IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 27 OF 2015 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND

IN THE MATTER OF CALEDONIAN BANK LIMITED (IN OFFICIAL LIQUIDATION) ("CBL")

APPLICATION BY THE JOLs OF CBL FOR RETROSPECTIVE SANCTION TAKEN ADMINISTRATIVELY, "ON THE PAPERS"
BY THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 23RD FEBRUARY 2018

REPRESENTATION: **Jennifer Colgate of Collas Crill for the Joint Official Liquidators of CBL (by way of Written Submissions)**

Winding up – JOLs entering into deed of compromise of debt due to the company without sanction of the Court – application for retrospective sanction of the Court – applicable principles.

RULING

1. This is an application by the Joint Official Liquidators of the CBL ("the JOLs") by which they seek retrospective sanction from the Court for the entering into of a deed of settlement by which sums due and owing to CBL pursuant to a Sales Purchase Agreement ("SPA") may be compromised. The subject of the SPA are the shares of a certain subsidiary of CBL – Caledonian Investment Services Limited ("CISL"). CISL

(now renamed Sterling International Services Limited ("SISL") was itself the owner of three companies which are the ultimate target companies of the SPA.

2. Pursuant to the SPA, the shares of CISL (now SISL) were sold by CBL to Sterling Global Fund Ltd. ("SGF") but certain payments due to CBL – USD1,727,395.43 in respect of the sale were not paid when due.

3. The obligation to make these payments were disputed by the counter-party GBA and, as the dispute concerned questions of the interpretation of certain ambiguous terms of the SPA, the JOLs determined, on legal advice, to compromise the payments.

4. They took the view that if a commercially accepted compromise could be reached, that would be preferable to expending significant costs of the estate litigating the disputed payments.

5. An agreement was reached in respect of the amounts payable to CBL and a Deed of Settlement was entered into as between CBL and SISL.

6. In summary, SISL agreed to pay CBL USD1,200,000 payable in four instalments. Only once all four instalments have been received are the obligations of SISL to CBL to be released.

7. However, by entering into the Deed of Settlement, the JOLs have avoided the risks and exigencies of litigation and have instead secured immediate cash recoveries for the CBL estate.

8. As explained at paragraph 30 – 42.2 of the 8th Affidavit of Claire Loebell (one of the JOLs) – the Settlement amount represents approximately 70% of the outstanding amount under the SPA and which the JOLs consider to be a reasonable and commercially acceptable sum.

9. The JOLs consider that entering into the Deed of Settlement was and remains in the best interests of the creditors of CBL. The affidavit of attorney Heather Ann Fraude of Collas Crill confirms that all payments due under the Deed of Settlement have been paid and are held in escrow pending the outcome of this application.

10. While the JOLs had received the unanimous approval of the CBL Liquidation Committee ("LC") for entering into the Deed of Settlement, they were unable to obtain formal resolution of the LC for doing so, before actually entering into the Deed of Settlement.

11. However, no objection has since been raised by the LC, even though this application for the sanction of the Court, as well as the supporting documents, have also been served on the LC.

12. The real question that arises now is therefore – in light of the fact that the JOLs have already entered into the Deed of Settlement (for reasons to be explained below) – whether this Court should now grant sanction for them doing so, in effect, retrospectively.

13. By way of explanation of the position in which the JOLs find themselves, Claire Loebell in her 8th Affidavit explains that based on their experiences in managing SISL over the previous two years, the JOLs were concerned that if the settlement were not formalised as a matter of priority, the compromise would fall away to the disadvantage of the creditors of CBL. That this concern was exacerbated by the possibility that CISL (now SISL)would be sold by its parent SFG, an event which could have severely prejudiced the prospect of any payments being made to CBL in respect of the SPA .

14. Accepting these as bona fide held concerns, the question for the Court now, is whether retroactive sanction might appropriately be granted to the entering into of the Deed of Settlement.

The Law – retrospective sanction to compromise receivables of the estates

15. On behalf of the JOLs, Ms. Colegate provided helpful submissions on the applicable law which I accept.

16. In summary, they are as follows.

17. Official liquidators appointed by the Grand Court are at liberty to exercise specific powers without sanction, and have the ability to use other specific powers with the sanction of the Court. The powers requiring sanction of the Court are set out in Part 1 of Schedule 3 to the Companies Law (as revised) (the "Part 1 Powers"), and include, inter alia, the power to "*compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims...subsisting, or supposed to subsist between the company and a contributory...or other debtor or person apprehending liability to the company*".

18. Generally, sanction for a Part 1 Power is obtained prospectively. The practical effect of omitting to obtain prospective sanction for the exercise of Part 1 Powers results in the liquidators themselves not being able to recover the costs and expenses in respect of the exercise of that power, unless the Court exercises its discretion to ratify the conduct of the liquidators. See *In the matter of Peregrine Derivatives Limited* [2013 (2) CILR 251 [16].

19. The Companies Law does not provide a mechanism by which the exercise of Part 1 Powers may be sanctioned retrospectively. Notwithstanding this gap in the legislative

regime, the Grand Court has looked to the jurisprudence of the English Courts establishing that retrospective sanction may be granted.

20. The local jurisprudence on this subject of retrospective sanction also developed by reference to r.4.184 of the Insolvency Rules, which stated that:

> *"General powers of liquidator*
>
> *4.184 (1) Any permission given by the liquidation committee or the court under section 167(1)(a), or under the Rules, shall not be a general permission but shall relate to a particular proposed exercise of the liquidator's power in question; and a person dealing with the liquidator in good faith and for value is not concerned to enquire whether any such permission has been given.*
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> *(2) Where the liquidator has done anything without that permission, the liquidation committee may, for the purpose of enabling him to meet his expenses out of the assets, ratify what he has done; but neither shall do so unless it is satisfied that the liquidator has acted in a case of urgency and has sought ratification without undue delay."*

21. On considering the applicable jurisprudence of the English Court, in particular, following and applying *Gresham Int'l Ltd v Moonie* [200] Ch. 285, [2009] EWHC 1093 (Ch.), this Court has confirmed that it is equally applicable in Cayman that "*as a matter of principle the court has power, under its supervisory role in compulsory winding up, to grant retrospective sanction in appropriate circumstances....*" See again *In the matter of Peregrine Derivatives Limited* (Supra [19].)

22. The provision of retrospective sanction is a matter for the Court's discretion. As explained also in *Re Peregrine*, in exercising its discretion, the Court will take into account all the circumstances of the case. In particular, the Court will have regard to whether: (i) the liquidators have acted promptly or delayed in seeking sanction of the exercise of the power; (ii) the liquidators took legal advice in respect of the action or

transaction subsequently entered into by the liquidators; and (iii) the liquidators had consulted with and obtained the support of the creditors' committee for the course of conduct embarked on and the liquidators' fees and cost incurred as a result of such actions and transfers.

Agreements in support of retrospective sanction to enter into the Deed of Settlement

23. Taking into account the decision of *Re Peregrine*, the JOLs submit that the Court may and should exercise its discretion in this case in favour of ratifying the JOLs entering into the Deed of Settlement for the following reasons which I accept:

(i) There are no past actions taken by the JOLs to be affected by retrospective sanction to the detriment or prejudice of any one. The JOLs have not entered into a number of major transactions or actions over many years before seeking the approval of the Court, but have engaged in a single act of seeking to document a commercially acceptable settlement which they regard as being in the best interests of the creditors of CBL.

(ii) Having regard to the commercially acceptable terms of the compromise and that the JOLs will have realised approximately 70% of the outstanding amounts calculated as due and payable to CBL, it is likely that, had the circumstances permitted, prospective sanction would have been granted for the JOLs to enter into the Deed of Settlement.

(iii) In bringing this application, the JOLs have promptly brought the Deed of Settlement and circumstances regarding its execution before the Court for its consideration and approval. While seeking to balance the need for a settlement with SISL to be secured in a timely manner, the JOLs have also recognised that

the final supervisory function lies with the Court. This is reflected in Clause 4.5 of the Deed of Settlement prepared by their legal counsel, and in the fact that the Payments are being held in escrow by Collas Crill, pending the determination of this application by the Court.

(iv) The prospect of compromising the Disputed Payments was a matter discussed with the Liquidation Committee of CBL in detail. The Liquidation Committee provided its unanimous support for entering into settlement discussions to reach a compromise on substantially the terms that have been agreed, and the JOLs have taken legal advice in respect of the compromise being entered into.

(v) In circumstances where the only practical alternative to entering into the Deed of Settlement would have been to commence costly and uncertain litigation against SFG and SISL, the JOLs believe that they have acted in the best interests of the creditors of CBL in securing a compromise in the terms set out in the Deed of Settlement.

Sealing of Loebell 8th Affidavit

24. The JOLs also seek an order for the sealing of Ms. Loebell's 8th Affidavit. I accept that the contents of this Affidavit includes information pertaining to the current and future conduct of the CBL liquidation which is sensitive and which is not in the public domain or otherwise generally available. The JOLs have a legitimate concern that that information in the wrong hands, could be deployed to the detriment of the creditors of CBL in the context of the claims under SPA and the Deed of Settlement where not all such claims are the subject of the compromise.

25. I accept that it would be in the best interest of the creditors of CBL to preserve the confidentiality of Ms. Loebell's 8th Affidavit and order that it be sealed on the Court file for a period of 12 months.

26. In summary, it is ordered that

(a) The JOLs are granted retrospective sanction for entering into the Deed of Compromise and Settlement dated 15 November 2017 as described in the 8th Affidavit of Claire Loebell ("Loebell 8");

(b) Loebell 8 be sealed pursuant to Order 24 Rule 6(1) of the Companies Winding Up Rules 2008 (as amended) for a period of 12 months, with the JOLs having liberty to apply for a further extension of the sealing of Loebell 8;

(c) The hearing of this application by Summons set down for 27 February 2018 at 09:30 be vacated, the matter now having been dealt with administratively;

(d) The costs of and incidental of the Summons be paid out of the assets of CBL as an expense of the liquidation.

Hon. Anthony Smellie
Chief Justice

February 23, 2018