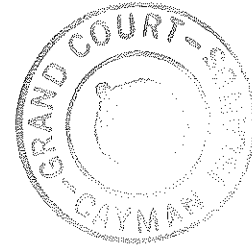


IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 129 OF 2013 (AJJ)

**Before the Hon Mr Justice Andrew J. Jones QC
In Open Court, 1st September, 6th October
and 21st November 2014**



**IN THE MATTER OF STEMATIX (CAYMAN) LTD (IN LIQUIDATION) (THE
"COMPANY")**

Appearances:

Mr James Austin-Smith of Campbells for the Official Liquidators

Mr Paul Keeble of Hampson and Company for Stematix Inc and Stematix OT LLC, respectively
a creditor and shareholder of the Company

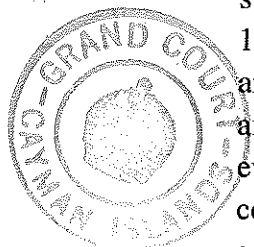
Mr Guy Dilliway-Parry of Priestlys for Harmonic Health Consultant Ltd, a creditor of the
Company, and Mr Philip Ebanks, a director of the Company

REASONS

1. Stematix (Cayman) Limited ("the Company") was put into voluntary liquidation on 5th September 2013 and one of its directors was appointed as voluntary liquidator. By an order made on 28th October 2013 the liquidation was brought under the supervision of the Court and Messers Matthew Wright and Christopher Kennedy of RHSW (Cayman) Ltd ("the Liquidators") were appointed as official liquidators, although Mr Kennedy took the lead and did most of the work. The Liquidators' final report dated 31st July 2014 ("the Final Report") was distributed to the creditors on 7th August 2014 and their application for an order for dissolution was listed for hearing on Monday 1st September 2014. The Final Report states that the Company is insolvent and that the amount realized from the sale of its assets is insufficient to pay the expenses of the liquidation. On the previous Friday, attorneys for StematixTM, Inc and Stematix OT LLC issued a summons seeking orders that the Liquidators be removed from office and replaced by Messrs Margot MacInnis and Alyson Reilly of Krys Global on the basis that they would be directed to investigate the

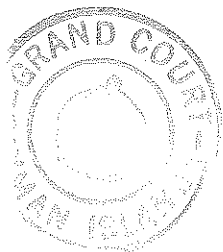
manner in which the Liquidators have conducted an important aspect of the liquidation, with a view to disallowing all or part of their remuneration and disallowing payment of their attorneys' fees.

2. The evidence put before the Court by the Liquidators in support of their application for an order for dissolution comprises their Final Report dated 7th August 2014. I also re-read their First Report dated 3rd November 2013 as it is included as an appendix to the Final Report. The evidence in support of StematixTM, Inc's application comprises an affidavit sworn by Dr David C. Bonner ("Dr. Bonner"), together with an exhibit comprising about 100 pages of documentary evidence which was supplemented with additional documents annexed to counsel's written submission. Dr. Bonner has played an important role in the affairs of the Company and my initial view was that his affidavit constitutes credible evidence in support of his complaints about the way in which this liquidation has been conducted and that these complaints need to be addressed by the Liquidators. In order to give the Liquidators a proper opportunity to respond, I adjourned the matter and made directions designed to ensure that the Liquidators and the Court had a proper understanding of exactly what it is that any replacement or additional official liquidators would be directed to do. I also required that those nominated for appointment swear affidavits confirming their willingness to act and that appropriate provision has been made for payment of their professional fees. This material was filed on 8th September and the Liquidators' counsel filed and served a written submission on 18th September. Having read these submissions I directed counsel for StematixTM, Inc to serve a reply and set the matter down for a further hearing on 6th October 2014, when it proceeded as an application to appoint additional official liquidators rather than an application to remove the Liquidators. I also read the Voluntary Liquidator's Report dated 25th November 2013 which was filed with the Court on 3rd December 2013. Since this report had not been referred to during the hearing, I gave counsel an opportunity to address me at a further hearing but neither of them sought to do so.
3. In order to put this matter into its proper context, I should first record my understanding of the way in which the Company's business was conducted and identify the key players. The Company was established to provide stem cell treatment to patients at a clinic located in George Town, Grand Cayman, for which purpose it was duly licensed as a health care facility under the Health Practice Law (2013 Revision). It was incorporated in March 2011 but did not actually commence its operations until September of that year. The establishment of the Company arose out of an agreement between Dr. Bonner (representing the Stematix group of companies based in Houston, Texas) and Dr. Christopher Centeno (representing the Centeno Shultz Clinic based in Bromfield, Colorado). The business model was that the Company would provide stem cell treatment at its clinic in Grand Cayman to patients referred to it by the Dr. Centeno's clinic. The



treatment was provided by medical practitioners supplied by Centeno Schultz Clinic pursuant to the terms of a consultancy agreement, a copy of which has not been put in evidence. According to Dr. Bonner, the Company's business never became financially viable because Centeno Schultz Clinic was unable to provide sufficient patients. Dr. Bonner says that his business relationship with Dr Centeno and his clinic deteriorated into what he describes as a "personality conflict". Dr Centeno was pressing for payment of the outstanding fees – ultimately around US\$315,000 – and Dr. Bonner was pressing for a greater flow of patients without which he said that the fees could not be paid. This conflict had an important bearing on subsequent events.

4. The shareholders of the Company are Stematix OT LLC (40%), Mr Philip Ebanks (30%) and Mrs Rebecca Smith (30%). Mrs Smith is Mr Ebanks' mother. The Company's directors are Dr. Bonner, Mr. Ebanks and Mrs. Smith. The only other people who have played a material role in the events giving rise to this application are Mr James Rogers ("Mr Rogers") and Mr Carl Measer ("Mrs Measer"). Mr Rogers is an executive vice president and chief financial officer of Stematix Inc. Mr Measer is the practice manager of the Centeno Schultz Clinic.
5. By issuing 60% of its share capital to Messrs Ebanks and Smith, it could be said that the Company is 60% Caymanian owned, thus avoiding the need for a Local Companies (Control) Law licence. However, the issued share capital appears to have been nominal and Dr. Bonner's evidence is that they executed a shareholders agreement (a copy of which has not been put in evidence) pursuant to which Messrs Ebanks and Smith were each entitled to receive only 2.5% of any dividends. Their real economic interest in the Company arises in other ways. A company owned by Mr Ebanks called Harmonic Health Consultants Ltd ("Harmonic") received rent for the provision of premises used as the Company's clinic for the treatment of patients. Another company owned by Mr Ebanks called Cayman Medical Travel Ltd ("CMT") received a "finder's fee" of US\$2,000 for every patient who received treatment from the Company. Mrs Smith's economic interest arose through Pheonix Health Services Ltd ("Phoenix") from which the Company rented office space and premises for use as a laboratory. Apart from Stematix OT LLC's shareholding, Dr. Bonner's economic interest arose from the fact that fees were paid to Stematix OT LLC for management services and rent was paid to Stematix, Inc for the use of its laboratory equipment. The Company's unaudited management accounts for the period from inception to 30th June 2013 reflect that substantial sums had been paid out by the Company pursuant to these various arrangements. CMT received fees of \$326,000.00, Harmonic received \$217,500.00 in respect of rent, Phoenix received \$130,650.00 in respect of rent, Stematix OT LLC received \$214,513.65 in respect of management fees and Stematix Inc received \$117,650 in respect of equipment rental. The notes to these accounts reflect that none of these arrangements were formally documented except that there was a



“contract in place” with Pheonix. In respect of the payments made to CMT and Harmonic the notes state “No contract in force (requested by [Dr. Bonner])”. In respect of the payments made to Stematix OT LLC it states “No contract in place – need agreement”. Similarly, in respect of payments made to Stematix Inc, the Notes state “No contract in place – need rental agreement”.

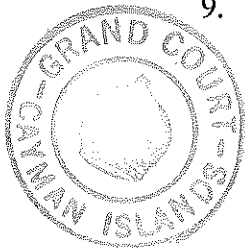
6. These management accounts were discussed at a meeting of the board of directors held on 22nd July 2013. All three directors were present together with the Company’s lawyer, Mr Daniel Priestly. This meeting was convened because Centeno Schultz Clinic had threatened to stop referring any further patients to the Company unless and until its outstanding fees, which then stood at US\$179,000, were paid in full. It was also threatening to sue the Company. The only subject recorded in the minutes as having been discussed at this meeting was the Company’s financial condition. The discussion was based upon management accounts which clearly reflect “Equipment Rental - \$114,875.61” as a separate line item. Mrs Smith questioned the sum of \$214,513.65 paid to Stematix OT LLC for its personnel, but neither she nor Mr Ebanks are recorded as having questioned the sum paid to Stematix Inc for the rental of its laboratory equipment. The outcome of this meeting was that the directors unanimously resolved that Mr Ebanks would take over control of and responsibility for managing the Company’s financial affairs from Stematix OT LLC’s personnel. It was also agreed that Stematix OT LLC would provide a loan of \$200,000 which would have been sufficient to pay the amount then owed to Centeno Schultz Clinic and provide a small amount of additional working capital. It was suggested, though not actually agreed, that the fees owing to Mr Ebanks’ company should be converted into a loan on the same terms as the loan intended to be made by Stematix OT LLC.



7. A few weeks later, Messrs Ebanks and Smith decided, apparently without reference to Dr Bonner, to convene an extraordinary general meeting of the Company’s shareholders to pass a resolution putting it into voluntary liquidation on the grounds of insolvency. The resolution was passed on 5th September 2014, against opposition from Stematix OT LLC, and Mr Ebanks was appointed as liquidator in spite of the fact that he is not qualified to act as liquidator of an insolvent company. The inference I draw from the minutes of the board meeting held on 22nd July 2013 is that the directors were then agreed that a loan of \$200,000.00 from Stematix OT LLC would be sufficient to pay the amount owing to Centeno Schultz Clinic and solve the immediate cash flow problem. Why the loan was never actually made is not addressed in the evidence. Dr Bonner’s evidence that the decision to put the Company into liquidation was made without reference to him tends to suggest that it was Mr Ebanks and Mrs Smith who changed their minds. Apart from saying that the Company is insolvent, the Liquidators’ Final Report does not explain the circumstances surrounding the decision to put it into liquidation.

