IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 0016 OF 2009 AND FSD 45 OF 2014 – ASCJ

IN THE MATTER OF THE COMPANIES LAW

AND IN THE MATTER OF THE SPHINX GROUP OF COMPANIES (IN OFFICIAL LIQUIDATION)

BETWEEN

1. **DEUTSCHE BANK AG LONDON**
2. **REFCO PUBLIC COMMODITY POOL LP**
3. **HFC LIMITED**

APPLICANTS

AND

1. **KENNETH KRYS and MARGOT MACINNIS** (as Joint Official Liquidators of the SPhinX Group)
2. **KRIS BEIGHTON and RICHARD HEIS** (as Scheme Supervisors of the SPhinX Group)
3. **BEUS GILBERT PLLC**
4. **BROWN RUDNICK LLP**

RESPONDENTS

IN CHAMBERS
BEFORE THE HON. JUSTICE SIR ANDREW MORRITT
THE 16TH AND 17TH FEBRUARY 2015

APPEARANCES: Mr. Graeme Halkerston instructed by Mr. Christopher Young of Forbes Hare for Beus Gilbert/Brown Rudnick

Mr. Mark Phillips, QC instructed by Ms. Andrea Dunsby of Turners for the Scheme Claimants

Mr. Aristos Galatopoulos and Ms. Gemma Newell of Maples and Calder for the Scheme Supervisors

JUDGMENT

1. This application is a further chapter in the long-running liquidation of the SPhinX Group ("SPhinX"). By their summons issued on 1st December 2014 the third and fourth

respondents seek a stay of the summons issued on 23rd October 2014 whereby the Claimants (on behalf of themselves and the other members of the Scheme Committee) applied for directions enabling a release of US$50m from the General Expense Reserve maintained by the first and second respondents. The stay is sought under s.4 Foreign Arbitral Awards Enforcement Law (1997 Revision) or the inherent jurisdiction of the court. To explain how these issues arise it is necessary to recount the relevant facts in some detail.

The Facts

2. SPhinX consists of 22 companies incorporated in the Cayman Islands. At all material times down to its voluntary liquidation on 30th June 2006, subsequently brought under the supervision of the court, it carried on business as an open-ended investment company. On 6th June 2007 the first defendants, as the joint official liquidators ("JOLs") and with the sanction of the court, engaged the services of the third respondent, Beus Gilbert PLLC, a firm of attorneys based in Arizona USA. They, in turn, retained the fourth respondent, Brown Rudnick as their New York agents. I shall refer to the third and fourth defendants collectively as "BG". The terms of engagement of Beus Gilbert PLLC were and are contained in a Legal Representation Agreement dated 3rd July 2007 ("LRA") to which I shall refer in some detail later. At this stage it is sufficient to record that BG was to be remunerated by means of contingent fee arrangements.

3. Thereafter BG was engaged in recovering assets of SPhinX and reducing its liabilities, primarily to certain indemnity claimants. In May 2011, the first and third claimants ("DB" and "HFC" respectively) proposed a scheme of arrangement under which the assets of the 22 companies would be pooled from which the liabilities to the creditors of any one of them would be paid. The scheme also involved a release of the liabilities to SPhinX of DB and another company, BAWAG. On 22nd September 2011, the day the Petition for obtaining the sanction of the court to this scheme was presented, BG indicated to the JOLs that if the scheme were approved they would claim to be discharged from any further performance of the LRA and would seek recompense from the JOLs by means of a quantum meruit.

4. This and other matters which had already arisen caused the Chief Justice to direct the resolution of two issues in order to ensure that the court had jurisdiction to sanction the scheme. They were whether on sanction of the scheme there was any risk that the assets and reserves of SPhinX would be exhausted by the appropriate reserve for satisfying the Indemnity Claimants and the potential liability to BG. I tried those issues in June and July 2013. BG was not present or represented notwithstanding, as I was told, that they had been given the opportunity to do so. For the reasons given in my judgment handed down on 9th July 2013 I concluded that (1) the total reserve required was US$138,918,394 but (2) BG was not entitled to any compensation by way of quantum meruit as then claimed. This conclusion and subsequent adjustments and recoveries enabled the JOLs to distribute US$319m to the members in March 2014 and the Scheme Supervisors to distribute US$45m to the members in August 2014.

5. It would seem that shortly after I had delivered judgment the JOLs became concerned that if they distributed the available funds without reserving sufficient sums to satisfy the claims of BG on some basis not considered by me they would be personally liable to BG in the event that BG established a right to payment. On 26th August 2013 the JOLs informed the claimants that they had had further discussions with BG which suggested that the claim of the latter might be capped at a manageable level. On 30th August 2013 they suggested an increase in the reserve of US$50m on account of their potential liability to BG. This was reiterated in an affidavit of one of the JOLs sworn on 23rd September 2013. At a meeting of all those involved in the sanction of the Scheme of Arrangement held on 27th September 2013 the claimants agreed to the increase of US$50m proposed provided that it was added to the general reserve and not labelled 'the BG reserve'.

6. The Scheme of Arrangement, having been duly approved by the various classes of creditor and member, was sanctioned by the Chief Justice on 8th November 2013. It became effective on 22nd November 2013. The general reserve was, as agreed, increased by US$50m. The claims of SPhinX against DB BAWAG were thereby released. The scheme provided in paragraph 5.3.5 that

> "The JOLs…and/or any Scheme Claimant may apply to the Cayman Court for a direction that…part of the General Expenses Reserve is no longer required and that it should become available for distribution to Scheme Claimants."

7. On 20th December 2013 the claimants amongst others applied by summons for an order that:

> "The Joint Official Liquidators be instructed to release $50m from the General Expenses Reserve, such amount should be available for distribution to the Scheme Claimants and that this order take effect as a Released Funds Ruling under clause 5.3.6 of the Scheme of Arrangement."

The affidavit of James Carroll sworn on behalf of the Claimants in support of the summons on 19th December 2013 clearly identified the US$50m to be released with the increase in the reserve of the like amount agreed to cover the potential liability to BG.

8. On 8th January 2014 the JOLs sought the approval of the court to a compromise with BG. The response of the claimants was to pass a resolution of no confidence in the JOLs at a meeting ordered on 27th November 2013 and held on 16th January 2014. The application to remove the JOLs had been issued on 26th September 2013. The disputes between the claimants and the JOLs were resolved by an Amendment Scheme sanctioned by the court on 10th June 2014 which transferred most of the functions of the JOLs to the second defendants, the Scheme Supervisors ("SS") and reconstituted the Liquidation Committee as the Scheme Committee. As part of the compromise all outstanding applications were withdrawn including both the summons to remove the JOLs issued on 25th September 2013 and the summons to release US$50m issued on 20th December 2013. Coincidentally, on the same day, BG wrote to the SS quantifying their claim as US$242,874,849 or US$36,753,163.

9. Negotiations in respect of the fees due to BG took place from June to October 2014. In the course of those negotiations the SS at least twice, on 15th August and 6th October 2014, refused to institute the arbitration for which the LRA provided. These negotiations culminated in the issue on 23rd October 2014 of the summons which BG now seeks to stay. This summons ("the Second Release Summons") sought relief in all material respects the same as that sought by the earlier summons issued on 20th December 2013 ("the First Release Summons").

10. The relief sought by the Second Release Summons was in the following terms:

> "1. A direction that the Joint Official Liquidator ("JOLs") and the Scheme Supervisors ("SS") of the SPhinX Group shall not retain any reserves

out of any current or future assets of the SPhinX Group for the purposes of satisfying any claim or potential claim by Beus Gilbert PLLC or Brown Rudnick LLP (Claimants"), either pursuant to the terms of the Legal Representation Agreement dated 3 July 2007, as amended, ("LRA") or otherwise, arising out of a settlement or resolution of legal claims by or against the SPhinX Group to the extent such settlement or resolution did not result in a cash payment to the SPhinX Group, including:

i the settlements with and releases of Deutsche Bank Securities Inc., and related entities and BAWAG PSK Bank Fur Arbeit Und Wirtschaft Und Osterreichische Postsparkasse Aktiengesllschaft which took effect pursuant to the terms of the Scheme;

ii the reduction of alleged contingent claims of Indemnity Claimants (as defined in the Scheme), or the indemnity reserves maintained by the SPhinX Group in respect of the same, which for the avoidance of doubt shall extend to any future reductions of such alleged contingent claims or indemnity reserves; and

iii the agreement the SPhinX Group entered into with PlusFunds on 26 April 2007

(the "Settlements and Releases")"

Paragraph 2 has been abandoned. Paragraph 3 seeks an order that the JOLs be directed to release US$50m from the General Expense Reserve and that such an order should take effect as a Released Funds Ruling for the purposes of Paragraph 5.3.6 of the Scheme of Arrangement. Paragraphs 4 and 5 claim declarations that neither the JOLs nor the SS would have any personal liability in consequence.

11. By their summons dated 1st December 2014 BG sought an order staying the Second Release Summons. It was directed by the Chief Justice to be heard before and separately from the Second Release Summons. The evidence in support of it consists only of the affidavits or affirmations of Leo Beus, the principal of Beus Gilbert PLLC, David Molton, a partner in Brown Rudnick LLP and the expert reports of the Hon. Robert S. Smith and the Hon Stanley G. Feldman. There is no evidence from the Claimants. An affidavit of Kris Beighton, one of the SS indicates the support of SS for the position of the claimants. There has been no cross-

examination. The stay is sought pursuant to the arbitration clause in the LRA to which I now turn.

The Legal Representation Agreement

12. The evidence shows that the LRA was the product of extensive negotiations and expert legal advice on both sides. It was made on 3rd July 2007 in New York by and between Kenneth M Krys and Christopher Stride "as joint official liquidators of SPhinX Managed Futures Fund SPC et al (as identified in Appendix 1) (hereinafter referred to as "Client")" and Beus Gilbert referred to as "Counsel". Clause 1 dealt with the scope of the engagement and defined the matter in respect of which BG agreed to provide its legal services as:

> "The investigation of activities surrounding the SPhinX Fund's losses and litigation against those culpable for said losses, as well as related matters as directed by the Client, advising the Client as to an overall litigation strategy, the merits of any claims/litigation to be brought and the appropriate parties to be sued, pursuing such litigation and reporting thereon to the Client. The Client shall have the discretion to approve all parties to be sued and claims/litigation to be brought. Nothing contained herein shall prevent Client from pursuing any potential parties or claims which Client has not approved with a law firm other than Counsel or otherwise. Claims/litigation against potential parties which have not been approved by Client shall not be included in the definition of "Matter" and shall not be the subject of this Agreement. The definition of "Matter" shall not include any action or proceeding commenced by Client to avoid or recover any payment or transfer made by SPhinX to any investor or creditor based on a preference, fraudulent conveyance, or similar claim, cause of action or theory of recovery. All lawsuits, pleadings and related documents will be forwarded to the Client for review, comment and approval and no such documents shall be served or filed without the prior consent of Client."

13. Clause 2 deals with legal fees and expenses. So far as relevant it provides:

> "2.1(a) Client agrees to pay Counsel a fee contingent upon any cash recovery in this Matter on Client's behalf a sum equal to:

- If settled within 90 days of the date of this agreement, an amount calculated on the basis of two times (2) actual work hours expended at Counsel's normal schedule of hourly rates in effect at the time, and for all costs and expenses incurred pursuant to Section 2.3 hereof.

  .....

- 33 1/3% of the Gross Recovery if settlement or agreement or judgment is reached after ninety (90) days after the date of this Agreement."

  ....

"If there is no cash recovery, there shall be no fees owed by Client to Counsel for representation in this Matter, except as provided in Section 2.1(d)(ii). Client agrees, however, that, regardless of cash recovery, Client is responsible for and will pay all other costs and expenses as described in Section 2.3 herein."

14. I can omit sub-paragraphs (b) and (c). The clause continues in sub-paragraph (d):

(d) Counsel's fee shall be computed on the basis of the "Gross Recovery". The Gross Recovery shall consist only of:

(i) cash (or immediately negotiable instruments) actually received by Client in connection with the resolution, by settlement or otherwise, of a claim asserted by Counsel for Client.

(ii) with respect to any settlement or agreement that results in the direct reduction of the liabilities, taken as a whole and on a consolidated basis, of the SPhinX Fund, Gross Recovery shall be calculated exclusively as follows: liabilities recorded on the accounting books of SPhinX Funds as at June 30, 2006, or shares held in the SPhinX Funds as of that date, multiplied by the amount of dividend that would have been paid on those liabilities or shares, excluding any benefit that is derived from other recoveries made by Counsel. As to any

contingent fee under this Section 2.1(d)(ii), the fee shall be determined and paid to Counsel only when dividends are declared and paid and only as if those liabilities or shares were to be included in any distribution. For illustrative purposes, if the Client enters a settlement with Mr. X which includes a compromise of Mr. X's shares in SPhinX Funds with a NAV of $1million as at June 30, 2006, and the Client subsequently pays an interim dividend of 15% to the shareholders of SPhinX Funds (of which 5% is sourced from recoveries arising from claims pursued by Counsel on behalf of the Client), Counsel will receive 33 1/3% of $1million [calculated as 15%-5%) of 1$ million];

(iii) "Gross Recovery" shall not include (x) any recoveries from PlusFunds or the Refco bankruptcy estate and (y) any liabilities, shareholdings, or other claims that are reduced, rejected or otherwise compromised in connection with, or resulting in whole or in part from, any effort by the Client or its consultants, attorneys (other than Counsel) accountants, or professionals to reconcile, dispute, or object to Proofs of Debt assertion of debts or claims, or assertions of rights as shareholders submitted to the Client or against any SPhinX entity.

[A subparagraph (iv) was inserted by the amendment agreement made on 1st February 2008 but it is not necessary to refer to it.]

15. The crucial provision is clause 2.2. This provides for arbitration. It is in the following terms:

"2.2 Fee Arbitration

If, for any reason, the parties to this Agreement are unable to reach agreement on the legal fees and expenses owed by Client to Counsel within thirty (30) days of the date of compromise or settlement of the Matter, or any portion of the Matter, or within thirty (30) days of any verdict or final judgment should the Matter proceed through trial, then in such event ether party may submit written notice to the other specifying that the issue of legal fees and expenses

shall be submitted to arbitration in the manner described in this section 2.2 (the "Arbitration").

(a) Except as specifically provided in this section 2.2, the Arbitration shall be conducted pursuant to part 137 of the Rules of the Chief Administrator for the statewide attorney/client fee dispute resolution program for the Courts of the State of New York.

(b) The Arbitration shall be held in New York City.

(c) The Arbitration shall be held within thirty (30) days of the date the Arbitrator is selected or as soon thereafter as is reasonably possible.

(d) The decision of the Arbitrator shall be final, binding and non-appealable. Each party agrees to cooperate fully with the other in taking any and all steps necessary to effectuate the entry of the Arbitrator's decision as a final judgment.

(e) Notwithstanding anything to the contrary contained in Section 2.2, Counsel, in its sole and absolute discretion, shall have the right to accept the decision of the Arbitrator or, in lieu thereof, to accept an amount equal to two point five (2.5) times the aggregate hourly rate of all attorneys and paralegals of Counsel (including local counsel) who worked on the matter. In the event Counsel elects to receive two point five (2.5) times its aggregate hourly rate (plus costs and expenses, as defined in Section 2.3 below), the parties agree that said amount shall be made the award of the Arbitrator and shall be entered as a final judgment. Counsel assumes no financial responsibility for Client's U.S or non-U.S. counsel not hired by Counsel. Any financial obligations with respect to other counsel hired by client shall be the soles exclusive responsibility of Client."

Part 137.1(a) of the Rules referred to in sub-paragraph (a) provides that:

> "This Part shall not apply to
>
> (1)…
>
> (2) amounts in dispute involving a sum of less than $1000 or more than $50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;
>
> (3)-(8)"

16. I can omit the intervening paragraphs and go to paragraph 3.10. This provides that the LRA should be governed by and construed in accordance with the laws of the State of New York except for the provisions treating the ethical responsibilities and rights of Counsel which are, and shall be, governed by Arizona law.

The Expert Evidence

17. It is convenient at this stage to refer, in summary form, to the expert evidence adduced by BG. There was no contrary evidence on this summons and no cross-examination. Stanley G. Feldman is a former Chief Justice of the Supreme Court of Arizona and is now a member of the Bar of the State of Arizona. For the reasons he explained he considered that:

> "…absent the client's consent and while continuing to represent the client, an Arizona lawyer is ethically forbidden to commence arbitration proceedings against his client in the on-going litigation which gave rise to the fee dispute…. I know of no impediment to the client commencing arbitration proceedings to resolve the dispute so long as the lawyer consents."

This explains why BG did not commence arbitration but, by contrast, requested the SS/JOLs to do so.

18. The Hon Robert S. Smith is a former associate judge of the New York Court of Appeals and a member of the Bar of the State of New York. His opinion is relatively lengthy but contains a helpful summary of the questions he was asked and of his opinion on each of them in paragraphs 76-83. So far as now relevant I can summarise them as follows:

    (1) The fee claims of BG set out in paras (i) to (iii) of the Second Release Summons fall within the scope of the arbitration agreement contained in paragraph 2.2 of the LRA.
    (2) That agreement is not limited to quantum but includes liability.
    (3) The recovery of funds is not a pre-requisite to commencing an arbitration.
    (4) The reference in paragraph 2.2(a) to Part 137 of the Rules of the Chief Administrator for the Courts of the State of New York did not invalidate the arbitration agreement or limit its scope to claims below a specific value.
    (5) If the parties co-operate in good faith in the conduct of the arbitration it could be completed in 90 to 120 days.

(6) In relation to the merits of the claims summarised in sub-paragraphs 1(i) and (ii) of the Second Release Summons he expressed the view, based on the facts stated in the affirmations of Leo Beus, that "there is a valid claim for at least a minimum fee and (even assuming that there is no Gross Recovery) a claim for a larger amount cannot…be called fanciful."

19. At this stage it is convenient to deal with a submission made by counsel for the claimants in relation to the evidence of Mr Smith. Counsel contended that his evidence was all theoretical and conditional on the facts. He took as an example a passage in paragraph 32 where Mr Smith stated that "there is no reason why the parties here could not agree" without stating whether they had agreed or not. I do not accept this criticism. Read as a whole the opinion of Mr Smith is clearly based on the evidence of what Leo Beus said had happened. An expert witness cannot do otherwise. Mr Smith's conclusions which I have paraphrased in paragraph 18 above are not theoretical nor conditional save in that respect. He is clear in his conclusions that the arbitration agreement is valid, the claims summarised in the Second Release Summons fall within it and that BG have a good claim to at least the minimum fee. I can now turn to the submissions made to me.

The Submissions of Counsel

20. Counsel for BG contended that the Second Release Summons should be stayed pursuant to s.4 Foreign Arbitral Awards Enforcement Law (1997 Revision). That section provides:

> "If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

21. In the alternative counsel for BG relied on the inherent jurisdiction of the court. If for any reason a condition of the application of s.4 was not satisfied then, he submitted, a stay could

and should be granted pursuant to the inherent jurisdiction. By definition the ambits of the inherent jurisdiction cannot be precisely defined. It was described by Waller LJ in **Al-Naimi v Islamic Press Services Inc.** (2000) 70 ConLR 21, 26 in these terms:

> "…it must not be overlooked that the court has an inherent power to stay proceedings. I would in fact accept that on a proper construction of section 9 it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first. If, for example, the court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause, but that it was likely that on detailed inquiry the subject matter of the action will be found to be covered by the arbitration clause; and particularly if an arbitration was bound to take place in relation to some issues between the parties, and where having explored the details necessary to found jurisdiction, it would only be a short step to deciding the real issues, it will often be sensible for the court not to try and resolve that question itself but leave it to the arbitrator."

22. Counsel for BG submits that all the conditions of s.4 are satisfied. First, the Second Release Summons is plainly a legal proceeding commenced by the claimants. Second, he relied on the principles established by cases such as **Tanning Research Laboratories Inc v O'Brien** (1989) 169 C.L.R 332; **Lombard North Central plc v GATX Corpn** [2013] Bus.L.R. 68 and **Flint Ink NZ Ltd v Huhtamaki Australia Pty** [2014] VSCA 166 to demonstrate that in issuing the Second Release Summons the claimants were claiming through or under SPhinX and the JOLs, parties to the LRA. The principle established in these three cases

> "….implies a relatively broad conception of the requirement that an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party…" **Flint** ibid para 64.

In short the terms of the Second Release Summons plainly raised issues of claim or defence available to SPhinX or the JOLs as the other party to the LRA. Third, the Second Release Summons was against BG, the other party to the LRA.

23. Counsel for BG went on to submit that the Second Release Summons was "in respect of any matter agreed to be referred". He relied on **Lombard North Central plc v GATX Corpn** [2013] Bus.L.R.68 para 14. In that passage Andrew Smith J accepted the submission of counsel that

> "...the court should consider what questions will foreseeably arise for determination in the proceedings and whether they include referred matters..."

He submitted that it was plain from the body of the Second Release Summons that the issues include the questions whether SPhinX owes BG fees in respect of the matters specified in sub-paragraphs (i) to (iii). Thus, the parties to the LRA have been and are "unable to reach agreement" concerning liability for those fees and expenses within para 2.2 of the LRA.

24. Counsel for BG submitted that, having established those conditions for the application of s.4 the onus was on the Claimants to satisfy the court that the LRA "is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred". He submitted that counsel for the Claimants was unable to do so.

25. I did not understand Counsel for the claimants to dispute any of the propositions I have summarised in paragraph 22 above. Nor directly did he challenge those summarised in paragraphs 23 and 24 above. As I understood him his contentions were twofold. First, that the issues referred to in paragraph 1 of the Second Release Summons are not subject to any arbitration agreement. Second, the Second Release Summons seeks to exercise a power vested in the JOLs as officers of the court regulating class rights of the members and as such is not arbitrable at all. In the latter respect he relied, in effect, on the decisions of Judge Weeks QC in **Exeter City Association Football Club Ltd v Football Conference Ltd**

[2004] 1 WLR 2910 and Jones J in **Re Cybernaut Growth Fund LP** 23rd July 2013 (unreported).

Conclusions

26. The first point on which counsel for the claimants relied arises from the provision referred to in paragraph 2.2(a) LRA, namely the terms of part 137 para 1(a). He pointed out that, in terms, it applied only to claims for sums between $1000 and $50,000. Accordingly, he submitted, there is no arbitration agreement at all in respect of the claims referred to in the Second Release Summons which, it is common ground, involve sums greatly in excess of $50,000. The consequence, so he submitted, is that claims in excess of the stated maximum were left to be determined in ordinary litigation. Counsel was unable to suggest any rational reason why that should be so. Of greater significance is the fact that the submission was inconsistent with the expert evidence of Mr Smith.

27. The question whether the agreement to arbitrate pursuant to Part 137 was valid and binding was considered by Mr Smith in some detail in paragraphs 25 to 35. He considered that the agreement was valid and not limited to the particular amounts for which Part 137 provided. As he said in paragraphs 27 and 28:

> "27. The present dispute, and the attorney-client relationship from which it arises, do not resemble the situations for which Part 137 was primarily designed……The amounts involved in the contemplated litigation made it plain from the start that any fee dispute was highly likely to involve more than $50,000. The parties were certainly not obligated by New York law to provide in their agreement that any fee dispute would be arbitrated under Part 137.
>
> 28. Yet the LRA does so provide. This can only be interpreted as a deliberate choice of Part 137 procedures; the parties, ably represented as they were, could not have believed that they were compelled to follow this course."

28. Mr Smith is an expert in New York law which, by paragraph 3.10 of the LRA, governs it. There is no contrary evidence. There was no cross-examination. I accept this evidence. That, in my judgment, is more than sufficient to justify the rejection of the first objection advanced by counsel for the claimants.

