26-4-06

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 827 OF 2003
CAUSE NO. 828 OF 2003
CAUSE NO. 830 OF 2003

In the matter of The Companies Law (2000 Revision)
And in the matter of DAIRY HOLDINGS LIMITED (In Official Liquidation)
And in the matter of FOOD HOLDINGS LIMITED (In Official Liquidation)
And in the matter of PARMALAT CAPITAL FINANCE LIMITED (In Provisional Liquidation)

For circulation to SG+ Counsel 9/4/06.

BETWEEN:

(1) BANK OF AMERICA N.A.
(2) BLUE RIDGE INVESTMENTS, LLC
(3) BANC OF AMERICA SECURITIES LLC
(4) BANK OF AMERICA CORPORATION
(5) BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION
(6) BANC OF AMERICA SECURITIES LTD.
(7) BANK OF AMERICA INTERNATIONAL LTD.

Applicants

AND:

G. JAMES CLEAVER and GORDON MacRAE

Respondents

APPEARANCES:

Christopher Carr, Q.C. and Charles Quin, Q.C. for the Applicants

Michael Crystal, Q.C. and S. Corbett for the Respondents

LEGAL DEPARTMENT MAY 08 2006 Cayman Islands

BEFORE: MR. JUSTICE SANDERSON

Hearing Dates: April 3, 4 and 5, 2006

REASONS FOR JUDGMENT

1. These applications are brought for a judicial determination whether the Court should order the Joint Official Liquidators (JOLs) to disclose to the applicants (the Bank of

America and certain of its affiliates), a funding agreement that the JOLs have made with a third party. That agreement provides, *inter alia*, for funding by the third party of the litigation expenses incurred by the JOLs in a claim against the Bank of America, its affiliates, and others in the United States.

2. Dairy Holdings Limited and Food Holdings Limited (collectively called Food & Dairy) are in liquidation. This Court has appointed James Cleaver and Gordon McRae as Food & Dairy's Joint Official Liquidators. They are also Court appointed Joint Provisional Liquidators of Parmalat Capital Finance Limited.

3. The first three applicants all claim to be creditors of Food & Dairy in an amount exceeding U.S. $100,000,000. In addition the Bank of America claims to be a creditor of Parmalat Capital Finance Limited in an amount exceeding U.S. $116,000,000 but the applicants do not seek any relief against the Provisional Liquidators because section 159 of the Companies Law (2009 Revision) does not refer to provisional liquidators. None of those claims have yet been admitted by the JOLs or Provisional Liquidators.

4. The JOLs have caused Food & Dairy to commence proceedings in New York State against all seven of the above named applicants. I am told that claim alleges in part; fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, unjust enrichment, conspiracy and negligent misrepresentation. Those claims exceed U.S. $400,000,000.

5. Those proceedings are under case management by Judge Kaplan, a District Judge for the Southern District of New York. The time to file a defence and produce documents had not occurred as of the date of this hearing.

6. The JOLs say that the main, if not the only, remaining significant asset in the liquidation, is the claim in the lawsuit against the applicants. The JOLs did not have sufficient funds to retain lawyers to conduct those proceedings. It entered into an agreement with an unknown third party to provide financing to the JOLs to conduct them. In exchange the JOLs agreed to repay the third party from any proceeds received from the litigation. The JOLs describe that funding agreement in their Report to Creditors, in this way:

> "The JOLs have secured funding from a third party. The funding, which is a combined arrangement for both [Food and Dairy], is a multi-advance secured term loan (the 'Secured Term Loan') to fund litigation and liquidation costs. Repayment of the funding is due upon receipt of litigation recoveries by [Food and Dairy]. Interest is charged at LIBOR + 5.50% and an arrangement fee of 1.75% of the total loan has been charged. The JOLs have also agreed to pay the funder an additional fee, contingent upon actual litigation recoveries.
>
> The Secured Term Loan is secured upon litigation recoveries as defined and is a priority expense of the liquidation. The JOLs have entered into this arrangement in the best interests of the estate because, absent this funding, it would not have been possible to pursue the above mentioned litigation without entering a more costly contingent fee agreement with U.S. counsel. The JOLs believe the litigation represents the most likely route for recovery of assets for distribution to the creditors."

7. The first affidavit of Mr. Cleaver says:

> "The purpose of the Funding Agreement is to provide funding both for the U.S. Litigation, and to provide funding for the costs and expenses of the liquidation of Food and Dairy. The Funding Agreement is governed by the law of the state of New York."

8. The first affidavit of Wayne Porrit provides at paragraph 12 that the fee is payable on a sliding scale, but the JOLs declined to provide information as to what that scale might consist of.

9. I am also told that no funds have been used from the liquidation to fund the U.S. litigation. Funds have only been obtained from the third party lender and will only be repaid from the proceeds of that litigation. Mr. Cleaver also deposes, at paragraph 41(c), that the JOLs retain complete control over the U.S. proceedings.

10. The JOLs have not sought to obtain this Court's approval to enter into the funding agreement. That is somewhat unusual. Liquidators typically apply to Court in this jurisdiction for approval of significant agreements such as this. When asked why the liquidators did not apply for Court approval of the funding agreement Mr. Crystal Q.C., advised that it was not necessary because the JOLs had the standard powers granted to liquidators to enter into agreements on behalf of the company. He further added that an *ex parte* application by the JOLs, that would simply be rubber stamped by this Court could serve no useful purpose. As pointed out during his submission, that latter statement is, of course, incorrect.

11. Mr. Carr Q.C., for the Bank of America, submitted that I should draw a negative inference from the liquidators' failure to seek Court approval of the funding agreement. He suggested that it would be fair to conclude that the agreement may contain terms that the Court would view with disfavour and/or the funding agreement might not be in the best interests of the creditors as a whole.

12. At approximately the same time as the applicants filed their Ordinary Application, the JOLs of Food & Dairy filed an *ex parte* summons seeking direction whether the JOLs should produce a copy of the funding agreement. All applications were heard together.

13. The applicants seek production of the funding agreement pursuant to section 159 of the Companies Law (2004 Revision) which provides:

> "159. Where an order has been made for winding up a company by the Court or subject to the supervision of the Court, the Court may make such order for the inspection by the creditors and contributories of the company of its books and papers in the possession of the company as the Court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributories in conformity with the order of the Court but not further or otherwise."

The applicants ground their application on the following basis.

14. The first three applicants are creditors of Food & Dairy in the liquidations and have a right to see the funding agreement pursuant to section 159 of the Companies Law. They say its terms may ultimately affect the value of the estate available to all creditors, including themselves.

15. All applicants are defendants in the U.S. proceedings and they submit this Court has the discretion to order document production where that information may be needed or useful in defending their own interests rather than benefiting the winding-up.

16. The funding agreement may be champertous under the law of both New York State and the Cayman Islands. If it is champertous the applicants submit that this Court should be concerned about the liquidators, as officers of the court, engaging in "illegal" activity.

17. The applicants say that the funding agreement is producible in the New York proceedings and this Court should also consider that factor in determining whether it should be produced in the liquidation proceedings here.

18. The applicants say the funding agreement was made in breach of;

(a) section 13.3 of the Note Purchase Agreement between the Bank of America and Food & Dairy and;

(b) clause 5.1 of the Security Trust Agreement (which was part of the package of loan agreements):

because, Food & Dairy agreed to not allow its property to be subject to any lien or security interest and that the Trustee would have senior security interest over Food & Dairy property. The applicants say that the funding agreement may breach these clauses and they need to see it in order to make that determination.

I deal with those submissions as follows:

Jurisdiction

19. The JOLs argue that the applicants are not creditors or contributors of, or to Food & Dairy within the meaning of section 159 of the Companies Law (supra) because they are in truth bringing this application solely for the purpose of disrupting the U.S. proceedings, and not as creditors or contributors acting for the benefit of the estate. They also submit that applicants four to seven are not creditors or contributors at all and, therefore, have no status to seek the relief requested. They argue, therefore, that because

the applicants do not fall within section 159 of the Companies Law (supra), this court does not have jurisdiction to grant the relief requested.

20. Applicants one to three submit that they are creditors of Food & Dairy in the winding-up and as such do have the right to bring this application pursuant to section 159 of the Companies Law (supra). They suggest that once jurisdiction is established, the Court then has a discretion to exercise in determining if they have sufficient interest to properly bring the application.

21. Mr. Carr Q.C., goes further, however, on the issue of jurisdiction and says that this Court also has jurisdiction pursuant to section 108 of the Companies Law (supra) and as well, the inherent jurisdiction of the Court to govern the conduct of the JOLs as officers of the court. Section 108 of the Companies Law provides:

> "108. An official liquidator shall be described by the style of official liquidator of the particular company in respect of which he is appointed, and not by his individual name; he shall take into his custody or under his control all the property, effects and things in action to which the company is or appears to be entitled, and shall perform such duties in reference to the winding up of the company as may be imposed by the Court."

22. The inherent jurisdiction of the Grand Court to control the conduct of Court appointed liquidators was stated by Lord Millet in this way in *Deloitte & Touche A.G. v. Johnson and Another* [1999] 1 W.L.R. 1605 at 1612:

> "As liquidators of the company the liquidators are officers of the court. The court's inherent jurisdiction to control the conduct of its own officers is beyond dispute. But it does not follow that the plaintiff is a proper person to invoke that jurisdiction."

23. I conclude that the Court does have jurisdiction to order production of the funding agreement because:

(a) The first three applicants are *prima facie* creditors in the winding-up and fall under section 159 of the Companies Law;

(b) The Court has the authority under section 108 of the Companies Law to impose duties upon the liquidators in reference to the winding-up and;

(c) This Court has inherent jurisdiction to supervise the conduct of its own officers.

24. The Court's inherent jurisdiction is not removed because certain statutory provisions provide for particular types of orders to be made. The statutory and inherent jurisdictions of the Court co-exist so long as the statutory regime does not reduce, eliminate or change the Court's inherent powers. In this case the applicants based their application on section 159. If I am incorrect in my conclusion regarding section 108 or the inherent jurisdiction of the Court, I am nevertheless satisfied that I have jurisdiction, under section 159, to make the order requested, at least in respect of the first to third applicants as creditors.

Should the Court exercise its jurisdiction?

25. The question then becomes whether the Court should exercise its jurisdiction in this case and order that the applicants are entitled to inspect the funding agreement in the winding-up proceedings. The applicants submit that the funding agreement may ultimately be prejudicial to the creditors as a whole and therefore they should be entitled to see it and

perhaps challenge it in the liquidation proceedings in the Cayman Islands. The applicants say:

(a) There is no evidence that the JOLs were unable to obtain financing for the U.S. litigation from other creditors and they suggest that it would have been much preferred and likely more economic than the funding agreement;

(b) The proceedings in the U.S. will be lengthy and expensive and the funding arrangements will have been performed, with legal and liquidation costs paid. They say it will then be too late for the position and interest of Bank of America as a creditor to be protected;

(c) The assets of the companies will be depleted by the U.S. litigation and liquidation costs;

(d) That the effective interest rate on the funding alone is 7.25% plus an additional and undisclosed fee that is to be paid out of any funds recovered. The creditors want to know what the fee is, to consider whether it is reasonable and how much money will be paid out of the liquidation;

(e) The funding agreement also pays for liquidation costs. Therefore, the JOLs are in a conflict in entering into this agreement because it will ultimately provide substantial fees to themselves, potentially to the detriment of the creditors.

26. In summary, the applicants seek to persuade the Court that it is in the best interests of the liquidation to grant their application, on the basis set out in the previous paragraph.

27. The JOLs submit that the real purpose of this application is designed to thwart or stop the proceedings against the Bank of America and its affiliates in the United States. They say that the U.S. claim is by far the most significant asset in the liquidation. That there are no other funds available to allow those proceedings to go ahead and that entering into a contingency fee arrangement with U.S. attorneys would be more expensive than the present funding arrangement.

28. During the course of this hearing the JOLs advised the applicants that they would produce the funding agreement to the applicants, in the U.S. proceedings for use only in those proceedings. This was a change from the previously stated position that the funding agreement was not relevant or producible in the United States. The JOLs say that they changed their position because they learned that the applicants were going to plead in the United States action, that the funding agreement was champertous in the State of New York. The U.S. attorneys for the JOLs then decided that the funding agreement would be relevant and producible in the U.S. proceedings.

29. When I asked counsel for the JOLs why they continue to resist this application, Mr. Crystal Q.C. advised, it was because the JOLs did not wish to reveal the litigation strategy. With respect, this does not make sense. The funding agreement will be disclosed in the U.S. proceedings and any litigation strategy it might reveal, will therefore be disclosed to the U.S. defendants and may be fully used in those proceedings.

30. When I asked the applicants' counsel why they wanted to continue with their application, even though his clients were going to get a copy of the funding agreement, Mr. Carr Q.C. advised that it was in this Court's interest to ensure that its officers were not acting

illegally in any way, (either by entering into a champertous arrangement or breaching a contract,) that could adversely affect the creditors as a whole and his clients in particular. He also indicated that at least one of the primary reasons for his application was to allow his clients the opportunity to use it, to apply in this Court for an order that the JOLs discontinue the U.S. proceedings.

31. After some discussion with counsel I have concluded that the applicants primary purpose in this application is to obtain a copy of the funding agreement in the liquidation proceedings so that it can be examined and if legally possible an application brought in the winding-up proceedings here, to direct the JOLs to stop the U.S. proceedings on the basis that the funding agreement is either champertous or in breach of contract.

32. I think it is common ground that the disclosure of the funding agreement in the U.S. would not allow these applicants to use that document in the liquidation proceedings in the Cayman Islands, absent agreement of the parties or an order of the U.S. Court in which the document was disclosed. It is for this reason that the JOLs oppose the application. Namely, they do not want to give the applicants any basis for an application in this Court to stop or delay the U.S. proceedings.

33. The JOLs argue that if I conclude that the Court has jurisdiction to hear the applicants (which I have concluded), then I should refuse the application on the facts of this case. The JOLs submit that the Court should not grant the applicants' relief because they are not a party with "sufficient interests", to make the application.

34. The Privy Council's decision in *Deloitte & Touche A.G. v. Johnson and Another* [1999] 1 W.L.R. 1605 Lord Millet stated at 1611:

> "In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.
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> Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest *in the relief sought*. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator from an insolvent company on the application of a contributory who is not also a creditor: see *In re Corbenstoke Ltd. (No. 2)* [1990] B.C.L.C. 60. This case was criticised by the plaintiff: their Lordships consider that it was correctly decided.
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> ...
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> The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed form office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no step to remove them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators,.and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

35. Mr. Crystal Q.C., says that the object of the document production to the applicants is not for the benefit of the liquidation or the creditors generally but rather for the benefit of

those applicants to try to indirectly stop the U.S. proceedings. He argues, therefore, that the applicants have no "legitimate" interest in the relief sought.

36. He also relies upon the English Court of Appeal decision in *In re North Brazilian Sugar Factories* (1877) 37 Ch.D. 83. This case dealt with the interpretation to be given to section 156 of the English *Companies Act* 1862, which is the same as our section 159. There Cotton L.J. said at page 87:

> "But suppose these books were in the possession of the liquidator, would it be right to make an order for their inspection? I repeat as to this section what I said in *In re Imperial Continental Water Corporation* (1) as to sect. 115, that the powers given by it are *prima facie* to be exercised for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up. I do not say that in no case can inspection be ordered where it is not for the general benefit of the contributories, but *prima facie* it is only to be ordered with a view to their general benefit."

37. Lopes L.J. also stated at page 87-88:

> "It is right, however, that I should express my opinion on the other point. The words of sect. 156 are wide. But it must be borne in mind that this section is found in Part Iv. of the Act, relating to the winding-up of companies, which tends to the conclusion that its powers were given to be used for the purposes of the winding-up, and the remark in In re Imperial Continental Water Corporation (1) on sect. 115 applies equally to this section, that its powers were given with a view to the more beneficial winding-up of the company. Now what is the object for which inspection is sought here? Not the more beneficial winding-up of the company, but a collateral object, the obtaining discovery to enable individual shareholders to bring actions against the directors or promoters. The appeal must be dismissed."

38. The JOLs argue, therefore, that the funding agreement should not be disclosed because *prima facie* it is not for the general benefit of the creditors or the liquidation as a whole. It is clear from the decision of the Court of Appeal in *North Brazilian* (supra), that this is not an absolute rule that must be followed but, rather, is a rule that should be followed unless there is good reason for not doing so.

39. The decision in *In Re North Brazilian Sugar Factories* (supra) was considered by Millet J in *In Re DPR Futures Ltd.* [1989] 1 W.L.R. 778 where he stated at page 788 - 790;

> "A section in identical terms has been in every Companies Act since 1862. In re North Brazilian Sugar Factories (1887) 37 Ch.D. 83 the Court of Appeal held that (1) the section then in force applied only to documents in the possession of the company, and (2) it could be invoked only for the purpose of the winding up, for example, in order to prosecute claims against the directors or others which would increase the company's assets available to creditors or contributories. It was submitted to me that the second of these statements was strictly obiter, but it was the considered view of the court which has stood unchallenged for more than a century and, in my view, ought not to be departed from by a judge at first instance even if he were minded to depart from it, which I am not.
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> ...
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> Quite apart from this, in my judgment, it would not be right in this case to authorize inspection of any of the company's documents, whether in the possession of the police or of the company itself. Inspection is not sought by Mr. Page and Mr. Rycott as contributories for any purpose of the winding up, but as former directors in order to prepare their defence to criminal charges arising out of their conduct of the company's affairs.
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> It is significant that the section may be invoked only by creditors and contributories, not be debtors or directors. A creditor or contributory may inspect the company's documents in order to prosecute a claim against a director which will increase the company's assets and so benefit the winding up. It would be curious if the director's fortuitous status as a contributory gave him the right to invoke the section in order to resist the claim. That would be detrimental to the winding up. In my judgment, the section does not have that effect. For that purpose the director must rely on his ordinary right to discovery. A fortiori, he may not invoke the section in order to help him prepare his defence to criminal charges brought against him. That is altogether outside the winding up. Accordingly, I dismiss the application for inspection."

40. Mr. Carr, Q.C. submitted on behalf of the applicants that a more relaxed approach should be taken by the Courts in deciding whether to order document production in the winding-up proceedings, where those documents may be for the benefit of a party seeking to defend a claim by a liquidator or others. He starts with an examination of the words of section 159 and points out that they do not require that the application be for the general benefit of the liquidation. Rather, they say that if the Court thinks it "just" it may order inspection of documents in the company's possession. He submits that what is "just"

must be the main consideration and that the exercise in determining what is just, is a balancing exercise contrasting and weighing the interests of the applicants against the interests of the other creditors or the liquidation in general.

41. He refers to the Australian edition of MacPherson's Law of Company Liquidation (Professor Andrew Keery, 2001) at page 318;

> "The court's power is discretionary and although orders are sometimes made at the hearing of the winding-up petition in order to enable the petitioner to cross-examine officers of the company, there is no right to such an order and it will not be granted to a petitioner who proposes to fish for evidence. Orders may be granted subject to conditions. It appears to be the prevailing view that inspection exists for the purpose of the winding-up and not for the benefit of individual shareholders, so leave to inspect would not be granted where there was no prospect of increasing the assets of the company and the applicant was simply hoping to obtain evidence for the purpose of taking private proceedings against the directors. But, in recent years it has been suggested that the court may grant leave other than where inspection is needed for the purpose of the winding-up. Professors Sealy and Milman suggest that leave may be given where information needs to be obtained either by a creditor in order to permit the defence of a claim made against it pursuant to a guarantee, or by an insurance company which is subject to proceedings. Certain in Australia there have been a number of cases where creditors have been able to obtain orders for inspection for the purpose of furthering their own interests rather than benefiting the winding-up. Inspection will not be granted as a matter of course and even an appellate court in Australia (the Full Court of the Federal Court) has warned against overly extending the power to inspect. Whether or not inspection will be permitted depends on the court assessing the purpose of the applicant and the utility or detriment of allowing inspection."

42. He then referred to several Australian cases where the Court ordered the liquidator to produce documents. In *Re MMC Pty Ltd.* (1992) 10 Australian Law Cases ("ACLC") 365, Senior Master Mahoney said at page 370:

> "The ultimate question is whether, in the circumstances of this case, it is "just" to make the order sought. For the reasons I have already given, particularly as to why an order in this proceeding should be preferred to the alternative route provided under Rule 32.7, I consider that it is; but so that those (that is, the directors) who might be adversely affected by the order may be heard if they wish, the order should be such that they have a reasonable opportunity to apply for it to be set aside before the liquidator acts upon it. It will be framed accordingly and provide for service of copies of it on each of the directors the applicant proposes to sue under section 556."

43. In *Re BPTC Ltd.* (1991-2) 7 Australian Corporation and Securities Report ("ACSR") 291, McLelland J. stated at page 292-293:

> "I was referred to the decision of the English Court of Appeal in Re North Brazilian Sugar Factories [1887] 37 ChD 83 in which consideration was given (obiter) to an equivalent provision, s. 156 of the Companies Act 1862 (UK). There is a statement in that case to the effect that the obtaining of evidence in support of actions by individual shareholders against the directors of a company in the course of being wound up necessarily lies outside the proper ambit of the section. In my opinion such a limited view cannot be regarded as acceptable at the present day. Facilitation of the accountability to individual creditors or contributories, as well as to the company itself, of those who participated in the conduct of its affairs prior to the winding up should nowadays be regarded as sufficiently related to the winding up to fall within the scope of the section."

44. In *IACS Pty Ltd. v. Australian Flower Export Pty Ltd.* (1993) 11 ACLC 618 Rowland J. held at page 623:

> "Our rules of Court, however, do not allow for discovery of documents from a non-party, although the *Federal Court Rules* by O 15A do, so that many of the reasons of Senior Master Mahony for allowing inspection has no application in this case. However, it seems to me that the introduction of s 592 into the *Corporations Law* (and its predecessors into the *Companies Code*) and especially into the part of the *Corporations Law* dealing with winding up is particularly relevant and could in fact have the effect that Senior Master Mahoney determined i.e. widening the circumstances in which it is "just" for a court to order that a creditor or contributory can inspect the books of a company which has been wound up. Further, *Re North Brazilian Sugar Factories* does not preclude this conclusion but merely makes a *prima facie* determination against such a conclusion. It could very well be to the benefit of the winding up if a creditor could establish a claim against the directors of the company: See also *Ross Investments v. Farrow Finance Co Ltd (In Liq)*, unreported; SCt of VIC (Eames J); No 4926 of 1993: 20 April 1993."

45. It is correct that the legislation in Australia is somewhat different from the Cayman Islands legislation and the particular Australian legislation did have some influence on the Court's reasoning there. Notwithstanding those differences in the legislation I think that the Australian Courts were, however, inclined to take a broader view than that taken by Millet J. in *DPR Futures Ltd.* (supra).

46. I conclude that the proper test to be applied in the Cayman Islands is that as outlined by the English Court of Appeal in *North Brazilian Sugar Factories* (supra) and the Privy Council in *Deloitte & Touche* (supra). I also accept the interpretation given by Rowland J. at page 623, namely, that when the Court is exercising either its statutory or inherent jurisdiction to require the company to produce documents in a liquidation, the Court's powers are to be exercised *prima facie* for the purpose of winding-up and for the benefit of those who are interested in the winding-up. The Court must examine and determine the object for the which the inspection is sought. However, even if the Court's conclusion is that the object of the inspection is not primarily for the benefit of the liquidation or those who are interested in the winding-up, but rather for the personal benefit of the applicants, it may, if there is good reason to do so and justice requires it, order inspection of the documents when such inspection may have a secondary benefit to the liquidation.

47. As I have previously stated, I find that the reason the applicants seek production or inspection of the funding agreement is for the purpose of using it here to apply to have this Court direct the JOLs to discontinue the US proceedings. I am satisfied that *prima facie* there is no real economic interest to the liquidation that would be served by ordering inspection of the funding agreement. The evidence before the Court satisfied me on balance, that it was in the economic interest of the liquidation to proceed with the funding agreement in the terms that have been outlined. The objective of this application is not to improve upon those terms or increase recovery in the winding-up. It is not in the interests of the creditors generally that it be produced.

48. The applicants further argue that the Court should be concerned to govern the conduct of its officers, if the officers are engaging in illegal activity, for example, champerty or breach of contract. The applicants also say that the JOLs conduct should be transparent and above reproach.

Champerty

49. The applicants argue that the funding agreement is champertous and illegal in both New York and the Cayman Islands. Both parties filed considerable affidavit evidence dealing with the issue of champerty in New York. I was not asked to make a determination of that issue. Even if I was, it may not have been possible. The authors of the affidavits were diametrically opposed in their views. Although U.S. case law was cited it was not provided to the Court and there was no cross-examination on the affidavits. All I am able to comfortably conclude from a review of the affidavit evidence is that the applicants might have some ground for concluding that the funding agreement is champertous in New York. I also recognize that the company has grounds that may succeed in defeating the champerty argument.

50. I am advised that the issue of champerty will be raised and fully argued in the New York proceedings. The funding agreement was made there, the money is being advanced there, and the action is being litigated there. The issue of whether or not the funding agreement is champertous under New York law, is clearly best determined by the New York Court in the proceedings before it. This Court should not attempt to resolve that issue as it is both unnecessary and undesirable in these circumstances.

51. The applicants also argue that the funding agreement is champertous and perhaps even criminal under the law of the Cayman Islands and therefore the Court should be concerned about the conduct of its officers and allow the document to be inspected so those issues can be determined here.

52. However, the funding agreement was made in the United States with an American lender and is subject to the laws of the United States. Champerty and its derivative, contingency fee agreements, are permitted in many other jurisdictions. Legislation relating to champerty deals with the appropriate administration of justice in that particular jurisdiction. I can see nothing wrong in principle with a liquidator, acting as an officer of this Court, entering into a funding arrangement in the United States, which he may be entitled to do, even if such an agreement would be prohibited or illegal in the Cayman Islands. Further, in Dicey and Morris on the Conflict of Laws, 13th Edition 2000, Stuart & Maxwell, the authors at page 1282, paragraph 32-39, indicate that "if X enters into an agreement in England with A, such that A shall conduct an action for X in the United States on the terms of A being paid for his work by a share of the damages, if any, to be recovered by X in the action, then the contract is valid."

53. I agree with that principle. Accordingly, the argument that the funding agreement might be champertous in the U.S. or the Cayman Islands does not persuade me that the funding agreement should be produced because:

(a) whether it is champertous in the United States is a matter for the U.S. Court to determine;

(b) whether such an agreement would be champertous in the Grand Cayman is not relevant because the agreement was not made or being performed here and therefore there is no "wrong" being committed here.

54. The applicants also argue that the funding agreement breaches the provisions of the Note Purchase Agreements and the Security Trust Agreement. Both parties filed extensive affidavit evidence from their respective New York attorneys on this issue. They are almost entirely contradictory of each other. It is not possible for me on the affidavit evidence, to property conclude whether a breach of these agreements has occurred under the laws of the State of New York (for the same reasons mentioned above, on the issue of champerty).

55. Further, even assuming that the applicants are correct and the funding agreement breaches the Note Purchase Agreement or the Security Trust Agreement, I do not think the appropriate remedy would be to enjoin the liquidators from continuing the U.S. proceedings. If both the Bank of America and its affiliates have suffered damages as a result of breaches by the company (through the JOLs) then those matters are best resolved by the U.S. Courts as well. The Bank of America no doubt has options available in the U.S. such as filing a counterclaim for damages and set-off, or seeking declaratory relief, or applying to the U.S. Court for an order that they are at liberty to use the funding agreement in the liquidation proceedings here, on the basis that it is a breach of the U.S. securities arrangements.

Conclusion

56. This Court has both statutory and inherent jurisdiction to order liquidators of a company to allow a creditor or contributor to inspect any document in its possession. Those powers are *prima facie* to be exercised for the purpose of the winding-up and for the benefit of those who are interested in the winding-up. The Court may, however, also order inspection in other circumstances where justice requires that it be done.

57. The Court must, therefore, examine and consider the primary purpose for which the inspection is sought. In the present case the primary purpose for which the application is brought is to obtain information to allow the applicants the opportunity to apply here for an order that the liquidators' proceedings in the U.S. be stopped. Accordingly, justice does not require and there is no good reason for departing from the ordinary rule that the Court's powers are *prima facie* to be exercised for the purpose of the winding-up and for those who are interested in the winding-up.

58. The applicants' concerns can and should more appropriately be dealt with in the U.S. litigation. The transaction occurred there and is governed by New York law. There is no evidence before this Court that the liquidators, as officers of this Court, have conducted themselves in such a way as to require this Court's intervention at this time. If the liquidators have in fact misconducted themselves and as a result the Bank of America or its affiliates have suffered damages and they are unable to bring proceedings or seek appropriate relief in the United States, it is always open for them to seek leave of this Court to commence proceedings against the liquidators here. I do not, however, think it is desirable at this time to resolve those issues. I think the applicants must first seek to

attempt to resolve them in the United States. To allow document production and inspection at this time could have the likely effect of a lengthy and protracted application in the Cayman Islands in which this Court would be asked to determine questions of U.S. law, on disputed and contradictory opinion evidence for the purpose of stopping what are *prima facie* legitimate proceedings in the U.S.

59. The interests of all creditors are best served by allowing the U.S. proceedings to go forward. The merits of those claims are obviously best resolved in the United States. All of the potential defences available in that jurisdiction can be employed. The funding agreement is being produced in those actions. The reasons advanced by the applicants here do not persuade me that they are interested in anything other than using the funding agreement to obtain an order from this Court to order the JOLs to discontinue proceedings which might ultimately prove beneficial to the liquidation.

60. The applicants have failed to satisfy this Court that there is any real advantage or benefit to the liquidation of the funding agreement it produced here. It seems that it could only be advantageous to the applicants and potentially disadvantageous to all other creditors. The applicants have also failed to establish that the JOLs have misconducted themselves in this jurisdiction. If they have entered into "illegal" contracts or committed breaches of contract that is obviously a matter of U.S. law and therefore appropriately dealt with there.

61. Accordingly, the applications for production and inspection of the funding agreement is dismissed. If costs are not agreed, then the parties may make written submissions to the Court within fourteen days.

62. Although other relief was claimed by the applicants in the Ordinary Application, it was not pursued or requested in argument. If counsel seeks an order in respect of paragraphs 2, 3 and 4 of the Ordinary Application, he should do so in writing within fourteen days and the JOLs shall have fourteen days thereafter to reply.

Dated: April 26, 2006

Sanderson, J.

Judge of the Grand Court