8. The liquidation was brought under the supervision of the Court at a hearing on 28th October 2013 when Mr Ebanks (in his capacity as voluntary liquidator) was represented by Mr Guy Dilliway-Parry of Priestlys who had previously acted for the Company on the instructions of its directors. The Centeno Schultz Clinic and a related party called Regenerative Services LLC were represented by Campbells. The Stematix companies were represented by Mr Keeble of Hampson and Company. By a letter dated 17th October 2013 Mr Keeble informed Mr Ebanks that the Stematix companies would not oppose the appointment of Messrs Wright and Kennedy as official liquidators "...assuming that [they] will seek independent legal advice as necessary following their appointment...". He was actually concerned to ensure that the Liquidators did not instruct Priestlys. It never occurred to him that the Liquidators might engage the lawyers acting for Centeno Schultz Clinic. During the course of this hearing I was asked by counsel for Mr Ebanks to make an order that the Liquidators be authorized to carry on the Company's business for the benefit of the liquidation. The intention was that all those patients who had paid deposits would be treated during the course of November 2013 and that the associated expenses would be treated as an expense of the liquidation. I declined to make this order because there was no sufficient evidence before the Court from which to infer that performing what was subsequently referred to as "the November clinic" would be beneficial, but I indicated that upon receipt of a report from the Liquidators I might be prepared to make such an order without the need for a further hearing. In the event, I did make an order on 12th November 2013 based upon the evidence contained in the Liquidators' First Report.

9. For present purposes the Liquidators' First Report is relevant in a number of ways. First, it was preceded by correspondence passing between Mr Ebanks and Mr Keeble on behalf of Stematix Inc Inc and Mr Austin-Smith of Campbells on behalf of Centeno Shultz Clinic. Mr Keeble's correspondence expresses concerns about the arrangements for the safety and security of his client's laboratory equipment. There was then no suggestion that the equipment belongs to the Company. Second, the First Report was sent to the Court under cover of a letter dated 5th November 2013 and written by Campbells, but it was not copied to the other interested parties. Their invoices reflect that they considered acting for the Liquidators as early as the 28th October 2013, the day upon which I heard the supervision petition, but the intention to instruct them was not disclosed during the hearing. Third, the report reflects that the key players were agreed that the November clinic should proceed. Indeed, it is difficult to see how it could have been performed without the active co-operation of Dr. Bonner, Dr Centeno and Mr Ebanks. Fourth, the report has annexed to it a projection of the income receivable from the patients and the projected costs of carrying out the treatment which is said to have been "prepared by the Company". Exactly who prepared it is unclear. It includes rent payable to Stematix Inc for the use of its laboratory equipment, fees payable CMT, rent payable to Harmonic and rent payable to Phoenix. It is

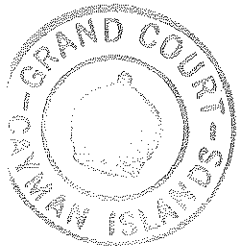


reasonable to infer that the key players were content with this expenditure. The Liquidators considered that the projected net profit of around \$4,800 was insufficient to justify incurring the expenses. The Liquidators' First Report states that "following negotiations with the service providers, costs have been reduced and the profit margin is projected to total approximately \$52,200". One of the service providers with whom the Liquidators conducted negotiations was Stematix Inc. It agreed to waive its rent. At this point the Liquidators were being told that the laboratory equipment contained in the Company's 'clean room' belonged to Stematix Inc from whom it was being rented by the Company at \$6,100 per month. A few weeks later – at some point prior to 14 December 2014 - Mr Ebanks and Mr Measer asserted to the Liquidators that the equipment actually belonged to the Company. According to the Liquidators, their assertion was that it had been transferred to the Company by Stematix Inc by way of a capital contribution on the part of Stematix OT LLC. This was the principal issue in the liquidation and this application arises out of the way in which the Liquidators – more specifically Mr Kennedy – dealt with the matter.

10. By an e-mail dated 14th November Mr Kennedy made it clear that the Liquidators had been concentrating on the November clinic and had not reviewed any documents with regard to ownership of equipment. He followed up on 20th November by asking how Mr Keeble was getting on with assembling the proof of title documents and was told that the supporting invoices and spreadsheets comprise a 3" ring binder. The list of equipment and supporting invoices (comprising 6 pdf attachments) was sent on the following day. It was intended to comprise only capital equipment leased to the Company and Mr Rogers made the point that consumables purchased for the Company (for which Stematix Inc would have to prove as an ordinary unsecured creditor) had been excluded from the list. On the 29th November Mr Kennedy said that he would not be able to verify ownership of all the items in the list by the following Monday which was when Stematix Inc proposed to send an expert to dismantle and pack it for shipment, but he offered to pay rent until the end of January. The inference to be drawn from this correspondence is that the Liquidators were concerned only to ensure the accuracy of the list.

11. In the meantime Mr Ebanks' Voluntary Liquidator's Report dated 25th November 2013 was delivered to the Liquidators, who filed it with the Court on 3rd December 2013. Since Mr Ebanks was both a director and liquidator of the Company, his liquidator's report was also treated as a statement of affairs and he swore an affidavit on 25th November 2013 verifying the truth of its content. Mrs Smith concurred with her son's report and also swore an affidavit verifying the truth of its content. Mr Ebanks' report lists the Company's physical assets in three detailed appendices, as follows –

Appendix 9 - This comprises a schedule entitled 'Clinic Inventory as of October 8th 2013'. It is a detailed inventory of consumables, specifying the vendor, the purchase order



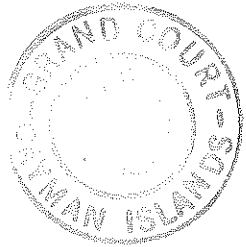
number, the unit cost, the number in stock and the value. The total asset value, at cost, is stated to be \$20,865.82.

Appendix 10 - This comprises another schedule entitled 'Stematix Cayman Lab Inventory with costing' and it is dated as of November 2013. It is a similarly detailed inventory of low unit cost consumables. The total asset value, at cost, is stated to be \$12,925.83.

Appendix 11 - This a summary of all the Company's physical assets, including the consumables detailed in Appendices 10 and 11. Apart from the consumables, the two largest items are a silent standby generator valued at \$11,000 and a SonoSite portable ultrasound machine valued at \$36,980. The total value of the Company's physical assets is stated to be \$107,501.29.

To my mind, the Voluntary Liquidator's Report is highly significant because it also constitutes Mr Ebank's sworn statement of affairs made in his capacity as a director. It is significant that Appendix 11 does *not* include the laboratory equipment which he later claimed as an asset of the Company. Furthermore, Appendix 12 is a schedule of 'Stematix Cayman Creditors as at Oct.28, 2013'. It *does* include Stematix Inc as creditor to whom \$29,566.72 is owed. Appendix 3 is an invoice dated October 4, 2013 from Stematix Inc which includes 'Oct. Rent – Laboratory Equipment' at \$6,100. According to the Liquidators, within about two weeks after having produced this report, Mr Ebanks was alleging that the Company owned the laboratory equipment and that it had a "book value" of \$300,000. I find it unsurprising that the Liquidators ultimately rejected Mr Ebanks' claim but their Final Report contains no criticism of the fact that he put forward a claim on behalf of the Company which was flat contradictory to his sworn statement of affairs.

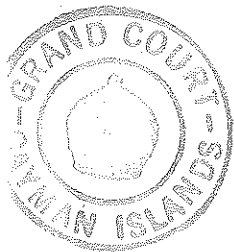
12. As I have already said, Stematix Inc provided the Liquidators with documentation intended to identify the laboratory equipment and establish its ownership. At this stage the Liquidators were only concerned with establishing an accurate inventory of what belonged to Stematix Inc. On 21st November 2013 the Liquidators were sent an e-mail with six attachments containing supporting documentation. On 29th November 2013 the Liquidators received a Laboratory Lease Agreement from Stematix Inc, a copy of which is included as Appendix XII of their Final Report ("the Lease"). It bears the date September 1, 2011 on its front cover. It is expressed to be "effective as of September 1, 2011". It does not expressly state the date on which it was actually executed. The subject matter of the Lease is stated in Article I as an "ISO Class 7 Laboratory constructed at Rankins Plaza, Grand Cayman with initial Laboratory, clean room and leasehold improvements as described in Annex 1". There is no Annex 1. The rent is stated as \$6,100 per month. This document was not created on or about 1st September 2011. The notes to the 30th June 2013 management accounts state that there is no equipment lease and that such a document is needed. An



equipment lease is one of several contracts which, according to Stematix Inc as the author of these accounts, ought to have been put in place. I have not been told when the Lease was actually prepared and executed. It must have been some time after the board meeting on 22nd July 2013 and it may be that it was created in November 2013 in response to the Liquidators' request for documentary evidence in support of the inventory. Whoever sent it to the Liquidators on behalf of Stematix Inc obviously did not explain that it had been backdated but the e-mail to which it was attached has not been put in evidence.

13. The Lease was passed on to Mr Ebanks. His initial response has not been disclosed by the Liquidators. However, in a subsequent e-mail dated 12 December 2014 (which is recited in Mr Austin-Smith's written submission) he said "As stated in my previous e-mail this lease is fraudulent in that it purports to be signed in September 2011 as indicated by the cover page". He goes on to explain why he thought that it could not have been executed at that time. In fact, it was not executed at that time and, so far as I am aware, no one ever represented to the Liquidators that it had been executed in September 2011, although I can understand why an uninformed reader would have understood that to be the case. The complaint against these Liquidators is that, when faced with Mr Ebanks and Mr Measer's claim that the laboratory equipment had been transferred into the Company's ownership by way of a capital contribution and that the Lease was a forgery, they failed to investigate it properly. Although the claim was eventually decided on 25th March 2014 in favour of Stematix Inc, the allegation is that they failed to deal with the matter in an evenhanded way and wasted time and money for which they ought not to be remunerated or reimbursed. It is also said that the Liquidators' Final Report constitutes an inadequate, inaccurate and biased account of the matter and that it unfairly damages the reputation of Dr. Bonner and his company. Indeed, Mr Keeble goes so far as to say that the content of the Liquidators' Final Report is deliberately damning of Dr Bonner as a means of deflecting attention from the Liquidators' own failings.

14. Mr Ebanks and Mr Measer first presented their claim, which I shall refer to as "the capital contribution argument" at the beginning of December 2013. Exactly how it was presented and how the Liquidators reacted has not been disclosed but the Liquidators did speak directly to them about their allegations. However, for whatever reason, the Liquidators never spoke to Dr. Bonner or Mr Rogers. Had Mr Kennedy asked them when they had executed the Lease, the subsequent course of events might have been completely different. An enquiry from Mr Rogers to Mr Kennedy on 18th December went unanswered. A follow-up enquiry on 23rd December resulted in a response from Mr Kennedy that "we are reviewing and finalizing some advice from our attorneys" but he said that he would not be able to finalize and communicate the advice to Stematix Inc until after the holiday. It seems to me that Mr Kennedy's response was less than frank. I find it difficult to understand why Mr Kennedy was apparently willing to discuss the matter with Mr Ebanks



and Mr Measer but at the same time unwilling to discuss it with Mr Rogers. It seems to me that he ought to have engaged with those on both sides of the argument in an evenhanded way. Instead, on 6th January 2014 the Liquidators instructed Campbells to write letters to Dr. Bonner and Stematix Inc demanding a response to the capital contribution argument and the allegation that the Lease is a “forgery”. Having regard to the history of the matter, the content of these letters is quite extraordinary and does tend to suggest that that the Liquidators were not dealing with this matter in an evenhanded way.

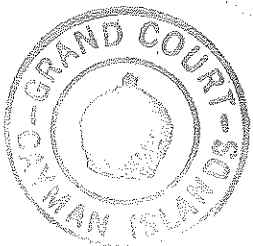
15. Both letters begin by saying “As you are aware, we act for the Joint Official Liquidators (“JOLs”) of the Company.” Dr. Bonner was not aware of this fact, nor were his attorneys, although they would have been able to deduce that Campbells had been instructed if they had looked closely enough at the sanction order made on 12th November 2013 which states that it was filed by Campbells as attorneys for the Liquidators. Mr Austin-Smith also pointed out that he was one of five people, including Dr. Bonner, who participated by telephone in the creditors’ meeting held on 10th December 2013 but the minutes do not record him as having been introduced as counsel for the Liquidators. Nor is he recorded as having said anything. Dr Bonner knew that Campbells had been retained by Centeno Schultz Clinic. The Stematix companies had been informed about this representation some five months earlier on 8th August 2013. If he had known that Campbells were acting for the Liquidators he would have objected. The 6th January letter addressed to Dr Bonner states as follows –

“The JOLs have spoken with Mr Ebanks, one of the former directors of the Company, and Mr Measer of Centeno Schultz, both indicate that the Equipment was provided by the Stematix Inc. as part of its capital contribution to the Company at the time of its formation. In support of this they rely on the email sent by you to Carl Measer dated 24 March 2011 and entitled “CONFIDENTIAL: Summary of Discussions in Broomfield on March 21 Regarding the Caymans Project” in which you state your understanding that “Stematix will provide...g. Equipment procurement and logistics to move equipment and disposables inventory to the Cayman islands”.

Furthermore, both Mr Measer and Mr Ebanks state that they were unaware of any lease agreement. Mr Ebanks says that he was unaware of the payments made pursuant thereto. The JOLs provided Mr Ebanks with a copy of the lease agreement dated 1 September 2011 which Stematix Inc. provided on 29 November 2013. He claims this is a forgery.

Please provide a detailed response to this allegation. In particular, can you indicate when the other parties were made aware of the lease and provide copies of any supporting evidence. It is also unclear whether the other directors of the Company were made aware of the payments made in respect of the lease. Please confirm when they were informed of the execution of the Lease and provide supporting evidence.

That lease provides for a profit to be made by you in your role as a director of Stematix Inc. As a director of the Company this would potentially constitute a breach of your fiduciary duties. Please provide evidence of the Company’s formal waiver and consent to



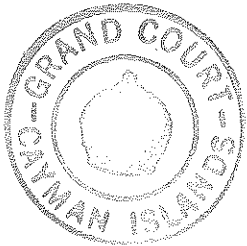
you making this profit.”

The Liquidators were in the position of having to adjudicate between two diametrically opposing claims. I find it impossible to understand how these Liquidators came to the conclusion they could properly adjudicate upon this issue in reliance upon advice received from the attorneys retained by one of the protagonists.

16. These letters are written in an adversarial tone which tends to suggest that the Liquidators have pre-judged the issues. The fact that they were written by Campbells inevitably resulted in an indignant response that the Liquidators were failing in their duty to act independently by engaging the lawyers retained by Centento Shultz Clinic. Messrs Ebanks and Measer were of course asserting the capital contribution argument on behalf of the Company but they had a very significant financial interest in its outcome. If they had succeeded in persuading the Liquidators that the laboratory equipment did indeed belong to the Company, their own companies would have benefitted in two ways. First, they would have been able to buy the equipment, potentially at a very favourable price and there is evidence tending to suggest that the Liquidators knew that this is what they were trying to do. Second, a high proportion of the price paid would have flowed back to their respective companies, which are by far the largest unsecured creditors.

17. Hampson and Company’s response dated 16th January 2014 explained the conflict of interest and reminded the Liquidators of their duty to act independently, which necessarily means that if they engage lawyers, they have a duty to engage a firm which is in a position to give independent advice. If the Liquidators knew that Campbells had been retained by Centeno Shultz Clinc, as they ought to have done, their original decision to retain the firm was an error of judgment. Their decision to continue to retain Campbells in the light of the objection raised by Hampson and Company seems inexplicable to me. Furthermore, by virtue of Schedule 3, Part I, paragraph 11 of the Companies Law (2013 Revision) the Liquidators had no power to engage Campbells without the sanction of the Court which will only be forthcoming if it is satisfied that the firm in question is independent and that the terms of its engagement comply with the requirements of CWR Order 25, rule 1. It is not improper to make a sanction application retrospectively and I recognize such applications are made retrospectively very frequently. However, in the absence of a compelling explanation, their failure to make any such application in response to the objection expressed in Hampson and Company’s letter is evidence tending to suggest that they were disregarding their duty to act independently. The Liquidators’ justification for continuing to retain Campbells is set out in paragraphs 23-37 of Mr Austin-Smith’s written submission. It concludes by saying –

“ 36. The conflict allegation was nothing more than a red herring designed as an attempt to allow



Stematix Inc. and Bonner to void answering difficult questions about their actions during the operation of the Company and its liquidation. It is now resurrected as part of a meretricious attempt to allow Stematix Inc. and Bonner a chance to have the JOL's Final Report rewritten.

37. The JOLs intend to make a retrospective application for sanction to engage attorneys pursuant to Order 25 rule 1 and, subject to any rulings given by this Court, will issue a summons seeking leave to do so in due course."

18. I reject this submission. I also reject Mr Austin-Smith's oral submission that Dr. Bonner has nothing to complain about because the Liquidators ultimately decided the ownership issue in favour of Stematix Inc. The evidence before the Court and the Liquidators' response leads me to the conclusion that the Stematix companies have a legitimate complaint. On any view, the Liquidators ought not to have insisted upon retaining Campbells in the face of this objection without making a sanction application. The suggestion in paragraph 37 of Mr Austin-Smith's written submission is that the Liquidators now intend to make a retrospective application and will issue a summons in due course which seems somewhat disingenuous to me. The Liquidators made an application for an order for dissolution based upon the evidence contained in their Final Report. An inherent part of it is an application for approval of the official liquidators' final accounts and remuneration. The summons contains no express application to sanction Campbells' engagement but I was being asked to approve accounts which reflect that they have been paid \$29,417 out of the Company's assets. However, the Liquidators' Final Report contains no hint that their decision to retain Campbells was highly contentious. It follows that the evidence put before the Court was materially deficient.

19. Campbells' letters of 6th January provoked a highly adversarial and somewhat acrimonious correspondence between the lawyers which continued through February and March, right up to the very day (25th March 2014) when the Liquidators wrote directly to Dr. Bonner informing him that they agree that the Company has no claim to the laboratory equipment. The complaint is that the Liquidators could and should have resolved this issue at the beginning of December and that Stematix Inc was improperly kept out of possession of its property for some four months. Clearly, the claim made by Mr Ebanks and Mr Measer that the laboratory equipment was owned by the Company had to be investigated, but this ought not to have been difficult having regard to the fact that it was inconsistent with Mr Ebanks' sworn statement of affairs and inconsistent with the Company's books and records which reflect that invoices for rent were rendered and paid from September 2011 onwards. Similarly, the Liquidators needed to ascertain from Dr. Bonner and/or Mr Rogers whether the Lease had been backdated. Why the Liquidators engaged with Mr Ebanks and Mr Measer but never called Dr Bonner or Mr James to ask if the Lease had been backdated calls for an explanation. They never actually discussed the matter with Dr Bonner until 7th March 2014. Why it took the Liquidators four months to come to the conclusion that there was never any agreement amongst the shareholders that the laboratory equipment



purchased by Stamntix Inc would be transferred to the Company by way of a capital contribution by Stematix OT LLC also calls for an explanation.

20. The most significant part of the Liquidators' Final Report is section 7 under the heading 'Investigations'. Paragraph 7.1 says that the Liquidators performed a review of the Company and its affairs leading up to it being placed in voluntary liquidation on 5th September 2013 but they do not say what they discovered as a result of this review. It is reasonably clear from the management accounts and the discussion which took place at the board meeting on 22nd July 2013 that the Company's overhead expenses were too high. However, it is also clear that a very high proportion of these expenses were being paid to companies owned and controlled by the three shareholders who therefore had it within their power to reduce the Company's cost base as Mrs Smith was proposing at the meeting. If the Liquidators enquired into the reasonableness of the rent and fees – especially the "finder's fees" paid to Mr Ebanks' company – their findings are not reflected in the Final Report. In particular, the Liquidators have not recorded whether it was Mr Ebanks and Mrs Smith who changed their minds and decided to put the Company into liquidation notwithstanding the offer of a \$200,000 loan from Stematix OT LLC or whether Dr Bonner changed his mind and withdrew the loan offer. Since there are some independent creditors who will receive a nil dividend, I would have expected the Liquidators to address the reasons why the Company failed. Dr. Bonner's suspicion is that Mr Ebanks and Mrs Smith changed their minds and put the Company into liquidation against his wishes because they wanted to set up a new business with Dr Centeno's companies.

21. Paragraph 7.2 of the Liquidators' Final Report states that the Liquidators "took possession of a lab and its equipment and inventory held at 21 Eclipse Drive, Rankin's Plaza...". This is a reference to the laboratory equipment which the Liquidators' ultimately decided belonged to Stematix Inc. They go on to state that "Based on information provided to the JOLs by the Voluntary Liquidator, the total book value of these assets and inventory was approximately \$300,000." This statement calls for an explanation. It is not what they were told by Mr Ebanks in his Voluntary Liquidator's Report. Indeed, it is flat contradictory to the statement of assets contained in Appendix 11. The Liquidators' Final Report simply does not address how Mr Ebanks attempted to reconcile his capital contribution argument with what he said in his Voluntary Liquidator's Report. Focusing only on that part of the argument which reflects badly on Dr Bonner and ignoring that part which reflects badly on Mr Ebanks does tend to give the impression of bias.

22. Paragraphs 7.3 and 7.4 addressed the capital contribution argument. It states that –

"Evidence was provided by Centeno Schultz in the form of a 'letter of intent', which outlined the basis for a joint venture agreement, where Stematix Inc would provide equipment into a Cayman



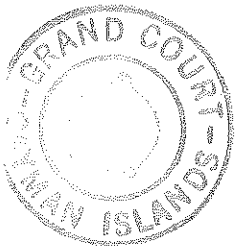
Islands venture as a capital contribution. The parties acknowledged that this agreement did not go ahead but Mr Ebanks and Mr Carl Measer, on behalf of Centeno Shultz, maintain that [the] spirit of this agreement was carried forward into the establishment of the Company.”

I assume that the reference to a ‘letter of intent’ means the e-mail dated 24th March 2011 and sent by Dr Bonner to Dr Centeno. To my mind, this argument appears to be inherently improbable. Even if one disregards the contradictory statements in the Voluntary Liquidator’s Report and the management accounts for 30th June and 31st August 2013, it still seems inherently improbable that Stematix Inc would make a capital contribution (on behalf of Stematix OT LLC) unilaterally. Unless the companies owned by Mr Ebanks and Mrs Smith also made capital contributions of commensurate value, the economic effect of a unilateral capital contribution is that they receive a gift from the Stematix companies worth \$90,000 each, or more if the installation cost is taken into account. It seems inherently improbable that Dr Bonner would agree to do this, especially when the companies owned by Mr Ebanks and Mrs Smith were receiving rent for the use of their premises. The Liquidators’ reaction is not explained. Their apparent willingness to accept such an inherently improbable proposition does suggest a lack of objectivity.

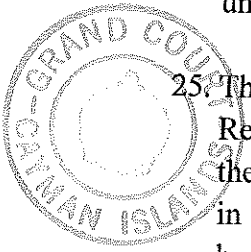
23. Paragraphs 7.5, 7.6 and 7.7 of the Liquidators’ Final Report deal with the Lease. Paragraph 7.6 begins with the statement that “Upon inspection of the Lease Agreement, the JOLs noted that Mr Ebanks was the lessee, however it was signed by Mr Bonner in his capacity as a director of the Company.” This statement is patently wrong. The Lease is expressed to be made between Stematix Inc as lessor and the Company as lessee. In any event, the fact that it appeared to have been backdated is said to have created doubt in the minds of the Liquidators about its validity and the reliability of the information provided to them by Dr. Bonner. Again, this reflects a lack of objectivity. The Liquidators (or at least Mr Kennedy) appear to have seized upon the fact that the lease was backdated to justify pursuing the possibility that it was “forged” in the sense that Dr Bonner was attempting to defraud the Company rather than unwisely attempting to confirm the true position retrospectively. They appear to have ignored the fact that the content of Lease actually reflects what Mr Ebanks apparently believed to be the true position when he prepared his Voluntary Liquidator’s Report and swore his verifying affidavit.

24. Paragraph 7.8 of the Final Report says that –

“After an initial investigation was performed over the books and records of the Company to support many of the claims asserted by the Parties [meaning Mr Ebanks and Centeno Shultz Clinic on one side and Dr. Bonner and the Stematix companies on the other side] it became clear that there was a significant lack of documentary evidence held by the Company to support many of the claims asserted the Parties. From the outset the JOLs noted that important documents were never drafted or signed leaving the investigation to be carried out in a vacuum of information.”



This statement calls for an explanation. They had Mr Ebanks' very detailed schedules of assets. Practically every line item in Appendices 9 and 10 appears to be cross referenced to a purchase order or invoice. They had the financial statements from inception to 30th June and 31st August 2013. They had a series of invoices reflecting that Stematix Inc was charging rent for its equipment at \$6,100 per month from September 2011 onwards. They had the payment instructions and bank statements from which to verify that the invoices had been paid. They had the shareholders' agreement. They had the consultancy agreement between the Company and the Centeno Shultz Clinic. The Company's books and records did not contain the invoices reflecting the purchase of the laboratory equipment, which was to be expected having regard to the fact that it was bought by Stematix Inc. They were sent these documents on 21st November 2013. The books and records did not contain any equipment lease agreement between the Company and Stematix Inc. Not for that matter did the Company's books and records contain any agreements with Harmonic and CMT. All this information was available to the Liquidators at the time when Mr Ebanks and Mr Measer first raised their capital contribution argument. Why it took nearly four months until 25th March 2014 to resolve this issue calls for an explanation.