29. In respect of the second point, I should refer first to the authorities on which counsel of the claimants relied. In the first, **Exeter City Association Football Club Ltd v Football Conference Ltd** [2004] 1 WLR 2910, the court was concerned with a petition under s.459 Companies Act 1985. The petitioner alleged that the affairs of the company were being conducted in a manner prejudicial to himself and sought an order to wind it up. All relevant parties were bound by a rule to refer to arbitration any dispute or difference between them. The respondents sought a stay. This was refused by Judge Weeks QC. He considered that the question whether or not to wind up the company was a matter for the court, not an arbitrator. He concluded in paragraph 26 that the court was the appropriate tribunal to decide both the s.459 petition and all the related issues.

30. The second authority relied on by counsel for the claimants was **Re Cybernaut Growth Fund LP** Jones J 23rd July 2013 (unreported). That case concerned a petition to wind up a limited partnership the terms of which included an arbitration clause in relation to "Any dispute arising out of or relating to this agreement…". Five of the limited partners applied to wind it up under s.15(4) Exempted Limited Partnership Law (2007 Revision). The general partner applied for an order striking out the petition or staying it. Jones J refused. In paragraph 7 he said:

> "As a matter of principle, I think this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding up order (whether relating to a company or an exempted limited partnership) is an order in rem which is capable of affecting third parties. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. Secondly, any dispute about who should be appointed as liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business…..There is a public interest in ensuring that all businesses are properly liquidated in the interests of all their stakeholders….I regard winding up orders, supervision orders and orders for the appointment/removal of liquidators as class remedies, which in turn leads

me to the conclusion that such proceedings fall within the exclusive jurisdiction of the court."

31. Counsel for the claimants contends that the ascertainment and fixing of reserves is of crucial importance to all those interested in the assets of the company in liquidation. It is a duty of a liquidator, but the liquidator is subject to the jurisdiction of the court, see s.110(3) Companies Law (2013 Revision), not the control of an arbitrator.

32. There are, in my view, two answers to that submission. The first is based on the substance of the Second Release Summons. This makes it plain that the reserve in question is entirely dependent on whether or not BG is entitled to remuneration for all or any of the items listed in sub-paragraphs (i)- (iii). That question is subject to the arbitration clause in paragraph 2.2 LRA. In addition to the form of the summons demonstrating the nature of the substance of the dispute referred to in paragraph 23 above it also shows that the dispute is about fees first and then only about reserves. The latter question is wholly dependent on the answer to the first.

33. The second arises from decisions in three very recent cases. I will take them in chronological order. They are **Fulham Football Club (1987) Ltd v Richards** [2012] Ch 333; **Assaubayev v Michael Wilson Partners Ltd** [2014] EWCA Civ 1491 and **Salford Estates (No:2) Ltd v Altomart Ltd** [2014] EWCA Civ 1575.

34. In **Fulham** the parties had agreed that all disputes between the members of the club, including the petitioner, should be referred to arbitration. The petitioner sought an order under s.994 Companies Act 2006 on the ground that the actions of the chairman R had caused the affairs of the company to be conducted in a manner unfairly prejudicial to him as one of its members. The company and R sought a stay of proceedings under s.9 Arbitration Act 1996 which is in substantially the same form as s.4 Foreign Arbitral Awards Enforcement Law. A stay was granted by Vos J. The club appealed. The relevant principle was stated by Patten LJ, with whom Longmore and Rix LJJ agreed, in paragraph 40 to be:

> "it does not follow from the inability of an arbitrator to make a winding-up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes *inter se* as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an

attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process."

In paragraph 78 he considered that the decision of Judge Weeks QC in **Exeter City** was wrong.

35. In **Assaubayev** the claimants had been clients of the defendant, a solicitor, under a retainer which contained an arbitration clause. The Solicitor had sent them a bill which they challenged by a part 8 claim. The solicitor applied to stay that claim on the ground that the costs were within the scope of the arbitration agreement. The stay was granted by the judge and the claimants appealed. Clarke LJ with whom Aikens and Black LJJ agreed, dismissed the appeal. In paragraph 68 he said:

> "I can, however, see no valid reason why in this case the public interest should require the arbitrator not to consider the issues that have been referred to him. These are, in essence, the legality of MWP's actions (including whether the Retainers are champertous), the effect of any such illegality on the recoverability of costs and, if relevant, the reasonableness of the costs claimed. These issues are covered by the terms of the arbitration agreements and well within an arbitrator's reach. As the judge rightly held [205] the relief sought (cancellation or an assessment) is not such as to render the claims incapable of arbitration. The fact that the arbitrator cannot exercise the Court's supervisory jurisdiction is no reason to refuse a stay. No one is asking him to exercise that jurisdiction. In any event, the fact that an arbitrator cannot give all the remedies which a Court could give does not afford any reason for treating an arbitration agreement as of no effect: *Fulham Football Club* [103]."

36. Just over two weeks later a similar point was again considered by the Court of Appeal. In **Salford** a petition to wind up a company was based on a debt which was itself subject to arbitration. The judge had ordered a stay, the petitioner appealed. The contention of leading counsel for the petitioner is described in paragraph 25 of the judgment of the Chancellor in these terms:

> "She said that, unlike an ordinary money claim where the proceedings are for payment of what is due, a winding up petition is not a claim for payment. She said that it is in the nature of a class action in the public interest: it brings into operation the statutory regime for realising and distributing the assets of the

company for the benefit of its body of creditors. An arbitrator has no power to wind up a company. She submitted that a winding up petition is, accordingly, not "arbitrable" and not a "claim" within section 9 of the 1996 Act. On that basis, she contended that, in accordance with long established jurisprudence, the Court should only stay or dismiss a petition based on an unpaid debt if the debt is bona fide disputed on substantial grounds."

37. This argument was rejected for the reasons stated by the Chancellor, with whom Longmore and Kitchin LJ agreed, in paragraph 41 in the following terms:

> "There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in *Halki Shipping*, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under IA 1986 s. 122(1)(f), it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds."

38. The upshot of these three cases is that it is now shown that it is no bar to a stay in order that a contractual arbitration may take place that the same issue may arise in associated legal proceedings. What is not permitted is the reference to arbitration of a matter which is within the exclusive jurisdiction of the court. A matter of public interest cannot be delegated to a private contractual process. These three cases appear to me to confirm that the Second Release Summons is wholly dependent and consequential on whether SPhinX is liable for the fees claimed by BG in the three matters specifically referred to in the summons. As such there is no reason why the arbitration should not proceed. Indeed I would go further. There is every reason to stay this summons so that it may not be used to by-pass the agreed resolution processes.

39. In my judgment all the conditions for ordering a stay pursuant to s.4 Foreign Arbitral Awards Enforcement Law have been made out by BG. It follows that I am bound to grant a stay under that section. There is therefore no need to resort to the inherent jurisdiction. Had it

been necessary I would not have hesitated to grant such a stay. It would have been needed to avoid the claimants and the JOLs/SS seeking to avoid the agreed forum for resolving disputes as to the fees payable under the LRA.

40. There has been little argument as to the terms of the stay given that, currently, there is no arbitration on foot. The evidence of Mr Feldman shows why BG cannot be expected to commence one, at least until after the conclusion of the DPM proceedings due to commence on 22nd June next. Indeed the SS seem to have recognised that. In those circumstances I will grant the stay sought until three months after the conclusion of an arbitration to determine the liability of SPhinX or its liquidators to BG in respect of the matters referred to in paragraph (i) to (iii) of paragraph 1 of the Second Release Summons. The parties are at liberty to apply for the stay to be lifted not earlier than three months after the conclusion of the DPM action, including any appeals, if no such arbitration has been commenced by then. In these circumstances the hearing of the Second Release Summons fixed for 16th March 2015 should be vacated.

DATED the 24th day of February 2015

GRAND COURT - CAYMAN ISLANDS

The Hon. Justice Sir Andrew Morritt
JUDGE OF THE GRAND COURT