme, that *“there is a great deal more to unite [them] than divides them”*.

Analysis

72. A Court Meeting is convened according to similarity or dissimilarity of Scheme Claimants’ legal rights against the Scheme Companies, not on similarity or dissimilarity of Scheme Claimants’ private interests not derived from such legal rights.

73. The question is therefore whether the rights which are to be released or varied under the Amendment Scheme, or the new rights which the Amendment Scheme gives in their place, are so different that the Amendment Scheme should be treated as a compromise or arrangement between the Scheme Companies and more than one class of Scheme Claimant in respect of the Scheme Companies.



74. In short, Scheme Claimants' rights before the Amendment Scheme takes effect are to be compared with Scheme Claimants' rights after the Amendment Scheme takes effect.
- (1) If Scheme Claimants' rights are sufficiently similar that they can consult together, then they should be in the same class for the purpose of voting on the Amendment Scheme.
- (2) If Scheme Claimants' rights are not sufficiently similar that they can consult together, then they should be in different classes for the purpose of voting on the Amendment Scheme.
75. Scheme Claimants are not compromising their rights to Cash Distributions under the Original Scheme, but only certain of their ancillary rights under the Original Scheme.
76. The rights of all Scheme Claimants in relation to the matters which are the subject matter of the Amendment Scheme, and which are to be replaced by the new rights given by the Amendment Scheme, are the same.
77. It therefore does not matter whether a Scheme Claimant comes, for the purposes of the Original Scheme, within one or other of the different groups of potential claimants under the SPhinX estate, viz: an S Shareholder, or a pre-14 June Redemption Creditor, or a post-14 June Redemption Creditor, or a Non-Redeeming Investor.
78. Accordingly in respect of each Scheme Company (of which there are eleven) all Scheme Claimants relating to that Scheme Company will be in the same class for



the purpose of voting on the Amendment Scheme and therefore there will be a single Court Meeting for each Scheme Company. I so order.

79. The rights of the Indemnity Claimants, the Portfolio Managers and Trade Creditors, Beus Gilbert and any other actual, contingent or alleged creditors will not be compromised or otherwise affected by the Amendment Scheme and they will not therefore be entitled to vote on the Amendment Scheme. They therefore do not raise any class issues.
80. There is a separate issue relating to the interrelationship between the SPhinX Master Funds and the SPhinX SPCs. The SPhinX Master Funds hold the overwhelming majority of the shares in the SPhinX SPCs and are therefore Scheme Claimants in these SPCs. There is therefore a risk that the results of the meetings of the SPCs could be distorted if the votes of the Master Funds in relation to their shareholding in the SPCs went against the votes of the individual investors in the SPCs. In order to reflect the position properly and to give proper weight to the views of the individual investors, the JOLs need to vote the Master Funds shares in accordance with the vote in the SPCs. As a result (a) it is proposed and I accept and order that the meetings of the SPCs will be a meeting of a single class of Scheme Claimants and the relevant SPhinX company shareholders, and (b) as with the Original Scheme, the Petitioners/Removal Applicants seek a direction of the Court and I order that, where a class includes company shareholders, the JOLs be directed to vote the votes of the company shareholders in keeping with the votes of individual investors in that company.



81. Being satisfied as to the foregoing requirements and as to the further issue of the adequacy and form of the Explanatory Memorandum required by GCR O. 102, r 20(4)¹⁵, I direct that the Court Meetings be convened.

Hon. Anthony Smellie
Chief Justice

May 2nd 2014

ON THE SANCTION HEARING ON THE 10TH JUNE 2014

82. The order directing the convening of Court Meetings having been made on 2nd May 2014 under section 86(1) of the Law and the meetings convened, I am now invited to sanction the Amendment Scheme . The prerequisites of the jurisdiction to sanction a scheme of arrangements are set out under section 86(2) as follows:

“(2) *If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, where a company is in the course of*



¹⁵ GCR O.102 r.20(4) provides that the Affidavit in support of the Summons must exhibit a draft explanatory memorandum “which provides the shareholders or creditors with all the information reasonably necessary to enable them to make an informed decision about the merits of the proposed scheme”.

See also Practice Direction No. 2 of 2010: Scheme of Arrangement and Compromise under section 86 of the Companies Law.

being wound up, on the liquidator and contributories of the company”.