25. The Liquidators' conclusions are set out in paragraphs 7.18, 7.19 and 7.20 of their Final Report. In paragraph 7.19 they conclude that the directors appear to have acted in breach of their duties because there was a lack of documentation for significant transactions and little in the way of oversight of the financial affairs of the Company. This conclusion reflects badly on all three directors. If official liquidators are going to make statements of this sort in their reports, they should provide cogent reasons for their conclusions and at least a high level summary of the evidence upon which they have relied. The evidence before the Court suggests that there were only three significant transactions which had not been formally documented, namely the tenancy agreement with Harmonic, the consultancy agreement with CMT and the equipment lease agreement with Stematix Inc. Only the last of these transactions is addressed in the Liquidators' Final Report.

26. In paragraph 7.19 the Liquidators assert the belief that "there is a potential claw back claim against Stematix Inc for the repayment of lease payments, totaling \$109,800". Having concluded that the laboratory equipment belonged to Stematix Inc, I find it difficult to see why it would constitute a breach of fiduciary duty on the part of Dr Bonner to cause the Company to pay rent for its use. This is consistent with the fact that the Company paid rent to Mrs. Smith's company for the use of its premises; paid rent to one of Mr Ebanks' companies for the use of its premises; and paid substantial fees to Mr Ebanks' other company for reasons which are not entirely obvious. The fact that Stematix Inc received rent was not concealed. It rendered monthly invoices. The payment instructions were copied to Mr Ebanks. The equipment rental is reflected in the management accounts. It is

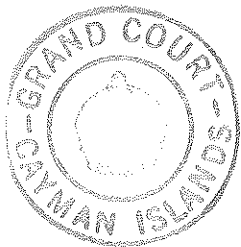
also reflected in the Voluntary Liquidator's Report without any adverse comment by Mr Ebanks. In paragraph 7.20 the Liquidators express the view that it would not be in the interests of the estate to pursue the claim, not because it lacks merit, but because the costs of doing so would be prohibitive relative to its value. It seems to me that the Liquidators are at fault for having published a serious allegation against Dr. Bonner without giving any cogent reasons for their conclusion or any sufficient explanation of the evidence upon which they relied.

27. Unfortunately, the Liquidators have not seen fit to address the substance of the allegations made against them. Firstly, it is said that Stematix Inc has no *locus standi* to make an application for the appointment of an additional liquidator for the purposes of investigating the manner in which these Liquidators dealt with the competing claims relating to ownership of the laboratory equipment. It is said that it has no *locus standi* because it has no substantial interest in the assets of the Company as an ordinary unsecured creditor with an admitted claim of just \$1,514 which is said to represent only 0.238% of the total creditor claims. This argument misses the point. Stematix Inc claims to have been the victim of breaches of duty committed by the Liquidators in connection with the way in which they adjudicated and reported upon its proprietary claim and the opposing capital contribution argument. It seems to me that the victim of an official liquidator's breach of duty must be able to seek a remedy. I am satisfied that there is evidence to support the complaints made and that the application should not be struck out for lack of standing.

28. Second, it is said that I should strike the application out because it does not constitute a *bona fide* use of the Court's process. It is said that Stematix Inc could have applied for some directions at a much earlier stage and that it has left it too late to make a claim for the appointment of an additional liquidator to conduct an enquiry. In the events which have happened, I do not think that Dr Bonner and Stematix Inc can be criticized for delaying the commencement of their application until after they became aware of the contents of Liquidators' Final Report.

29. Third, it is said that I should strike this application out as an abuse of the process because it is essentially based upon an allegation of bias which is demonstrably absurd. I reject this proposition. The fact that these Liquidators insisted upon engaging Campbells impaired their independence and gave the impression of bias. Furthermore, there is evidence tending to suggest a failure to investigate the matter in an evenhanded way and a failure to report upon the outcome of the investigation in an evenhanded way. Such evidence is capable of leading to the conclusion of actual bias.

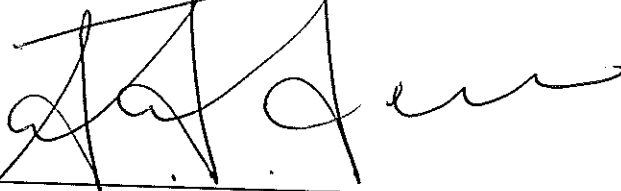
30. Finally, it is said that an investigation into the conduct of these Liquidators and their lawyers would serve no economically useful purpose. The point is made that the



Liquidators' fees are \$135,689 and that the only available assets available to pay them is cash at bank in the sum of \$32,164 (which will be increased by \$29,417 unless the Court is persuaded to sanction the decision to retain Campbells). The result is that the ordinary unsecured creditors will receive nothing and that these Liquidators are suffering a significant write off in any event. For this reason it is said that there is nothing to be gained by enquiring into their conduct. I do not accept this argument. The Liquidators are officers of the court. There is evidence supporting the allegation that they have acted in breach of duty and that their Final Report does not properly reflect what actually happened and contains unsubstantiated conclusions adverse to Dr Bonner and his companies. The fact that Dr. Bonner and Stematix Inc have not alleged any specific financial loss is not a good enough reason for dismissing this application.

31. For these reasons, I will appoint Kenneth Krys and Margot MacInnes of Krys Global as additional liquidators and give directions for them to investigate the manner in which the Liquidators adjudicated upon the ownership of the laboratory equipment. .

DATED this 21 day of November 2014



The Hon Mr Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT

