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

CAUSE NO. 61/2007

IN THE MATTER OF THE COMPANIES LAW (2004 REVISION)

AND IN THE MATTER OF ORYX NATURAL RESOURCES

-Civil

23.03.07

Appearances: **Mr. Kenneth Farrow of Quin & Hampson for the Company**
Mr. Andrew Bolton of Appleby for Beagle Equities
Mr. Sam Dawson of Solomon Harris for a Creditor

Before: **Hon. Justice Henderson**

Heard: **April 2, 2007**

RULING

Beagle Equities Limited petitions for the winding up of Oryx Natural Resources and for the appointment of official liquidators. It is agreed that Beagle loaned the sum of $875,000 U.S. to Oryx on a demand-loan basis, and that neither principal nor interest have been paid.

A letter was sent by Beagle to Oryx in October 2006 which is sufficiently equivocal in its terms that it cannot be viewed as a true demand at all. It is essentially a request for negotiation. That was followed by a statutory demand under section 95(a) of the *Companies Law* delivered January 11, 2007. Mr. Randy Conn on behalf of the company has deposed to the circumstances. He says in his affirmation at paragraph 2.2:

> "The company does not immediately have the necessary cash in hand or at bank to pay the sum demanded. However, it has very substantial assets which should be on its balance sheet and from which the loan could be repaid."

He then particularises two claims: one for the approximate amount of U.S. $110 million against AMIL, and another for an unspecified amount arising from the sale of shares in a Congolese company. Mr. Conn says (at paragraph 2.4), "In view of these claims, I believe that Oryx is currently solvent on the balance sheet basis."

The balance sheet basis is not any part of the legal test of solvency in the Cayman Islands at the present time.

Mr. Farrow, for the company, makes two points. First, he says that the purported demand in October 2006 was not a demand in law at all. As a consequence, Beagle was not a creditor as at January 11, 2007. Since only a creditor can properly deliver a statutory demand and trigger the presumption provided for in section 95(a), Beagle has failed to obtain the benefit of that presumption.

Mr. Bolton, for present purposes, accepts that proposition, but says (correctly) that it is far from fatal in the present case. Section 94(c) gives me jurisdiction to wind up the company and appoint liquidators if "the company is unable to pay its debts". It has been well established that the test is a on a cash flow basis. The presumption provided for in section 95(a) is useful to petitioners on many occasions but it is not a necessary prerequisite. Under section 95(c) a company is deemed to be unable to pay its debts if "it is proved to the satisfaction of the court that the company is unable to pay its debts." The evidence of Mr. Conn establishes that very fact.

Mr. Farrow's second point is essentially a plea that the court exercise its discretion against a winding up on the ground that the unrealised contingent assets, the claims against third parties, can be best realised by the directors of the company without the additional complexity and expense which would arise necessarily from a liquidation.

I accept that there will be cases where additional complexity and expense would provide a cogent reason for an exercise of discretion against a winding up. Such cases must be the exception and not the rule. Ordinarily, where the petitioning creditor has proved, as Beagle has, that it has been owed for some considerable period of time a sum of money which the company is unable to pay, that creditor should be entitled to a winding up order.

When liquidators are dealing with a company whose only assets of substance are claims against third parties, it seems to me that the additional cost of which Mr. Farrow speaks should not be substantial. The liquidators will have to retain attorneys to assess the claims and pursue them. The company would have to do the same thing. In either case, the cost of the attorneys should be the same. The additional cost to be added by the liquidators is essentially the cost of understanding on a broad overview basis the nature of the claims and the advice given by the attorneys. That should not add any exceptional layer of complexity or expense.

For these reasons, I am exercising my discretion in favour of a winding up order and the appointment of Joint Official Liquidators.

THE COURT: I would like to see a creditors' committee put in place, and I would like to see a written retainer agreement between that committee and the official liquidators at an early stage.

Dated this 2nd day of April, 2007

Henderson, J.

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Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS