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IN THE GRAND COURT OF THE CAYMAN ISLANDS



FSD 0002/2010ASCJ
FSD 0003/2010ASCJ
FSD 0004/2010ASCJ
FSD 0005/2010ASCJ
FSD 0006/2010ASCJ
FSD 0007/2010ASCJ
FSD 0008/2010ASCJ
FSD 0009/2010ASCJ

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)
AND IN THE MATTER OF the Insolvency Practitioners' Regulations 2008
AND IN THE MATTER OF THE Companies Winding Up (Amendment) Rules 2010

AND

IN THE MATTER OF AWAL FINANCE COMPANY LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FINANCE COMPANY (No. 2) LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FINANCE COMPANY (No. 3) LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FINANCE COMPANY (No. 4) LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FINANCE COMPANY (No. 5) LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FINANCE COMPANY (No. 6) LIMITED
(IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL FEEDER 1 FUND (IN OFFICIAL LIQUIDATION)

IN THE MATTER OF AWAL MASTER FUND (IN OFFICIAL LIQUIDATION)

(together "the AWALCOs")

IN CHAMBERS
THE 31ST MAY 2011
BEFORE THE HON. CHIEF JUSTICE

Appearances: Mr. David Dinner for the Joint Official Liquidators (“the JOLs”) (with him Mr. Ian Lambert, Mr. Russell Smith and Mr. Russell Homer of the JOLs)

Mr. George Keightley of Mourant for AHAB (with him Chantelle Whittaker (trainee))

RULING

1. The JOLs of the AWALCos apply pursuant to CWR O.9 r.1(7) for directions dispensing with the need to establish liquidation committees in the respective liquidations on the basis that it is practically impossible to do so. The practical impossibility is said to have come about as follows.
2. The JOLs have summarily determined that the AWALCOs are solvent. This they did by reliance on CWR Order 8 r.1(1) which is in these terms:

“(1) For the purpose of convening meetings and establishing a liquidation committee, the official liquidator shall summarily determine whether, in his opinion, the company should be regarded as being

- (a) solvent;*
- (b) insolvent; or*
- (c) of doubtful solvency,*

and the official liquidator’s determination shall be final and binding upon the company’s creditors and contributories for the purposes of this Order and Order 9 unless and until it is changed by the official liquidator in accordance with this Rule.”

3. Having determined that the AWALCOs are solvent, the JOLs conclude that any liquidation committee would comprise only of contributories having regard to Order 9 rule 1(3) which reads:

“3. The liquidation committee shall comprise not less than three nor more than five creditors (if the official liquidator has determined that the company should be regarded as insolvent)

or contributories (if the official liquidator has determined that the company should be regarded as solvent).”

4. As there is only one contributory in respect of each of the companies (that is: Awal Bank (presently itself in administration in Bahrain) in respect of the six Awal Finance companies and Awal Feeder 1 Fund in respect of Awal Master Fund; the literal effect of rule 1(3) requiring not less than three contributories, could not be met. Hence the “practical impossibility”.
5. AHAB in its capacity as a creditor in each liquidation (having been admitted to the notional value of \$1 in each) objects to the dispensation from the requirement to form liquidation committees. It argues that any dispensation should not be given on the basis that the companies are solvent because that is a determination at which the JOLs have arrived erroneously and so have also arrived erroneously at the view that the AWALCOs’ liquidation committees should comprise only of contributories.
6. While AHAB recognises that the determination of solvency, doubtful solvency or insolvency is a matter for the JOLs pursuant to Order 8 4. 1(1); Mr. Keightley on its behalf argues nonetheless that if proper provision is made as required for AHAB’s full claim of \$9.2 billion, treating it as a contingent claim for which full provision should be made; the JOLs would be bound to determine that the AWALCOs are, at the very best, of doubtful solvency. Such a proper determination would then require them to reconsider the make up of any proposed liquidation committee so as to involve not only contributories but creditors as well. This is what Order 9 r. (1)(6) provides:

“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 nor more than six members, of whom the majority

shall be creditors elected at a meeting of creditors and at least one of whom shall be a contributory elected at a meeting of contributories.”

7. With the matter approached in that way, AHAB would qualify for membership and any dispensation sought of the Court would then involve merely a reduction in numbers to two (AHAB and Awal Bank or Awal Feeder 1 Fund as the case may be); not the complete dispensing away with liquidation committees as now proposed by the JOLs.
8. While it is a matter for the JOLs and not for the court to arrive at the summary determination of the opinion as to solvency (O.8 r.1); the issues raised require me to consider the basis on which the JOLs arrive at that determination in this case. If I am not convinced about that, I would not be obliged or inclined to accede to their application for directions to dispense with the convening of liquidation committees.
9. Essentially, the view taken by the JOLs is that Section 92(d) of the Companies Law – the provision under which the Companies were placed into liquidation – continues to govern the relationship between the Companies and their creditors; such that only proven debts, not contingent debts, must be taken into account when determining the question of the solvency of the companies.
10. Section 92 (4) provides that:

“A company may be wound up by the Court if–

...
...
...

(d) the company is unable to pay its debts....”

11. And of relevance also, Section 93 provides:

“A company shall be deemed to be unable to pay its debts if–

- (a) *a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;*
- (b) *execution of other process issued on a judgment ...against the company, is returned unsatisfied in whole or in part; or*
- (c) *it is proved to the satisfaction of the courts that the company is unable to pay its debts."*

12. It is the JOLs' position that none of those bases upon which a company may be wound up (including upon which the AWALCOs are being wound up) include a petition based only upon an unproven contingent claim of the kind asserted by AHAB here. They say that as the basis for a creditors' petition is the inability of a company to pay its actual debts – (section 92(d)) – the question becomes one of whether the Companies' assets are sufficient to meet their actual liabilities as and when they arise. The petition for a contingent debt (future or unascertained) cannot therefore ground a creditor's petition to wind up. It follows that they are not obliged to make provision for such a debt – a provision that, on the balance sheet basis, they recognise would render the Companies insolvent because their assets would then be far outstripped by their liabilities including AHAB's contingent debt of \$9.2 billion.
13. As authority for that proposition Mr. Dinner for the JOLs relied upon two case authorities in particular.
14. In the matter of *Onyx Natural Resource 2007 CILR Note 6* ("*Onyx*"), Justice Henderson reviewed section 92(d) of the Companies Law (section 94(c) of the 2005 Revision as it then was) and held that:

“It was well established that the legal test for solvency for the purposes of the Companies Law, S. 94(c), was on a cash flow and not on a balance sheet basis. That the company had unrealised contingent assets on its balance sheet in the forms of claims against third parties was not a factor enabling the court to exercise its discretion against winding it up.”

15. AHAB argues that the Companies are insolvent on the basis that AHAB has submitted Proofs of Debt against them in the amount of USD9.2 billion. AHAB’s claim in the liquidation stems from its claims against the Companies (with the exception of Awal Master Fund and Awal Finance Company No. 6) in Cause FSD No. 54 of 2009. The claim is defended and so until a judgment has been given in FSD 54 of 2009, AHAB’s claims remain unascertained and contingent. Pending judgment, no amounts are due and owing from the Applicants to AHAB.
16. AHAB’s claims are therefore at best, say the JOLs, future contingent liabilities on the Companies’ balance sheets and so, on the basis of the pronouncement in *Onyx*, do not factor into a determination of the question of solvency of the Companies. The test for solvency does not include consideration of a company’s balance sheet.
17. The JOLs also rely upon the following dictum from the Court of Appeal in *In the Matter of Strategic Turnaround Master Partnership Limited 2008 CILR 447* (“*Strategic Turnaround*”):

“The Companies Law (2007 Revision), as Mr. Akiwumi has been at pains to point out, is at present at least in very different terms from its English equivalent. In England, the Insolvency Act 1986 includes s.123(2), which provides that—

“a company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.”

No such provision has yet been introduced into Cayman law, and so far as I can see, it will not be introduced when the Companies (Amendment) Law 2007 comes into force. Section 123(2) of the English Insolvency Act 1986 was introduced to allow the “balance sheet” test to prove that a company is unable to pay its debts, in addition to the “cash flow” test. Up until its introduction, a respondent in England wishing to rely on the “balance sheet” test had to petition on the “just and equitable” ground.”

[(While overturned on other aspects by the Privy Council, this dictum from the Court of Appeal’s decision remains relevant:)]

18. While the foregoing dicta from Onyx and Strategic Turnaround will govern the circumstances under which a creditor’s petition to wind up will be determined, I do not think they apply so as to govern the present situation which arises in circumstances such as here where the Companies are already in winding up.
19. In the present circumstances, I entertain no doubt that the JOLs are under an obligation to take account of and make provision for contingent liabilities of the Companies when determining the state of their solvency.
20. In this regard, Mr. Keightley is plainly correct when he submits that section 139(i) of the Companies Law applies and which provide as follows:

“139(i) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.”

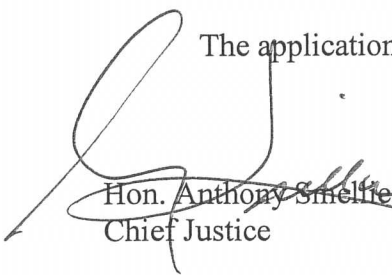
21. It has been said of this provision (as it then appeared as section 161 of the Companies Law (2004 Revision):

“It will be immediately apparent from this provision, that whether or not a contingent, or future, claim is admissible to proof cannot depend only on whether it is possible to make a just estimate of it. If the debt is one which exists, albeit payable only upon a contingency, it shall be

admissible to proof. The requirement then arises for a just estimate of its value, so far as possible, to be made."

22. See *In Re Bristol Fund 2008 CILR 317 AT 336*, in which it was decided that a debt, for which provision should be made in the winding up, included a debt or liability (in that case as could arise from an indemnity given by the company to its former auditors) to which a company may become subject after the date of liquidation by reason of any obligation incurred before that date. Such is the nature of the contingent liability that may become actualised in the event of AHAB's claim in FSD No 54 of 2009 succeeding.
23. The fact that when a company is in liquidation, future or contingent debts are debts which are provable in the liquidation pursuant to English Insolvency Rules r. 12.3 (enshrined in s.139(1) of the Companies Law); was also specifically recognised by Vos JA. in giving the judgment of the Court of Appeal in *Strategic Turnaround* (above, at paragraphs 24 and 42).
24. With all the foregoing in mind, I am unable to accept the premise on which the JOLs present application is presented, as I remain unconvinced about the appropriateness of their determination that the Companies are solvent. It seems to me that if proper regard is had of AHAB's massive claim; these Companies would at best be regarded as being of doubtful solvency. That being so, I may not grant dispensation from the CWR in respect of the requirement that liquidation committees be convened.

The applications are refused.


Hon. Anthony Smellie
Chief Justice

June 22 2011

