IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

2/08/10

CAUSE NO. FSD 54 OF 2009

IN THE MATTER OF THE LIQUIDATION OF SAAD INVESTMENT AND FINANCE COMPANY LTD #5 ("SIFCO #5")

IN CHAMBERS
THE 23 July 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: **Mr. David Herbert for the Kinetic, the Official Liquidators of SIFCO #5**
Mr. Payne for Barclays
Mr. Haynes of Walkers for Saad Investments Company Limited ("SICL")
Mr. Hayden of Mourant for Ahmad Hamad Algosaibi and Brothers Company ("AHAB")

REASONS FOR RULING

1. SIFCO #5 is one of a group of companies (the "Saad Group") some 17 of which (including SIFCO #5) are now in official liquidation before this Court. SICL is another of the 17 and as the holding company of the Saad Group having loaned money to SIFCO #5, claims as both a shareholder and as a creditor of SIFCO #5.

2. AHAB is a well known Saudi Arabian partnership that has instituted action before this Court involving allegations of fraud against the Saad Group, including SIFCO #5 and their principal Mr. Maan Al Sanea; himself a well known businessman in Saudi Arabia.

3. The issue to be resolved is whether in the circumstances presented, the JOLs of SIFCO #5 are obliged to arrange for the formation of a liquidation committee and if so, whether AHAB is qualified and entitled to be a member of it.

4. The issue arises against the background of the JOLs having unsuccessfully, from their point of view, attempted to convene a meeting of creditors and shareholders for the purpose of electing a liquidation committee ("LC") from amongst them.

5. Only three candidates presented themselves as possible appointees: AHAB, SICL and Barclays. While these would satisfy the statutory minimum as explained below, the JOLs object to AHAB on the basis of what the JOLs say is its apparent conflict of interest and propose that the Court, in the exercise of its discretion under the Rules where it is shown to be practically impossible to convene an LC in keeping with the Rules, either appoint only SICL and Barclays or do away with the LC altogether. AHAB's apparent conflict of interest is said to arise from the circumstance of it having sued the Saad Group including SIFCO #5, for amounts which would equate to all their assets even while AHAB seeks to claim as a creditor in the SIFCO #5 and other liquidations.

6. I decided that the LC shall be convened as constituted by AHAB, Barclays and SICL but without any remit to advise the JOLs upon anything to do either with AHAB's claim as creditor in the liquidations or with AHAB's fraud action.

7. These are my reasons.

JURISDICTION

8. The Companies Winding Up Rules ("CWR") Order 9 Rule 11(1) requires that:

> *"A liquidation committee shall be established in respect of every company which is being wound up by the Court."*

9. O.9 r.1(7) provides:

> *"If the official liquidator is satisfied, for whatever reason, that it will be practically impossible to establish a liquidation committee in accordance with the foregoing rules, he shall apply to the court for*
>
> *...*
>
> *(b) a direction permitting the establishment of a liquidation committee with a fewer number of members or a different combination of creditors and contributories."*

10. The JOLs having determined that SIFCO #5 is of doubtful solvency, O.9 r.1(6) also applies and states:

> *"In the case of a company determined by its official liquidator to be of doubtful solvency the liquidation committee shall comprise not less than three and no more than six members of whom a majority shall be creditors and at least one of whom shall be a contributory elected at a meeting of contributories."*

11. The JOLs advise me that having regard to the circumstances described above, they are satisfied that it is "practically impossible" to form an LC in compliance with Order 9 Rule 1(6). In essence, the present question to be answered is therefore whether I agree with the JOLs.

12. While at the outset of the hearing AHAB's claim in the liquidation had not yet been admitted for any purposes, by the time of the resumed hearing in this matter (1 July 2010), it had been admitted by the JOLs for the nominal amount of $1 for the purposes of voting. This became the case in respect of SICL's claim as well.

13. At the outset the JOLs had also argued that there were no creditors who could be elected to form the LC because none of the two purporting to be available – AHAB and SICL – had an incontrovertible right to participate. This was, circuitously, because their status as creditors had not yet been formally recognized.

14. That formal position having been changed by the time of the resumed hearing, so did the arguments.

15. Now it is said by the JOLs, as already mentioned, that although AHAB is technically a creditor, nonetheless, for all practical purposes, AHAB's institution of suit seeking to take all the assets of SIFCO #5, places it in an irreconcilable conflict of interest such that AHAB should be regarded as an outside third party plaintiff rather than as a creditor within the liquidation. The fundamental reason is that its claim is not yet one coming within the liquidation estate and so to be regarded as a claim to part of the assets deemed to be held upon the statutory trust created for the benefit of creditors and/or shareholders upon the company going into liquidation ***(Ayerst v C. K. Construction Ltd.* [1976] A.C. 167; 179-180)**. Rather, it is said that AHAB's claims falls outside the estate as being a competing claim to those of the creditors and shareholders to ownership of all the assets of the estate. That view of the position would have this Court regard AHAB not as a

creditor, but as a third party having a competing *but as yet unproven claim* to the assets of the liquidation estate and despite the formal admission of AHAB's claim.

16. I accept that the Court has jurisdiction to relieve the JOLs of their obligation to form an LC but not on the basis simply that AHAB is not to be regarded as a creditor resulting in insufficient numbers of candidates. Indeed, I affirm that AHAB has a right to be regarded for these purposes as a creditor, its claim having been admitted even on the limited basis identified. What I do accept though, is that there is a "practical impossibility" by virtue of AHAB's conflict of interest – standing in the way of the formation of an LC whose members may be regarded for all purposes of the LC as being able in an objective manner, to carry out the fiduciary responsibilities of membership. See ***In Re Bulmer Exparte Greaves*** ***[1937] 1 Ch. 499; Re W & A Glaser Ltd. [1994] BCC 199;*** and ***In Re R.T. Hawkins & Co. Ltd. [1952] 1 Ch. 881;*** which confirm that members of the LC serve in a representative and fiduciary capacity.

17. That kind of practical impossibility being recognised, I think that the jurisdiction under the C.W.R. O.9 r.1(7) Rules can be invoked. But, in the exercise of that jurisdiction, I also accept that the guiding principle remains that the Court should consider what possible practical constitution of a liquidation committee would best serve the interests of the stakeholders in SIFCO #5 as a whole, even while recognizing that stakeholders are likely to have distinct and different interests in the conduct of the liquidation.

18. If AHAB is excluded from the already minimal number of three, it becomes not only practically, but also physically impossible, to form an LC in keeping with the CWR. This is the scenario that suggested in the first place that the JOLs are allowed to apply to the Court as they have for disposing with the requirement altogether.

19. But, to my mind, the possible resolution of the problem presented by potential conflicts of interest is not necessarily "all or nothing" – not necessarily an LC constituted by the JOLs in keeping strictly with the given remit of the JOLs and in keeping with the requirements of the CWR or no LC at all.

20. The jurisdiction of the Court invoked here is one that operates in the context of practical impossibility of strict compliance with the requirements of the CWR and so it is not a jurisdiction to be fettered by those very requirements. For reasons more fully discussed below, I consider that the jurisdiction is certainly broad enough to allow the Court not only to constitute but also to *define the powers* of an LC as constituted by the Court, something that the JOLs have no power, themselves, to do under the CWR. It is, moreover, a jurisdiction to be exercised in light of the clear preference expressed in CWR O.9 r.1(1) that there shall be an LC in respect of every company being wound up by the Court.

21. Accordingly, my decision in the terms already mentioned above, as is apparent from its terms, is intended to avoid the potential conflicts of interest in which any member of the LC might be placed (including AHAB itself) in having to or in seeking to advise the JOLs in any way in respect of AHAB's claim in the liquidation or for that matter, in any way in relation to AHAB's suit against

SIFCO #5. This will leave the LC free to carry out its other important functions, particularly in respect of the approval of the remuneration and expenses of the JOLs (an issue on which all LC members may be expected to act in the same interests and generally as well on behalf of all others interested in the estate).

22. This is a conclusion I reach for the further reason given below and notwithstanding the provisions of CWR O.9 r.1(7).

23. As already noted, by themselves, the JOLs have no authority to curtail the ordinary remit of an LC so as to avoid concerns over conflicts of interest. While that ordinary remit is not spelt out in the CWR, it is well recognized in practice and by convention to include the right to be consulted on such matters as the institution of or defence of legal action which might place the liquidation estate at significant risk of costs or damages.

24. The usual remit involves several other matters as well, as appears from the Insolvency Rules 1986 of the UK in the context of a creditor's winding up:

    (i) the right to access to the liquidators' records (IR 1986 r.4, 4. 155(3);

    (ii) the right to fix the liquidators' remuneration (R.4. 127 (3));

    (iii) to sanction the continuance of the directors' powers (Insolvency Act ("IA") 1986 s.13;

    (iv) to sanction the payment of any class of creditors in full, to compromise with creditors, members or other debtors (IA 1986, S. 165 (2) and Sch. 4 Part 1);

(v) to sanction the acceptance of shares, policies or other like interests in a transferee company as consideration for the sale of the company's property (IA 1986, s.110);

(vi) to sanction the entering into of a transaction with a connected person;

(vii) to review the liquidators' security from time to time [(but in the context of the CWR, only as such security may be required beyond that set by Regulation 8 of the local Insolvency Practitioners Regulations)].

25. In the exercise of its discretion, it seems to me that the Court should, if possible, allow an LC to exercise as many of those important rights and powers as circumstances might permit; including even where there is perceived to be a possibility of conflicts of interests which may, otherwise than by the complete dispensation with an LC, be avoided.

26. The case law supports the proposition that the discretion exists in sufficiently broad terms to allow the Court to take that approach. See ***Donaldson v O'Sullivan (Official Receiver intervening [2009] 1WLR 924***. In that case in the analogous context of personal bankruptcy, it is confirmed that the process is a court-controlled process in relation to which the Court has wide powers, not limited to those conferred expressly by the relevant legislation and intended to enable the Court to appoint office holders (there a successor to a trustee in bankruptcy) implicitly on such terms as may be necessary for the administration of the estate. See also ***Re BCCI S.A. (No. 2) 1992 BCC 715*** where the wide discretionary powers of the Court expressed in section 195 of the IA 1986 that "*...the court may as to all matters relating to the winding up of a company have*

regard to the interests of the creditors or contributories.... " was considered. The same power is expressed in section 115 (1) of the local Companies Law (2009 Revision) except that the word "*may*" is replaced by the mandatory "*shall*".

27. In that ***BCCI*** case, the power was construed as being wide enough to permit the Court granting approval for the entering into certain agreements by the liquidators, notwithstanding that a liquidation committee which would ordinarily be asked to grant such approval could not be constituted and notwithstanding the disapproval of a minority of creditors who had formed themselves into an ad hoc committee.

28. By narrowing the remit of the LC to avoid conflicts of interest in this case, SICL and AHAB can be included qua creditors and Barclays qua contributory, thus satisfying the minimum number of three (this being a liquidation of doubtful solvency). I consider the giving of such directions to the JOLs to be well within the bounds of the inherent or statutory discretion of the Court as recognised and discussed in the cases.

29. The JOLs are, of course, always at liberty to apply to the Court in the event, for instance, some other unforeseen issue of conflict of interest were to arise. The JOLs shall now proceed to issue their certificate of the constitution of the LC as directed and in keeping with CWR Form No. 15.

Hon. Anthony Smellie
Chief Justice

August 2, 2010