83. This Court’s approach to the process described by section 86 follows the same three stage process as under the equivalent legislation in England, that which was summarised by Chadwick LJ in *Re Hawk Insurance Co Limited*¹⁶ at 510-511 as follows:

“[11] There are ... three stages in the process by which a compromise or arrangement becomes binding on the company and all its creditors (or all those creditors within the class of creditors with which the compromise or arrangement is made). First, there must be an application to the court under s 425(1) of the 1985 Act for an order that a meeting or meetings be summoned. It is at that stage that a decision needs to be taken as to whether or not to summon more than one meeting; and, if so, who should be summoned to which meeting. Second, the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made; and are approved (or not) by the requisite majority in number and value of those present and voting in person or by proxy. Third, if approved at the meeting or meetings, there must be a further application ... to obtain the court's sanction to the compromise or arrangement.

[12] It can be seen that each of those stages serves a distinct purpose. At the first stage the court directs how the meeting or meetings are to be summoned. It is concerned, at that stage, to ensure that those who are to be affected by the compromise or arrangement proposed have a proper opportunity of being present (in person or by proxy) at the meeting or meetings at which the proposals are to be considered and voted upon. The second stage ensures that the proposals are acceptable to at least a majority in number, representing three-fourths in value, of those who take the opportunity of being present (in person or by proxy) at the meeting or meetings. At the third stage the court is concerned (i) to ensure that the meeting or meetings have been summoned and held in accordance with its previous order, (ii) to ensure that the proposals have been approved by the requisite majority of those



¹⁶ See paragraph 63 above

present at the meeting or meetings and (iii) to ensure that the views and interests of those who have not approved the proposals at the meeting or meetings (either because they were not present or, being present, did not vote in favour of the proposals) receive impartial consideration” (emphasis added).

84. At the third stage of the process, it is apparent that the role of the Court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the ‘fairness’ of the proposed scheme, the task of the Court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The Court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the Court. The position was explained by David Richards J at the sanction stage in *Re Telewest Communications* [2005] BCC 36:

“[20] The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in Re National Bank Ltd [1966] 1 WLR 819 by reference to a passage in Buckley on the Companies Acts, which has been approved and applied by the courts on many subsequent occasions:

‘In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon



to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme’.

[21] *This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under s.425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be satisfied that it is a fair scheme. It must be a scheme that ‘an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve’. That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court’s view, the best scheme. Necessarily there may be reasonable differences of view on these issues.*

[22] *The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court ‘will be slow to differ from the meeting’.*”

85. From these dicta, in order to sanction a scheme which has been approved by the requisite majority of creditors at the court directed meetings, the Court must be satisfied:

- (1) that the meetings of the Scheme Claimants were summoned and held in accordance with the Court’s order (the “Compliance Issue”);
- (2) that the scheme was approved by the requisite majority of those who voted at the meetings in person or by proxy (the “Voting Issue”); and
- (3) that the scheme is such as an intelligent, honest man acting in respect of his interest might reasonably approve (the “Fairness Issue”).



86. Thus, the following issues fall to be addressed now.

The Compliance Issue

87. The evidence of compliance with the requirements of the Order directing the convening of the Court Meetings ("Meetings Order") is contained in the Chairman's Report which is contained in Exhibit MM-95 to the 39th Affidavit of Margot MacInnis. In summary:

- (1) The JOLs duly convened the 11 meetings at the offices of KRyS Global at Lime Tree Bay Avenue in the Cayman Islands at 9am local time on 28 May 2014 (see para. 1 of the Chairman's Report and para 5 and 7 of the 39th Affidavit of Margot MacInnis);
- (2) Margot MacInnis was appointed to act as Chairman of the Court Meetings (see the introductory paragraph to the Chairman's Report and para 8 of the 39th Affidavit of Margot MacInnis;
- (3) The JOLs gave the Scheme Claimants notice of the Court Meetings by emailing the specified documents to each of them on 7 May 2014, which was at least 21 days before the day appointed for the Court Meetings (see para 1 of the Chairman's Report and paras 5 and 6 of the 39th Affidavit of Margot MacInnis; and
- (4) The form of proxy identified in the Meetings Order was used for the purposes of the Court Meetings (see para 7 of the 39th Affidavit of Margot MacInnis).



88. In the circumstances I accept that there has been full compliance with the requirements of the Meetings Order (as varied).

The Voting Issue

89. As set out in the Chairman's Report, the resolution in favour of the Amendment Scheme was passed unanimously by the Scheme Claimants at each Court Meeting. In short, therefore, the Amendment Scheme was approved by one hundred per cent in number representing one hundred per cent in value of the Scheme Claimants present and voting either in person or by proxy at each Court Meeting. The statutory requirement was therefore satisfied.

90. The Scheme Claimants attending and voting at the Court Meetings represented a very substantial proportion of Scheme Claimants by value. The lowest attendance by value was in Meeting 4, which was attended by almost 80% of Scheme Claimants by value. Turnout reached 100% in 6 meetings (Meetings 3, 5, 7, 8, 9 and 10) and 98% by value and 99% by value in two further meetings (Meetings 6 and 11 respectively). Turnout at the remaining 2 meetings (Meetings 1 and 2) was in the region of 92% by value.

91. Further, although it is apparent that some of the Scheme Claimants did not attend to vote at the Court Meetings, it is highly relevant that no Scheme Claimant attended to vote against the Amendment Scheme. As stated above, every Scheme Claimant who was sufficiently interested to attend the Court Meetings (whether in person or by proxy) voted in favour of the resolution approving the Amendment Scheme.



The Fairness Issue

92. Before sanctioning a scheme, the Court must be satisfied that the arrangement is such as an intelligent, honest man acting in respect of his interest might reasonably approve: see *Re National Bank Limited* [1966] 1 All ER 1006 at p.1012 and *Re Equitable Life Assurance Society* [2002] BCC 319 at para 67 followed and applied in *RE Telewest* (above) – dictum already considered and approved in *In Re SPhinX* 2012 (2) CILR 371 (in respect of the sanction of the Original Scheme).
93. For these purposes, the Court will recognise that creditors are normally the best judges of what is in their commercial interest: “*If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be*” (*Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. 385 at p.409).
94. Given that the Amendment Scheme was approved unanimously at each of the Court Meetings, I accept that there was unanimous and unequivocal expression of what the Scheme Claimants believe to be in their commercial interests.
95. In any event, the Amendment Scheme was plainly one which an intelligent, honest man acting in respect of his interest might reasonably approve. I accept that the Amendment Scheme represents a sensible compromise between the JOLs and the Removal Applicants (and other shareholders/investors) and provides a way for the SPhinX Companies to continue to move forward to the completion of these costly liquidations for the benefit of those with an economic interest in



them. Without the Amendment Scheme, there is likely to be further costly and time-consuming litigation and/or further disputes between the JOLs and stakeholders in these liquidations. The terms of the Amendment Scheme provide a clear and sensible route out of what had turned into a difficult situation in circumstances where (in the absence of this reasonable compromise) there would be no question but that the relationship between the JOLs and the Removal Applicants/Petitioners had broken down irretrievably.

96. The outcome of the Court Meetings was clear and unequivocal, and no Scheme Claimant has suggested that it had insufficient information to enable it to form a view on the merits of the Amendment Scheme. In the premises, I accept that the Court should treat the Scheme Claimants as “much better judges of what is to their commercial advantage than the Court can be”.

97. Ms. Bryant QC and Ms. Toube QC have been good enough to present now some further case law in support of the jurisdiction to sanction the Amendment Scheme, notwithstanding that, as has been recognized, it would depart from the principles of the insolvency regime prescribed under the Law.

98. The question of jurisdiction to sanction remains an issue about which the Court should be satisfied right up to the point of sanction, notwithstanding that it was earlier resolved (as discussed above in relation to the four questions) for the purposes of convening the Court Meetings.

99. I am satisfied that Counsel’s further research has – as they both assert – only served to confirm the correctness of the decision taken at the earlier stage. I record my gratitude for their industry and invaluable assistance throughout these



proceedings. Three of the further cases had been cited and relied upon by Neuberger J. in *Anglo-American Insurance* (above). I will summarise the dicta from the further cases to illustrate their applicability.

100. In *Re Trix* [1970] 1 W.L.R. 1421 Plowman J. was confronted with what he correctly described as an important question of principle; namely whether it was right to authorise a distribution of assets other than strictly in keeping with the statutory scheme based on an agreement of compromise without either the consent of every creditor or a scheme of arrangement under section 206 of the Companies Act 1948 (UK) (the equivalent of section 86 of the Law) and which would bind apathetic creditors and the dissentient minority shareholder.
101. He held that it was not right to do so. That matter was one which the creditors should decide for themselves and on which they were entitled to express their views at a meeting or in Court in the context of a scheme of arrangement.
102. The significance of the case for present purposes, is that it recognized that those having the economic interest in a liquidation may alter, among themselves, the statutory regime, even for the distribution of assets, provided they did so under the process of a scheme of compromise or arrangement prescribed by the Law.
103. Plowman J. was prepared to sanction a compromise or arrangement which would be embodied in a scheme of arrangement, notwithstanding that it is inconsistent with the insolvency regime because (as he went on to explain at p.1424):
 - (a) The process provides every creditor with the opportunity to vote for or against the proposal;



- (b) The process provides every creditor with the opportunity of challenging the proposal in court;
- (c) The voting exercise is conducted under the auspices of the court, which ensures that:
 - (i) the meetings are conducted with proper notice having been given;
 - (ii) the meetings are held after publication of a circular explaining the proposal; and
 - (iii) the Court is able to rule on whether or not to sanction the scheme of arrangement having had the benefit of argument and evidence from both the petitioner and the dissentient creditor(s).

104. The second case relied upon by Neuberger J. in *Anglo-American* (above) was *Re BCCI SA (No. 3) [1993] BCLC 1490*. There the Court approved of the liquidators' entering into a pooling agreement and compromise of claims against majority shareholders without the approval of the general body of creditors; which had been withheld, among other reasons, because the compromise infringed the *pari passu* principle. The compromise approved was not a scheme of arrangement because it had proven impossible to convene a court meeting. The central dicta relied upon came from the judgment of Dillon LJ who said (at 1509-1510):



“When the liquidation supervened, the rights of all concerned were governed by the pari passu rule in company liquidation which superseded the arrangements for the previous clearing house settlement agreements. As I see it, in a liquidation there can be a departure from the pari passu rule by a scheme of arrangement under s. 425 [(of the Companies Act 1985, the predecessor of s.895 of the Companies Act 2006 and the equivalent provision of section 86 of the Law)]; but equally, there can be a departure from the

pari passu rule if it is merely ancillary to an exercise of any of the powers which are exercisable with the sanction of the court under Part I of Sch. 4 of the Insolvency Act 1986.”

105. Dillon LJ went on to say (at 1510b):

“There are some things which cannot be done without a scheme of arrangement and in the normal run that would include a very large number of proposals, and indeed almost all, if not all, proposals for rearrangement of rights as between creditors of different companies or classes of creditors.”

106. Neuberger J. further observed in *Anglo-American* (at p.766 h):

*“Support can also be found for my view in the reasoning of the Privy Council in *Kempe v Ambassador Insurance Co. (in liquidation)* [1998] 1 BCLC 234.*

107. In *Kempe*, the liquidators had proposed a scheme of arrangement under the provisions of the Bermuda Companies Act 1981 – corresponding to section 425 of the Companies Act 2005 (UK) and to section 86 of the Law – the principal feature of which was to impose a strict deadline for filing claims, after which creditors would be altogether barred from participating in the liquidation (per Lord Hoffman at p.235h). The purpose of the scheme of arrangement was to defeat the principle that creditors are entitled to file new or revised proofs at any time before the assets are finally distributed, subject only to not disturbing distributions which had already been made, and the certainty and expedition created by the fixed time limits were the chief objects of the scheme (Lord Hoffman at 238 g-h). In reaffirming the primacy of the wishes of the creditors when expressed in a scheme, Lord Hoffman also stated (at 238 f-g):



“It is of course true that the sanction of the court is by no means a formality. Furthermore, in giving its sanction, the court has an inherent jurisdiction to correct any obvious mistakes in the document which sets out the scheme. But it cannot alter the

substance of the scheme and impose upon the creditors an arrangement to which they did not agree.”

108. The scheme considered by Neuberger J. in *Anglo-American Insurance Co.* was also one, which, in departing from the statutory regime, was much more elaborate than a scheme providing only for distribution. It was an asset-reserving scheme, requiring the scheme administrators to balance the interest of creditors with early-crystallizing claims, against those creditors with late-crystallizing claims and with the scheme co-existing alongside a liquidation, so it would not terminate if the company is wound up (per Neuberger J at 761 b-f and 760 d-3).
109. It appears then that *Anglo American Insurance Co.; Re Trix; BCCI SA (No. 3)* and *Kempe v Ambassador Insurance Co. (in liquidation)* all constitute authority for the proposition that the Court has jurisdiction to sanction a scheme of arrangement which ousts an aspect of the statutory insolvency regime, and none of those cases suggests that the Court’s jurisdiction to do so is confined to rules providing for the liquidation estate to be distributed in a particular manner, although that may be the subject-matter of a more typical scheme.
110. In each of those cases, the Court sanctioned (or was prepared to sanction) the scheme of arrangement although it had replaced a substantial ingredient of the insolvency regime with the creditors’ chosen alternative.
111. Since the Convening Hearing, Counsel came to learn also of a recent local case from which some dicta arise for consideration now in the context of sanctioning a scheme of arrangement which will fetter the JOLs’ fiduciary power to control the New York litigation and other potential litigation. *In ICP Strategic Credit Income*



*Fund Ltd.*¹⁷ the ICP JOLs sought the court’s authority to commence litigation in the United States on the basis that its prosecution would be funded pursuant to a contingency fee agreement with a firm of New York lawyers. The primary concern of the court was whether the champertous nature of such an arrangement under Cayman Islands Law would preclude the grant of sanction.

112. At paragraph 27 of his judgment, Justice Andrew Jones found that it was open to the Court to sanction the proposed contingency fee agreement provided that the following criteria are met; and the third and last of these criteria is expressed as follows:

Third, the official liquidator must not fetter his fiduciary power to control the litigation. The court must be satisfied that the terms of the agreement will not, as a practical matter, tend to inhibit the official liquidators from exercising complete control over the manner in which the litigation is conducted. This necessarily involves the Court engaging in a careful review of the contractual terms.”

113. In granting sanction to the entering into of the contingency fee agreement (“CFA”), Jones J. concluded (in terms quite on par with the extant CFA between the JOLs here and their New York lawyers Beus Gilbert) that, because the CFA was proposed to be performed in the U.S.A., where its performance would be lawful and permissible in accordance with local law and rules of professional conduct, the CFA was valid and enforceable under Cayman law (*ICP Strategic* para. 26).

114. But more to the point of the jurisdiction to sanction the Amendment Scheme presented here, is Justice Jones’ third criteria in its prohibition against the ICP Liquidator fettering his fiduciary power to control litigation.

¹⁷ Cause No. FSD 82 of 2010 (AJJ) and 269 of 2010 (AJJ) 28 May and 18 July (unreported).



115. As set out above in the general description of the Amendment Scheme, here the JOLs will be required not only to fetter but to relinquish their fiduciary power to control litigation to the Scheme Supervisors. This is plain from Clause 15.2.10 of the Amended Scheme which will provide:

“15.2.10. The Cayman Court, by its sanctioning of the Amendment Scheme, gives the Scheme Supervisors a general permission (subject to the terms of this Scheme, including the provision empowering the Scheme Committee to approve any settlement or related agreement) to exercise the powers set out in Part I of the Third Schedule to the Companies Law without further sanction of the Cayman Court.”

116. The powers set out in Part I of the Third Schedule to the Law include:

“1. Power to bring or defend any action or other legal proceedings in the name and on behalf of the company.

....

11. The power to engage attorneys and other professionally qualified persons to assist in the performance of his functions.”

117. Sanctioning the Amendment Scheme will thus render it unnecessary for the Scheme Supervisors to seek the sanction of the Court before bringing any legal proceedings in the name and on behalf of the SPhinX Companies including any litigation for which the JOLs might otherwise have sought sanction in the Cayman court.



118. As discussed above, this, like the other aspects of the Amendment Scheme, has the approval and support of the JOLs.

119. I am satisfied that no finding of Justice Jones in *ICP Strategic* – in which his central concern was whether or not to approve of a CFA – would gainsay either the right of the Scheme Claimants to include this delimitation of the powers

vested in the JOLs by Part I of the Third Schedule as part of the arrangement under the Amendment Scheme or the ability of the JOLs to agree to its delimitation.

120. This delimitation of the JOLs' powers by way of the Amendment Scheme is of course, to be carefully distinguished from any notion of the JOLs themselves unilaterally assigning powers which are conferred upon them by the statutory regime as an incident of their office as liquidators, including the power to conduct litigation subject to the supervision of the Court, as provided under Part I of the Third Schedule of the Law.
121. That kind of unilateral assignment by a liquidator could well be in contravention of the policy of the statutory insolvency regime even while the assignment of the assets of a company in liquidation, including a cause of action, would not be when approved by the Court.
122. What is to be distinguished are the statutory privileges and liberties conferred upon liquidators as such, as officers of the Court, acting under the Court's supervision or direction.
123. In *Ayala Holdings (No. 2)* [1996] 1 BCLC 467, Knox J. said (at 480i – 481b) that for such powers to be unilaterally assignable, would not have been in contemplation in light of the liquidator's exercise of their statutory powers being subject to the control of the court by virtue of S.167(3) of the Insolvency Act 1986 which provides in terms very similar to section 110(3) of the Law:



“The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court, and any creditor or contributory may apply to the court

with respect to any exercise or proposed exercise of any of those powers.”

124. Further, in *Ayala Holdings (No.)*, Knox J. said that for an assignee of such powers not to be subject to the provisions of section 168(5) of the Insolvency Act 1986 is also a state of affairs which would not have been contemplated by Parliament, since section 168(5) provides:

“If any person is aggrieved by an act or decision of the liquidator, that person may apply to the Court; and the court may confirm, reverse or modify the act or decision complained of, and make such order as it thinks just”: ibid at p.484 a-b.

125. The circumstance that the assignee has an interest in the liquidation estate is irrelevant. Even if the proposed assignee is the largest creditor, the liquidator has no power to assign to him his powers as a liquidator: *ibid* at 480d.
126. Given that the Cayman Insolvency regime also respects the liquidators’ powers as having been bestowed by statute and being subject to the control of the Court, the JOLs here do not seek to persuade me that the general principle identified in *Ayala Holdings (No. 2)* in relation to the insolvency regime in England and Wales’ viz: that the liquidators’ powers are exercisable only by the liquidator, is not also applicable in the insolvency regime in the Cayman Islands.
127. Nor do the JOLs seek to persuade me that the principle of law in England and Wales which prohibits liquidators from assigning their powers to a third party is not equally applicable under the Cayman insolvency regime. It is accepted that under the Cayman insolvency regime the JOLs are not permitted to either assign their powers to the Scheme Supervisor, or to allow the Scheme Supervisor to exercise the JOLs’ powers set out in Part I of the Third Schedule of the Law.



128. It is primarily for these reasons, that it is acknowledged that the Amendment Scheme contains an arrangement or compromise that is inconsistent with the insolvency regime of the Law applicable to the SPhinX Companies. And it is for these reasons that it has been fundamentally important that the jurisdiction exists in the Court to sanction such a scheme of arrangement, notwithstanding that it is inconsistent with the insolvency regime.
129. But I am clear the Court doing so is nothing new: every distribution scheme that provides for a company's asset to be distributed in some way other than that provided for by the statutory insolvency regime may be so regarded. Such would include the Original Scheme in relation to the SPhinX Companies, as it took effect on 22 November 2013 with the sanction of the Court.
130. The several cases so helpfully presented and discussed by leading counsel and set out above in this ruling, are illustrative of the different types of circumstances under which schemes have been sanctioned while being inconsistent with the statutory insolvency regime.

Conclusion

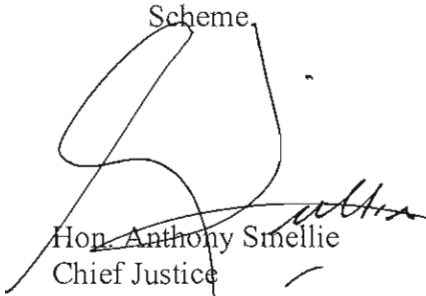
131. In the exceptional circumstances presented by the impasse that has arisen between the Petitioners and the JOLs, I am satisfied that the Court's sanction of the Amendment Scheme should be granted. I am satisfied that the Scheme Claimants have demonstrated, by means of a process which contains ample safeguards (not only for themselves as those having the ultimate economic interests in the estate but also for contingent creditors whose interests will not be altered by the Amendment Scheme), that the Scheme Claimants consider that it is in their



interests that the insolvency regime should be modified as provided for in the Amendment Scheme and that it is within the jurisdiction of the Court to sanction the modification as proposed by the Amendment Scheme.

132. For all the foregoing reasons, I grant the Court's sanction of the Amendment

Scheme.


Hon. Anthony Smellie
Chief Justice

10th June, 2014



Written reasons provided on the 23rd day of July 2014.