



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO : FSD 95 OF 2018 (IKJ)

**IN THE MATTER OF THE COMPANIES LAW (2023 REVISION)
AND IN THE MATTER OF ABRAAJ HOLDINGS (IN OFFICIAL LIQUIDATION)**

CAUSE NO : FSD 111 OF 2018 (NSJ)

**AND IN THE MATTER OF ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN
OFFICIAL LIQUIDATION)**

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Peter Sherwood, Carey Olsen for the Joint Official Liquidators of Abraaj Holdings (in Official Liquidation)
Mr Hamid Khanbhai, Campbells Legal for the Joint Official Liquidators of Abraaj Investment Management (in Official Liquidation)

Heard: On the papers

Date of Decision: 4 October 2023

Draft Reasons Circulated: 5 October 2023

Reasons Delivered: 23 October 2023

HEADNOTE

Sanction of compromise between liquidators of related companies-intercompany claims- governing principles

REASONS FOR DECISION

Background

1. By Summonses dated 12 September 2023 and 20 September 2023, respectively, the Joint Official Liquidators (“JOLs”) of Abraaj Holdings (in Official Liquidation) (“AH”) and Abraaj Investment Management Limited (in Official Liquidation) (“AIML”) sought this Court’s sanction for entering into a settlement deed resolving an intercompany commercial dispute (“Settlement Deed”).
2. The 19th Affidavit of Simon Conway of PricewaterhouseCoopers and the 54th Affidavit of Stuart Sybersma of Deloitte and Touche were sworn in support of the respective applications. I was requested to deal with the application on the papers.
3. It was agreed that I should deal with both the AH Summons (filed in a liquidation case assigned to me) and the AIML Summons (filed in a liquidation assigned to Segal J) because of an apparent overlap of certain issues relevant to the Settlement Deed and issues arising in another matter being

tried before Justice Segal. It was also agreed that I should dispose of the applications on the papers to save costs.

4. Since in or about 2018, AH and AIML has asserted an entitlement to a dividend declared in favour of Riyada Managers Limited (“RML”) by its subsidiary RED Entertainer SPV Limited (“Entertainer”). An initial agreement was reached between the JOLs of AH and AIML on 1 October 2018 in the form of an Intercompany Distribution Deed. On 27 December 2019, McMillan J sanctioned the AH JOLs’ entry into three further settlement agreements with the AIML JOLs. All of these agreements enabled some of the disputed funds to be used for the benefit of the respective liquidation estates while leaving for future resolution the final determination of the merits of the rival claims to the Entertainer dividend proceeds, which amounted to approximately US\$19 million. The Settlement Deed addresses the merits of this commercial dispute.
5. On 4 October 2023, I sanctioned the decision of the AH JOLs and the AIML JOLs, respectively, to enter into the Settlement Deed in their respective liquidations. In a nutshell, it was agreed (a) that AIML had a 58.7% interest in the dividend proceeds with AH’s interest being 41.3% (b) what the payment mechanism should be. I now give brief reasons for those two closely connected decisions, which amounted in practical terms to one composite decision.

Governing legal principles

6. The legal principles applicable to sanctioning liquidators’ decisions were summarised in Mr Sherwood’s supporting letter to the Court. Because the Settlement Deed reflects a quintessentially commercial bargain arising out of a complex factual matrix of ambiguously documented intercompany transactions which occurred many years ago, the following judicial statement was very aptly commended to the Court. In *Re SAAD Investments Company Limited (in Official Liquidation)*, FSD 215/210 (ASCJ), Judgment dated 1 October 2019 (unreported), Anthony Smellie CJ (as he then was) after reviewing various authorities opined as follows:

“37. The net effect of these decisions, taken together as I accept they should be taken, is that the Court should ordinarily respect the commercial judgment of the liquidator and grant sanction, unless the course of action proposed by the liquidator is regarded by the Court as so unreasonable or untenable that no reasonable liquidator would take it or, in

the more strident words of the English Court of Appeal in Re Edenote Ltd [1996] 2 BCLC 389 ‘so utterly reasonable and absurd that no reasonable person would have done it’.”

The rationality of the respective JOLs’ commercial decision

7. The key elements of the relevant commercial dispute and the rationale for the Settlement Deed can be pithily stated:
- (a) although the Entertainer payments were recorded in AIML’s accounts as an intercompany loan by AIML, there were grounds for questioning the accuracy of this rationale;
 - (b) AH contended that the majority of the funds advanced by AIML were in fact used for general administration of the Abraaj group and were not advanced as an intercompany loan;
 - (c) the merits of the respective cases appeared to favour AIML;
 - (d) the dispute was *“factually complex, and litigating it would be value-destructive (which would be particularly egregious in circumstances where there is a significant overlap between the creditors of AH and AIML)”* (19th Affidavit of Simon Conway, paragraph 36 (a));
 - (e) *“resolution of the dispute is not assisted by the inconsistencies and incompleteness of the records...If resolution is not reached between the two sets of officeholders, the estates would need to resort to having the dispute resolved by the Court, which would incur significant further costs and cause further delay”* (54th Sybersma Affidavit, paragraphs 26-27);
 - (f) AH’s payment obligations were structured so as to enable a portion of the funds due to be paid on a deferred basis to be used by AH’s JOLs to fund separate litigation on a more cost-effective basis;
 - (g) from AIML’s perspective, it would receive (1) roughly 70% of the settlement sum within two weeks of execution of the agreement (it already held more than half of that

sum) and (2) interest of 10% as compensation for the deferred portion of the settlement sum;

(h) all non-conflicted members of the AH Liquidation Committee supported the Settlement Deed being entered into and three of the four AIML Committee members positively supported the proposed transaction, with no manifest objections being raised by any member of either Liquidation Committee.

8. This particular dispute could clearly not have been fully adjudicated in a cost-effective manner and it was easy to see how both AH and AIML benefitted from the compromise which was reached. The respective claims had clearly been properly investigated, assessed as being fact-sensitive against a background of incomplete and/or unreliable records and worthy of a pragmatic compromise taking a high-level view of the respective merits. Against this background it was sensibly considered that the sanction applications should be dealt with a streamlined and economical manner through a joint hearing on the papers.
9. This was manifestly a case where the Court should respect the commercial judgment of the respective Liquidators, which was buttressed by the support of the respective Liquidation Committees. Indeed, the approach adopted would warrant inclusion in a 'Good Liquidator's Playbook' as an illustration of the appropriate way to resolve such an intercompany liquidation dispute in a commercially proportionate manner for the benefit of the respective estates.

Conclusion

10. For these reasons on 4 October 2023, I sanctioned the decision of the AH and AIML JOLs to enter into the Settlement Deed.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT