26/10/07

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 258 OF 2006

IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

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

Appearances: Mr. Alex Horsbrugh-Porter of Ritch & Conolly for the Joint Official Liquidators
Mr. Alan Turner of Turner & Roulstone for the Liquidation Committee
Mr. Fraser Hughes of Conyers Dill & Pearman for JP Morgan
Mr. Stephen Hall-Jones instructed by Diamond Law Associates for Contrarian
Mr. Quentin Cregan of Bodden and Bodden for Beach Capital Management Ltd (in liquidation)
Mr. Michael Alberga of Myers and Alberga (limited watching brief only) for a creditor
Mr. David Collier of Charles Adams Ritchie & Duckworth for Navasota

Before: Hon. Justice Henderson

Heard: October 16, 2007

JUDGMENT

The Joint Official Liquidators of the Sphinx Group of Companies ("the JOLs") have asked for my determination of whether they have a power to sanction and register certain transfers of shares. The request comes at a time when the company concerned has already been the subject of a winding up order.

The insolvency regime of the Cayman Islands contemplates that the court shall settle a list of contributories "as soon as may be after making an order for winding up": *Companies Law* (2007 Revision) section 112 (1). The Register of Members may be rectified to accord with the list: *ibid.*

An application to register a transfer of shares after the list has been settled is, by any standard, unusual. Section 156 of the *Companies Law* provides that every transfer of shares or alteration in the status of the members of the company made between the commencement of the winding up (i.e., the filing of the petition) and the order for winding up shall be void "unless the court otherwise orders." Thus, the court has a power to recognize share transfers prior to settlement of the list of contributories but such recognition constitutes an exception to the general rule that the transfer is void. There is no express provision anywhere in the *Companies Law* which contemplates the registration of transfers after the settlement of the list of contributories.

Section 156 is similar in its terms to section 153 of the *Companies Act*, 1862 (upon which our legislation is based). In *Re Onward Building Society* [1891] 2 QB 463, the Court of Appeal had before it a similar request. It drew the following conclusions from the legislation:

1. even though section 153 of the *Companies Act*, 1862, applies on its terms only to a transfer between the commencement of the winding up (i.e., the filing of the petition) and the order for winding up, it constitutes a clear guide to how a transfer after the order for winding up should be treated;

2. it follows that a transfer made after a winding up order is void *vis a vis* the company unless the court otherwise orders;

3. section 98 of the *Companies Act* requires the settlement of a list of contributories, with the power to rectify the Register of Members "in all cases where such rectification is required in pursuance of this Act". Rule 29 of the Rules of 1862 allows the list of contributories, once settled, to be varied or added to. The list may be "re-settled";

4. if the list of contributories is re-settled, the court may, at the same time, rectify the register;

5. the ultimate result is that the court has a discretion, after an order for winding up, to add a transferee to the list of contributories and to rectify the register;

6. usually, it will be undesirable to make such a change in the list. Leave should only be given in "exceptional circumstances" where there is "a very strong case";

7. in general, leave should be granted only where a transfer provides some positive benefit to the company and its creditors or contributories.

I accept those conclusions as a correct statement of the law of the Cayman Islands.

The parties requesting registration of these transfers rely particularly on section 109 of the *Companies Law*, which reads in its material parts:

> "An official liquidator shall have power, with the sanction of the Court -
>
> ...
>
> (b) to carry on the business of the company, so far as may be necessary for the beneficial winding up thereof;
>
> ...
>
> (d) to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose to use, when necessary, any seal of the company;
>
> ...

(h) to do and execute all such other things as may be necessary for winding up the affairs of the company and distributing its assets."

The reliance upon section 109 is misplaced. These are general powers provided to official liquidators in every case for the purpose of assisting in winding up the affairs of a company. To be sanctioned by section 109, an act must be carried out for that purpose.

Section 109 (b) permits a liquidator to "carry on the business of the company"; even assuming that the registration of a share transfer comes within the quoted phrase, the transfer must be "necessary for the beneficial winding up" of the company. The material before me does not demonstrate, or even suggest, that registration of these transfers is necessary for the winding up.

Section 109 (d) is a general authority to perform acts and to execute documents in the name of the company where that is required for some purpose connected with the winding up. Section 109 (h) is a very general authority to do such things "as may be necessary for" the winding up. Again, these subsections are of no assistance to the applicant as there is no apparent benefit to the body of creditors in the registration of these transfers.

The only power to register a share transfer, resettle the list of contributories, and rectify the Register of Members is that derived from the decision in *Onward Building Society*, which provides an expansive reading of our section 156 of the *Companies Law*. I acknowledge that I have a discretion, even after a winding up order has been made, to

register a share transfer. The order is available only in exceptional circumstances and will not be granted routinely. In general, the relief is available only where the applicant shows that the transfer will provide some positive benefit to the body of creditors (or to the body of contributories, where there is some possibility the company may be solvent).

In the present case, the applicants are unable to establish that the registration of these transfers will benefit the creditors as a whole in any way. Moreover, the subject of at least some of the transfer requests is S – Class Shares, the validity of which have been questioned. The draft order submitted for my consideration contains these provisions:

> 2. For the avoidance of any doubt, this Order does not determine and is without prejudice to any future submissions regarding or challenges as to the status or validity of the various classes of shares in the SPhinX Group of companies.
>
> 3. If and to the extent that any shares issued by the SphinX Group of companies are found (or otherwise finally considered) to not be valid share interests but to be some other right(s) or interest(s), the JOLs are directed to treat the applicable transferees as the holders of such right(s) or interest(s) previously held by the Transferors.

The possible invalidity of the S – Class Shares is an additional and compelling reason for refusing at this time to direct the JOLs to register the transfers.

The request of the JOLs in their summons is dismissed. The summons filed by Navasota is dismissed also.

Dated this 26th day of October, 2007

Henderson, J.

Henderson, J.
Judge of the Grand Court