IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD0015 OF 2010 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF SAAD INVESTMENTS COMPANY LIMITED (IN OFFICIAL LIQUIDATION) ("SICL" OR "THE COMPANY")

BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 22ND AUGUST, 2019. RULING DELIVERED ON 1ST OCTOBER, 2019

LIQUIDATORS' DISTRIBUTION SANCTION APPLICATION TAKEN ADMINSTRATIVELY "ON THE PAPERS"

REPRESENTATION: Walkers, Attorneys-at-law, for the Joint Official Liquidators

> ***Liquidators' application for sanction of proposal for interim payment of dividends – existence of competing proprietary claims to all assets – whether liquidators allowed to distribute dividends despite being on notice of the competing proprietary claims – legal tests for grant of sanction by the Court in such circumstances – requirements of adequate security for repayment of the distribution if proprietary claims succeed.***

RULING

Introduction

1. This is the application of the Joint Official Liquidators (the "**JOLs**") for the Court's sanction of their plan for a distribution of assets by way of an interim payment of dividends to the admitted unsecured creditors of the SICL estate.

2. The application is taken administratively "on the papers" in keeping with section B1.1(c) of the Financial Services Division Guide. The JOLs have secured the

unanimous agreement of the Liquidation Committee (**the "LC"**) that the matter may proceed without the need for an oral hearing, to save costs. This, even while the LC is divided, as will be explained, on the substance of the application.

3. While the need for sanction of other than a full payment of dividends to any class of creditors is not expressly contemplated by the governing statute[1], the JOLs would not have been allowed in their own right to make the interim payments in any event, having regard to the existence of an Order of this Court (as subsequently amended) which prevents them. That Order, the background to which will be explained below, was made in recognition of the proprietary claim of Ahmad Hamad Algosaibi and Brothers Company ("**AHAB**") to all the assets of SICL (as well as those of other related Saad group companies in liquidation). The purpose of the Order (as amended) has been to preserve the assets pending the resolution of AHAB's claim, subject to allowing for the JOLs' reasonable costs of defending against AHAB's claim[2]. AHAB's claim was rejected in its entirety by judgment of this Court delivered on 31 May 2018 ("the Judgment") but AHAB has exercised its right of appeal and the outcome of its appeal is still pending.

4. The application of the JOLs is supported by full written submissions from Walkers and the 19th Affidavit of Mr Hugh Dickson (one of the JOLs) ("Dickson 19") along with relevant documents exhibited to the Dickson 19. Accordingly, the JOLs seek orders from the Court that:

[1] The requirement for sanction of the Court is set out in Section 110 of the Companies Law (2018 Revision) (the "Law") as read with Schedule 3 Part 1 of the Law and Companies Winding-Up Rules ("CWR") Order 11. Part 1 sets out the powers of the liquidators which are exercisable with the sanction of the Court but paragraph 4 reads: *"Power to pay any class of creditors in full"* and does not expressly cover interim payments.

[2] Applying principles from *Berkeley Applegate (Investment Consultants) Ltd. In re, [1989] Ch 32. See report of decision leading to the Order at 2010(1) CILR 553.*

(a) The JOLs should, notwithstanding (a) the Orders of this Court dated 10 February 2010, 24 October 2013, and 20 July 2018; and (b) the claims of the proprietary claimants over the assets in the estate of the Company as detailed in Dickson 19, including those being pursued by AHAB against the Company in CICA Civil Appeal No: 15 of 2018, be permitted and be authorised to cause the Company to make interim distributions to its unsecured creditors in the liquidation of the Company upon the terms detailed in Dickson 19 (the "**Distributions**") and to take such additional steps and execute such additional documents as might be necessary or desirable in order to fulfil the obligations relating to the Distributions (and, if necessary, the aforesaid Orders be varied accordingly), and that in so doing, the JOLs and the Company shall be deemed to have discharged their duties and the Company and the JOLs shall be released from any and all liability (personal or otherwise) to creditors and the proprietary claimants in respect of the aforesaid proprietary claims and any other claims arising out of or relating in any way to the Distributions, including any sums paid thereunder (the "**Distribution Application**");

(b) The JOLs' and the LC's costs of and incidental to the Summons be costs in the winding up; and

(c) Such further or other order as the Court sees fit.

5. The JOLs explain, in summary, that the essence of the Summons is to seek the sanction of the Court to enable the JOLs, as a matter of principle, to make the Distributions to all creditors of SICL who are prepared to enter into an appropriate

secured indemnity. If the Court sanctions the Distributions as a matter of principle, then the JOLs will need to do further work to identify the quantum of the Distributions, the mechanics by which the Distributions will be effected, and the cost of the Distributions. That may necessitate a further application to the Court.

6. I note that the JOLs have sought to ensure that the Court receives the benefit of all arguments relating to the Distributions by making all relevant parties Respondents to the Summons. As Mr Dickson explains, each of the Respondents was served with the Summons.

7. Mr. Dickson explains that the JOLs are sympathetic to the concerns of the LC and other creditors who have been waiting for more than a decade for a first distribution where the estate is in funds and, but for AHAB's pending appeal, would otherwise be in a position to make a distribution. The JOLs explain that they find themselves in an unusual situation, faced with the challenge to find a mechanism to achieve a distribution which does not prejudice or impinge on their obligations to the creditors as a whole, including AHAB as a putative contingent creditor, but one that appropriately balances prejudice to the creditors from delay and costs of no distribution against the prejudice to its proprietary claims in the event that AHAB's claims are upheld on appeal.

8. As already mentioned, the LC is not unanimous in its support for the substance of the application and the proposed safeguards. Two of the three members, representing 62% of total unsecured creditors, support the application and proposed safeguards. The third LC member Credit Agricole Corporate and Investment Bank ("Credit Agricole"), representing 7% of the unsecured creditors, objects to the

application. The LC's views are described in more detail below as are the detailed objections of Credit Agricole.

9. The JOLs posit that their proposal for the Distribution addresses the ongoing prejudice to admitted creditors from the delay in making distributions while providing adequate safeguards, so that in the event AHAB's claims (and by extension Barclays Bank Plc's ("**Barclays**") "parasitic" or contingent claims[3]) are ultimately successful, that those parties' interests are properly protected. On balance, the JOLs consider that the risk of recoveries for the proprietary claimants being impacted by an early distribution, is outweighed by the immediate and certain prejudice to the interests of the admitted creditors from a further delay in distribution for an uncertain period.

10. The position of each of the parties to the Summons is summarised as follows:

    (a) Two of the three members of the LC (who together represent 62% of the total creditors by value) have requested that the JOLs take all possible steps to obtain the sanction of this Court for the making of the Distributions.

    (b) Credit Agricole, the third member of the LC (and who represents 7% of the creditors by value) has expressed the reservations mentioned above and these are discussed below as responded to seriatim by the JOLs.

    (c) AHAB and Barclays are potential proprietary claimants in SICL's estate, Barclays' potential proprietary claim being parasitic on the success of AHAB's proprietary claim. This is in the sense, broadly speaking, that if AHAB succeeds in its proprietary claim against SICL, it will have been

[3] See further below.

proven that SICL, in its financial dealings with Barclays, fraudulently misrepresented that it had title to and authority to deal with funds which belong to AHAB and so Barclays would be entitled to rescind their transactions, giving rise to a proprietary claim by Barclays for recovery of the funds which it invested in Saad Investments Finance Company (No.5) Limited ("SIFCO5"), in a secured leveraged arrangement with SICL.

(i) AHAB has confirmed in a letter from its attorneys, Mourant, dated 15 April 2019 that provided that adequate protection is put in place (which the JOLs consider they have achieved for the reasons explained below), it supports the Distribution Application.

(ii) Barclays had sought further information and confirmations in connection with the Distribution Application. I am told that this was provided pursuant to a letter from the JOLs' attorneys, Walkers, dated 15 May 2019. But Barclays has yet to confirm whether it supports or opposes the Distribution Application.

GRAND COURT CAYMAN ISLANDS

Background to SICL's Winding Up and Status of AHAB's and Barclays' Claims

11. The background to the winding up of the Company is in summary, as follows.

12. SICL is one of the main holding companies of the Saad group of companies. The group was formed in 1980 by Maan Al Sanea ("**Al Sanea**"), a Saudi Arabian/Kuwaiti national, and is headquartered in Al Khobar in the Kingdom of Saudi Arabia. Al Sanea was the group's Chairman and beneficial owner. SICL's stated purpose was to hold and manage the offshore assets of Al Sanea and his immediate family, including a portfolio consisting of equities, funds, interest

bearing securities, and real estate. According to SICL's last audited accounts for the year ending 31 December 2008, SICL held approximately US$9 billion in assets and had US$4.5 billion in liabilities. SICL's then interests were spread across the globe, including in the Caribbean, Australia, Europe, and the Middle East.

13. On 30 July 2009, Barclays, Credit Agricole, and The Royal Bank of Scotland (the "**Petitioning Creditors**"), each a lender under a syndicated revolving credit facility (the "**RCF**") filed a petition for the winding up of SICL and an application for the appointment of Joint Provisional Liquidators.

14. On 5 August 2009, this Court appointed Mr Dickson, together with Mark Byers and Stephen Akers as Joint Provisional Liquidators of SICL (the "**JPLs**") and authorised the JPLs "*to take such steps as may be necessary or expedient for the protection of SICL's assets.*" On 18 September 2009, after hearing from the Petitioning Creditors and other supporting creditors, the JPLs were appointed as the JOLs of SICL.[4]

15. Prior to the appointment of the JPLs, on 27 July 2009, AHAB filed proceedings before this Court against SICL and forty-two other defendants of the Saad Group (the "**Defendants**"), asserting that Al Sanea used his alleged complete managerial control of the "Money Exchange", a division of AHAB, to defraud AHAB of many billions of dollars which he channelled to the Defendants. AHAB had made similar complaints against Al Sanea in Saudi Arabia in May 2009, and those complaints led in due course to SICL (and other Saad group companies) defaulting on many

[4] Mr Akers resigned as Joint Official Liquidator of SICL with effect from 30 June 2018.

billions of dollars of finance agreements. Those defaults were then the trigger for creditors to petition for the winding up of SICL and other related companies.

16. In July 2016, AHAB's claims, as amended both prior to and during the course of the trial, ultimately proceeded to trial against the Defendants.

17. The trial took place over more than a year, and this Court delivered the Judgment on 31 May 2018, dismissing AHAB's claims against the Defendants in their entirety.

18. On 14 June 2018, AHAB filed and served a Notice of Appeal against the dismissal of its claims. The appeal was heard by the Cayman Islands Court of Appeal ("**CICA**") over six weeks in May and June 2019 and judgment has been reserved.

19. A case management conference was held before the CICA on 15 and 16 November 2018 at which it was ordered that AHAB must pay into Court the sum of US$10.6 million as security for the Respondents' (formerly the Defendants') costs of the appeal. The sum of US$10.6 million is now being held in escrow with Mourant in the Cayman Islands, along with a further sum of more than US$82 million earlier ordered as security for the costs of the trial.

20. Whilst the appeal was concluded by 21 June 2019, as already mentioned judgment has not yet been handed down and may not be for some time. There is also the potential for a further appeal to the Privy Council, irrespective of the outcome. All of which may mean that the overhanging proprietary claims of AHAB and Barclays may not be resolved for some considerable time.

21. The JOLs take the view that AHAB's claims are without merit, that its appeal should be dismissed, and note that AHAB has not obtained a stay of the winding

up but is exercising a right of appeal as of right (with the result that there has been no requirement that they demonstrate that the appeal has any merit). The JOLs nevertheless explain that they proceed upon the basis that because AHAB's appeal has not yet been determined, there is at least a theoretical possibility that AHAB is a proprietary claimant of SICL. Hence the need for this application for the sanction of the Court to remove any doubt about the propriety of the Distribution.

22. In light of the principle settled by the Privy Council in the *Guardian Trust*[5] case, this is a prudent course for the JOLs to adopt. In *Guardian Trust* it was declared that if trustees (such as the JOLs here) had received notice that a fund in their possession is, or may be, claimed by a third party "A", they will be liable to A if they deal with the fund in disregard to that notice should the claim subsequently prove to be well founded.

Request made by the LC

23. SICL's LC is comprised of three members:

    (a) Credit Agricole, which also represents CA Indosuez (Switzerland) SA (together "**Credit Agricole**");

    (b) Anchorage Capital Master Offshore Ltd. ("**Anchorage**"); and

    (c) Burlington Loan Management Designated Activity Company (an affiliate of Davidson Kempner ("**DK**")).

24. The claims of the LC total US$2,503,013,324.91 which is approximately 69% of the value of potential creditors' claims per the Estimated Outcome Statement of the JOLs, as at 31 March 2018 (the "**EOS**").

[5] Guardian Trust and Executors of New Zealand v Public Trustee of New Zealand [1942] AC 115.

25. Anchorage and DK, who together represent the majority of the LC members (and who together represent 62% of the total unsecured creditors) have indicated that they consider it to be inequitable and unjust for unsecured creditors to continue to be kept out funds in circumstances where:

(a) The liquidation commenced approximately ten years ago; and

(b) The liquidation has been dominated by AHAB's claims, which have now been comprehensively dismissed at first instance in the Judgment.

26. Against that background, Anchorage and DK have requested, as already mentioned, that the JOLs take all possible steps to obtain the consent of the Court for the making of an interim distribution, pending the outcome of AHAB's appeal.

27. The third member of the LC, Credit Agricole, is a creditor in the sum of US$253.7 million, representing 7% of the total unsecured creditors. Credit Agricole objects to the Distribution Application. As mentioned above, Credit Agricole considers that the proposed early distribution arrangement is highly unusual and that non-participating creditors will be subject to additional risk that in the normal course would not be the case, notwithstanding the protections proposed. Again, the nature of those objections and the responses of the JOLs to each of them is set out in more detail below.

AHAB's Support for the Distribution Application

28. AHAB has confirmed by letter that provided adequate protection is put in place, it supports the Distribution Application. A copy of that letter is presented in the exhibited materials.

29. For the reasons detailed in Dickson 19 and to be examined below, the JOLs contend that the safeguards that are being proposed provide AHAB with adequate protection in the event that its appeal is successful.

Creditors' Position Concerning the Distribution Application

30. The JOLs have adjudicated unsecured claims against SICL totalling US$2,944,039,795. Of those, claims totalling US$2.526 million relate to unsecured claims arising under the terms of the RCF. Other claims relate primarily to bilateral lending provided to SICL by financial institutions. A small number of claims remain to be adjudicated and the JOLs anticipate that those claims will be agreed shortly.

31. For the purposes of attending and voting at meetings of SICL's creditors, AHAB has (since the first meeting of creditors in November 2009) been admitted to vote nominally in the amount of US$1, as a contingent unsecured creditor.

32. As a result of the Judgment, AHAB currently has neither a proprietary nor an unsecured debt claim against SICL. However, for the time being, the JOLs will continue to recognise AHAB and Barclays as contingent creditors for the purposes of attending and voting at meetings of creditors.

33. Significant realisations have been made for the liquidation estate since 2009. Creditors are unsurprisingly frustrated that the JOLs have not been able to make any distributions out of those realisations, notwithstanding that the liquidation is in its tenth year. The JOLs aver that the estate has funds available for distribution which, absent the AHAB proceedings, would have in the normal course enabled a material interim distribution to creditors.

GRAND COURT - CAYMAN ISLANDS

The Sanction Application

34. As already mentioned, the application is necessary primarily because the Distributions are not permitted by the 2010 Order, as amended. Accordingly, the JOLs seek the Court's sanction, if necessary by way of further amendment of the 2010 Order, to permit and authorize them to cause the Company to make the Distributions and to take such additional steps as might be necessary or desirable to fulfill the obligations relating to the Distributions.

35. Although the sanction sought by the JOLs in the present instance does not relate to a power which is expressly stated in part 1 of Schedule 3 to the Companies Law, the JOLs submit that the Court has jurisdiction to grant the sanction in order to protect the JOLs as office holders from potential liability from any and all claims arising out of or relating to the Distributions. Given the terms of the 2010 Order (as amended) and of section 99 of the Companies Law[6] the JOLs are, in my view, strictly correct to seek the sanction of the Court.

36. Given also the scope of AHAB's potential proprietary claims, which cover all assets in SICL's estate and the possible consequences for the JOLs as trustees mentioned above, the JOLs' regard it as appropriate for them to seek the protection of the Court. There is established case authority for this approach. See, for example, *Re Nortel Networks UK Ltd and other companies* [2016] EWHC 2769 (Ch)] in which the English High Court, per Justice Richard Snowden, applied by analogy

[6] Which reads: "*When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void*"

statements of principles from *Public Trustee v Cooper* [2001] WTLR 901, dealing with the category of cases (described as Category 2 cases) where the issue is whether the proposed course of action is a proper exercise of a trustee's power, to assist administrators facing a momentous decision. He stated at [47]: "*The instant case is, in my judgment, just such a case. In signing the documents comprising the Global Settlement, the Administrators and the Conflict Administrator have already decided that the Global Settlement is in the best interests of each of the EMEA Companies*[7] *and their creditors. They do not propose to surrender the exercise of their discretion in that regard to the court, but they seek the approval of the court because of the great significance of the Global Settlement in the context of the administrations of each of the EMEA Companies. Given the size and complexity of the affairs of the Nortel Group and the amounts in the Lockbox [funds available for distribution], there can, in my judgment, be no doubt that the execution of the Global Settlement is a truly momentous decision*"; following and applying also *In MF Global UK Ltd [2014]* EWHC 2222 (Ch). The judge went on at [49] to state that: "*For my part, whilst noting that the position of an administrator seeking directions under the Insolvency Act, and a trustee seeking directions under the Trustee Act are not identical, I see no obvious reason why most of the same considerations should not apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds*

[7] Identified at [1] of the judgment as the 19 Europe, Middle East and Africa companies in the Nortel group.

the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed."

37. In deciding whether or not to grant sanction to the exercise of a liquidator's powers, similar principles apply and have been applied in different kinds of circumstances by this Court. They are set out in *In re DD Growth Premium 2X Fund* 2013 (2) CILR 361 and although in that case the principles were considered in the context of liquidators seeking sanction of the power to make a compromise or arrangement with creditors, the JOLs assert and I accept that they are applicable, *mutatis mutandis*, in the present situation. The principles were outlined in *Re DD Growth* at paragraph 30, as follows:

(a) the decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Companies Law is a decision for the Court (see *Re Greenhaven Motors Ltd.* [1999] 1 BCLC 635);

(b) in exercising its discretion to grant sanction, the Court must consider all the relevant evidence (see *In re Universal and Surety Co. Ltd.* [1992–93] CILR 149);

(c) the Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator (see *Re Edennote Ltd. (No. 2)* [1997] 2 BCLC 89);

(d) the Court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so (*Re Edennote Ltd No.2 (above)*);

(e) the liquidator is usually in the best position to take an informed and objective view (see *Re Greenhaven Motors Ltd*); and

(f) unless the Court is satisfied that, if the company is not permitted to enter the compromise in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all (see *Re Greenhaven Motors Ltd*).

38. The principles on which the Court decides sanction applications were also considered by Cresswell J in *In re Trident Microsystems (Far East) Ltd* [2012] (1) CILR 424. Citing *In re Universal Surety and Co Ltd (above)* it was similarly held that whether to sanction the exercise of a power under Part 1 of Schedule 3 to the Companies Law was a decision for the Court, which must consider the correctness, or otherwise, of the liquidator's decision having regard to all the evidence, in particular:

(a) the financial consequences of the decision for stakeholders;

(b) the wishes of the stakeholders; and

(c) whether the interests of stakeholders are best served by permitting the company to enter into the particular transaction (which reflected Chadwick LJ's approach in *Re Greenhaven Motors Ltd (above)*).

39. 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 unreasonable and absurd that no reasonable person would have done it*".

40. It is submitted on behalf of the JOLs that the Distribution Application for which sanction is sought, does not approach the threshold at which this Court's permission should be withheld. I accept this, the only remaining question being whether that conclusion is affected, in principle, by the existence of the contingent proprietary claims.

41. I now turn to consider that question more particularly. The first step is to consider the effect of the 2010 Order (as amended), upon the power of the JOLs to make the interim distribution.

The Liquidation Orders

42. The 2010 Order contains, *inter alia*, certain provisions that are applicable to the various Saad group companies in liquidation (including SICL) as to how the assets of those companies may be applied, taking into account AHAB's ongoing proprietary claims against SICL (inter alia), in FSD 54 of 2009.

43. Paragraph 2 of the 2010 Order sets out how the assets may be applied, which excludes the ability to settle any claims of the creditors of the defendant companies, prior to the determination of AHAB's proprietary claims.

44. Paragraph 9 of the 2010 Order further provides as follows:

> "9. *Upon any sale of the assets (or any part of them) of any of the companies in liquidation, the liquidators of the company disposing of such assets shall retain the net proceeds of sale of such assets and shall not dispose of such net proceeds of sale other than in the payment of the liquidators' costs until the earliest of:*
>
> 9.1 *judgment in Cause No. FSD0054 of 2009;*
>
> 9.2 *an order of the Court in respect of the net proceeds of sale or any part of them; or*
>
> 9.3 *the consent of AHAB (any such consent to be provided in writing by or through its attorneys Messrs. Mourant du Feu & Jeune) and in the event of there being any third-party claim to beneficial ownership of the assets of the companies in liquidation so sold, the consent of such third party or parties."*

[For present purposes, Barclays is such a third party].

45. Paragraph 2.4 of the 2010 Order was varied pursuant to paragraph 31 of the order dated 24 October 2013 (the "**2013 Order**") so as to permit the liquidators of the companies in liquidation to pay the costs of defending AHAB's claims up to and including trial.

46. In light of AHAB's appeal of the Judgment in FSD 54 of 2009, the 2013 Order was further varied by consent on 20 July 2018 so as to permit the liquidators of the

companies in liquidation to pay the costs of defending AHAB's claims up to and including the conclusion of the appeal (the "**2018 Order**").

47. Neither the 2013 Order nor the 2018 Order varied the substance of the 2010 Order so as to permit the JOLs to make any distributions to its creditors pending delivery of the Judgment in respect of AHAB's proprietary claims (or further order of this Court or the consent of any proprietary claimants). Although the Judgment was delivered on 31 May 2018 and dismissed AHAB's claims in their entirety (and the JOLs aver as to their belief that the Judgment is correct and will be upheld on appeal), there is a theoretical possibility that AHAB is a proprietary claimant of SICL since AHAB has exercised its ability to appeal as of right. It further remains a theoretical possibility also that Barclays has its parasitic proprietary claim, which it has indicated it will raise if AHAB's proprietary claim succeeds.

48. The foregoing history notwithstanding, the JOLs submit that the sanctioning of the Distribution Application by this Court does not require there to be a variation of the Liquidation Orders by virtue of paragraph of the 2010 Order, which is referred to above. This is because either (a) the Judgment has already been delivered (in accordance with paragraph 9.1 of the 2010 Order); and/or (b) the order sought now for the Distribution Application is an order contemplated by paragraph 9.2 of the 2010 Order; and/or (c) AHAB has provided its written consent to the Distribution Application subject to adequate protection being put in place (in accordance with paragraph 9.3 of the 2010 Order). So far as paragraph 9.3 is concerned, the JOLs accept that Barclays has yet to confirm whether it supports or opposes the Distribution Application.

49. However, in the alternative, were this Court to determine that neither of paragraphs 9.1, 9.2 or 9.3 of the 2010 have been satisfied, the JOLs would seek that the Liquidation Orders be varied accordingly.

50. This may indeed be described as a very cautious approach but given the "momentous" nature of the decision to make the interim distribution in the face of AHAB's and Barclay's proprietary claim, the JOLs, in my view, should not be criticized for being too cautious.

51. They submit that although it seems clear to them that it is in the interests of SICL's estate to make the Distributions, they seek sanction both because they do not have power to make the Distributions without it, and also because they do not want to assume any personal risk of the kind recognized by *Guardian Trust* (above) by making the Distributions.

The JOLs' Considerations

52. In reaching the conclusion that it is appropriate for them to seek sanction from the Court, the JOLs, I am told, have asked themselves the following questions:

(a) Is there an appropriate mechanism which allows the Distributions to be made to unsecured creditors, but which also protects AHAB (and Barclays in its capacity as a "parasitic" proprietary claimant against SICL's assets) in the event that its claims are upheld on appeal?

(b) Is there an appropriate mechanism that allows Distributions to be made in a way that protects unsecured creditors of the Company, whose claims may be unknown or not able to be adjudicated, at the time of making the Distributions?

(c) Is there an appropriate mechanism which allows Distributions to be made in a way that protects unsecured creditors of the Company, who despite having had their claims adjudicated, do not seek an interim Distribution?

(d) Is there an appropriate mechanism which allows Distributions, but which is consistent with the JOLs' duties as officers of the Court?

(e) Is there an appropriate mechanism which allows Distributions, but which protects the JOLs as potential trustees for the proprietary claimants, in the event that AHAB's claims are upheld on appeal?

(f) Having regard to the funds which might be available for the Distributions, is the potential benefit to creditors, coupled with the protections incorporated to protect the proprietary claimants if and insofar as AHAB succeeds in its appeal, sufficient to warrant an application and the making of Distributions?

53. The answers to these relevant and pertinent questions are, of course, ultimately a matter for this Court, but, in deciding whether to grant sanction to their proposal, it is important to note that the JOLs have reached the conclusion that the answer to each question is “yes”.

54. The JOLs aver that they consider that the proposed approach addresses the ongoing prejudice to admitted creditors which is being caused by the delay in making Distributions while providing adequate safeguards to ensure that, in the event that AHAB’s claims (and by extension Barclays’ claims) are ultimately successful, those parties’ interests are properly protected.

55. In light of the practical proposals for the protection of the interests of the proprietary claimants to which I next turn, I accept this premise of the JOLs' application.

Protection for AHAB and Other Creditors

56. In order to determine the possible protections, Mr. Dickson explains that the JOLs engaged primarily with DK, as a "representative" member of creditors and a member of the LC, to explore the terms on which it, as an intended recipient of the Distributions, would be willing to contract with the liquidation estate to ensure that the interests of AHAB (and any other contingent claimant or creditor) are protected in the event of AHAB succeeding on appeal, or any other material change in circumstance.

57. The result of this engagement with DK is that a draft Deed of Indemnity (**"DOI"**) has been prepared by the JOLs and DK, a copy of which is exhibited in evidence. The JOLs and DK have negotiated the document at arms-length, with a view to ensuring that all stakeholders' rights are adequately protected.

58. It is intended that any creditor who wishes to be a recipient of Distributions will be required to sign a deed in materially similar terms, and in particular with regard to the obligations to repay and to secure the dividend received, prior to receiving funds.

59. In summary, the DOI obliges the recipient of Distributions to repay the money to the liquidation estate in particular circumstances; and to provide security for its obligation to do so. The key terms of the DOI are set out below.

Obligation to Refund

(a) The fundamental obligation of the recipient of any Distribution (the "**Indemnifier**") is, in appropriate circumstances, to repay to the liquidation estate some or all of the amount by which the dividends it has received exceed those that have been received by all other creditors. Thus, any distribution made pending payment of a final dividend to creditors, will be deemed by Clause 2.1, a "**Relevant Conditional Dividend**".

(b) The obligation to repay appears at Clause 3 of the DOI. It can be triggered by the JOLs if they, acting reasonably, determine that the funds in the liquidation estate, under their control and held for the benefit of the liquidation estate, are or will be insufficient to satisfy fully all expenses and liabilities ranking ahead of unsecured creditors, as well as the entitlements of all other unsecured creditors to be paid dividends with those paid to the Indemnifier.

(c) The JOLs' freedom to make such a determination is constrained by the fact that they are only entitled, pursuant to Clause 3 of the DOI, to do so within 30 days of becoming aware of the occurrence of certain events (termed "**Assessment Events**" in the DOI) which the JOLs determine might reasonably either: (i) give rise to a potential shortfall; or (ii) signal the end of the liquidation, whether by way of a final distribution being paid to creditors or by way of an application for an order for dissolution of the Company.

(d) However, if the JOLs do not make such a determination within the relevant 30 days, that time is in effect extended by a further Assessment Event, which occurs in the event that this Court gives a direction to the effect that due to liquidity constraints or otherwise, funds are reasonably required by the JOLs. That provision has been included so as to ensure that this Court, as the supervising court of the liquidation, retains its discretion to facilitate a recovery by the JOLs under the DOI if it is clear that funds are needed in the liquidation and it appears that the Indemnifier has been paid more than its share of the assets available for distribution.

(e) The obligation to refund can be triggered at any time (subject to the occurrence of an Assessment Event) up to the end of the liquidation.

(f) Under Clause 2.1 of the DOI the Indemnifier also undertakes to hold the JOLs fully indemnified and harmless against all liabilities and claims arising as a result of the declaration and/or payment of any conditional dividend. This liability will not exceed the "Relevant Proportion" of such indemnified liabilities and claims, where the "**Relevant Proportion**" is the proportion that the total sums paid by the JOLs to the Indemnifier bears to the total sums paid by the JOLs to all Indemnifying Creditors pursuant to the Relevant Conditional Dividend.

GRAND COURT - CAYMAN ISLANDS

Adequate Security

(g) The JOLs recognised that an indemnity by itself might not be sufficient, because it would depend upon the credit-worthiness of the creditor who received a Distribution. As a result, the DOI provides at Clause 10.1.1 that the Indemnifier is to ensure at all times that its obligation to refund (discussed above) is fully secured by way of a surety bond from an institution with a credit rating of at least A - ("**Minimum Rating**"). The reason for the Minimum Rating is to ensure that the indemnity is held at an institution which is equivalent to the banks where the SICL estate monies are currently held.

(h) The DOI goes on to provide at Clause 10.2.1 that if, at any time during the liquidation, the provider of the security ceases to have such a credit rating, the Indemnifier must within a certain number of days procure the issue to the Company of a replacement security, by an institution with such a credit rating.

(i) The DOI expressly provides at Clause 10.3 that the Company, by the JOLs, may make a demand on the security, and is entitled to receive the proceeds of it, if the Indemnifier fails strictly to comply with its obligations to either make a refund as discussed above, or replace the security as appropriate. The security may also be demanded in full in the event that the Indemnifier becomes subject to an insolvency event.

(j) All cash in the liquidation estate has been and is currently held in accounts with Scotiabank and RBS, having A+ and A- credit rating, respectively. The DOI therefore requires that the surety bond securing an Indemnifier's obligation to refund Distributions must be provided by a financial institution with either the same or a higher credit rating than RBS. The effect of this is that to the extent that Distributions are made to creditors, AHAB and any other proprietary claimants not participating in the early distribution, will not be exposed to a credit risk which is greater than the credit risk which they face as a result of the estate's bank accounts being held at RBS.

Material Benefit to Creditors

60. As noted above, since 2009 there have been material realisations for the liquidation estate. Those realisations, and realisations which are anticipated in the future, are described in detail in the JOLs' reports to creditors, the most recent of which is dated 17 June 2018 and is exhibited in evidence.

61. An EOS appears at pages 42-61 of the report to creditors. A separate table relating to what the JOLs have defined in their reports as Significant Uncertain Realisations appears at pages 47-50.

62. The EOS discloses net realisations as at 31 March 2018 of US$404,100,133 (see internal page 42). There have, of course, been further movements in both realisations and costs since that date, and in the event that the Court permits Distributions to be made, I am told that a full up to date accounting would be carried out in order to determine the cash available for distribution, before necessary reserves. It is for this reason that the Court is not being asked at this stage to sanction the quantum of the Distributions, but instead to sanction the principle that the Distributions can be made.

63. Even taking into account a high-level assessment of reserves which would be required to be made, and the holding back of assets to which specific third-party claims remain unresolved, I am told that the JOLs are satisfied that there would remain a material sum to be distributed to creditors.

DOI Governing Law

64. The DOI is expressed to be governed by English law, as opposed to Cayman Islands law. That is because, having made preliminary enquiries, I am told that the JOLs ascertained that major insurance companies that might (for the additional protection of the estate) offer policies of insurance in respect of the obligations of creditors entering into the DOI, would require any such obligations to be governed by English law.

65. In addition, it is to be recognised that it is not proposed that the DOI must be subject to the exclusive jurisdiction of this Court. The reason explained is that creditors are located in various jurisdictions and the primary obligation under the DOI is for the Indemnifier to pay money to the JOLs or the Company. In those circumstances, the JOLs intend to select a jurisdiction in each case that will maximise the ability to enforce any money judgment against a given creditor in the jurisdiction (or jurisdictions) where it is located. Again, this is intended to minimise the risks that the indemnity cannot be enforced.

More on Adequate Security

66. As mentioned above, the refund obligation is to be backed by a surety bond. This, I accept, provides further security to the liquidation estate where the Indemnifier fails to meet its obligation under the DOI.

67. DK has substantially negotiated a form of surety bond (the "**Surety Bond**") with Chubb European Group SE (previously Chubb European Group Plc ("**CEG**")), pursuant to which an entity nominated and financially-backed by CEG will, among other things, guarantee DK's repayment obligation, pursuant to Clause 3 of the

DOI. CEG is rated AA (Very Strong) by Standard & Poor's and A++ (Superior) by A.M. Best. A copy of the Surety Bond is exhibited in evidence. CEG's credit rating is greater than that of RBS and Scotiabank, where the Estate's cash assets are held. In the circumstances, the JOLs consider, reasonably in my view, that the form of the Surety Bond to be given by CEG is acceptable.

Views of SICL's Unsecured Creditors

68. Having secured the majority support of the LC, the JOLs considered that it would be appropriate to canvass the views of the wider creditor body in relation to the Distribution Application so that all relevant factors would be made available to this Court. A copy of this letter, which was sent to SICL's unsecured creditors by email on 26 March 2019 is also in evidence as exhibited to Dickson 19.

69. As stated in the third paragraph, the aim of the letter was to:

(a) *"Set out a summary of the issue under consideration.*

(b) *Set out the key matters which the JOLs have, so far, taken into consideration when consulting with the LC.*

(c) *Invite creditors to indicate whether or not they support the principle of an application to the Court."*

70. The purpose of the letter to the creditors was therefore to set out the relevant issues concerning the Distribution Application in *principle* rather than to detail the terms of the mechanisms being proposed to balance and protect the interests of the various parties, which would in any event be subject to the sanction of this Court. Upon sanction being granted, it remains at each creditor's discretion whether it wishes to

seek an early distribution. Copies of the replies to the letter are also propounded in evidence by Dickson 19.

71. Up to the time Dickson 19 was sworn, the creditors who responded fell into two groups (in addition to the two members of the LC who support the Summons, and Credit Agricole who opposes it):

(a) the JOLs had received the qualified support of five creditors whose claims total US$240.2 million and represent 7% of the total unsecured creditors. The qualifications are largely either because the creditors do not intend to draw the funds, or the support is subject to seeing the detailed terms; and

(b) the JOLs have received an objection from two creditors whose claims total US$84.7 million and represent 2% of the total unsecured creditors, excluding the LC members.

72. It should be noted that Credit Agricole has expressed concern that the letter does not provide sufficient detail on the proposed terms of the indemnity. The JOLs have considered this concern, but note through Mr. Dickson, that in any event the support received is qualified by the creditors' consideration (and in my view, acceptance) of the detailed terms.

Credit Agricole's objections

73. Credit Agricole has asked the JOLs to note for this Court its view that "*the proposed early distribution arrangement is highly unusual and that it is unreasonable to represent the arrangement as being risk free and equitable for all creditors of the liquidation estate and thus in turn the non-participating creditors will be subject to additional risk that in the normal course would not be the case*".

74. A summary of Credit Agricole's objections, and the responses of the JOLs to each of them is set out in Dickson 19, but for ease of reference is further summarised below:

(a) <u>Costs of the Distribution Application</u>

Credit Agricole considers that the unsecured creditors who are not seeking an early distribution should bear none of the associated costs of the Distribution Application.

The JOLs propose that this objection can be addressed by ring-fencing the costs of the Distribution Application as well as all costs relating to the Distributions and also future costs relating to the monitoring, maintenance and enforcement of the indemnity and surety if this was required, and to apportion such costs only to the creditors who are seeking an early distribution.

(b) <u>Loss of Interest</u>

Credit Agricole considers that it is unfair that the benefit of the interest on the funds distributed early is lost to unsecured creditors who are not obtaining an early distribution, and further that the unsecured creditors who are obtaining an early distribution will continue to receive the benefit of interest on any of their *pari passu* share of the remaining funds in SICL's estate. This is referred to by Mr Dickson at paragraph 78(b) of Dickson 19 as the "*interest benefit.*"

The JOLs propose that the most commercial and practical way of addressing this objection is to ensure that the interest benefit is determined by a simple calculation (e.g. an annual rate of say 2.5%), being a reasonable commercial interest rate but to be finally determined once a distribution is made and the timeframe between early distribution and all subsequent distributions until all parties have received the same level of distribution. This will be calculated on the distributed amount for the period of time up to the time all parties have received the same level of distribution to be attributed to unsecured creditors who do not receive an early distribution.

(c) <u>General Risk of Early Distribution</u>

Credit Agricole is also concerned that if the JOLs make an early distribution to unsecured creditors and subsequently there is a 'trigger event', that the JOLs might be unable to recover the distributed funds.

The manner in which the JOLs seek to address the general risks associated with the Distributions, which apply to both the unsecured creditors and the proprietary claimants, are set out in detail in Dickson 19 under the heading *'The JOLs' Considerations.'* In essence, the JOLs will have sought to minimise such risks by obtaining the secured indemnity from those who receive Distributions.

(d) <u>Operational Risk of Early Distribution</u>

Credit Agricole is further concerned that the DOI puts the onus of the operation and administration of the indemnity and the Surety bond onto the Liquidation Estate. It considers the areas of operational risk would include:

i) Defective, incomplete or expired documentation especially as surety bonds can be replaced and amended during the term of the early distribution arrangement (i.e. 10.1 Adequate Security / 10.2 Replacement Security), and the DOI could be subject to replacement if the claims were subsequently transferred to another party. It considers that the executed versions of the DOI and Surety Bonds are not complete or in existence and there could be issues that arise with execution, authority, or other aspects which may only be discovered if and when the JOLs come to claim on the DOI/Surety Bond.

ii) Replacement risk for a down-rated surety bond which given the unusual nature of the instrument may not be readily available on appropriate commercial terms, plus there is a monitoring risk on the surety bond providers credit rating. It believes that if a replacement Surety Bond was not available the Estate would then be exposed to a higher credit risk and if the Indemnifier (which is not being assessed from a credit risk perspective on the basis the Estate currently has this risk on its investments in any event) may be a poor credit risk.

iii) Missed notification periods, i.e. DOI clause 3.1 requires that the JOLs may only demand payment under the indemnity within 30 days of the JOLs becoming aware of the occurrence of any given Assessment Event.

iv) Missed information rights, i.e. DOI clause 8.2- if the JOLs commit a material breach of clause 8.1 (information rights), which is either incapable of remedy, or which the JOLs fail to remedy within 21 days, this would mean the JOLs would not be entitled to be indemnified. In addition there is a potential risk that there is room for argument about what constitutes a "material breach".

v) In the absence of prior confirmation from the JOLs that they will not agree to any cap upon a requirement to "gross up" for any withholding tax that may arise, Credit Agricole considers this could put the Estate at risk of recovering less than the amount of the early distribution under the Surety Bond.

75. I am told by Mr. Dickson that the JOLs recognise and accept that the proposed distribution is not a riskless proposition. They consider that they have endeavoured to put in place appropriate protections by careful negotiation of both the DOI and the Surety Bond. As regards the four specific points of concern from Credit Agricole referred to above:

i) The JOLs respond that they do not consider the DOI or the Surety Bond to be defective or incomplete and Credit Agricole has not identified any respect in which it considers that they are. Further, the repayment obligation under the DOI does not expire until the liquidation is effectively complete. Whilst the Surety Bond may expire during the intervening period, if it does then the Indemnifier is required to extend it or replace it with an alternative surety bond with the same essential features as the original. Further, as is evident from the terms of the DOI, it is not the case that it could be subject to replacement if the claims were subsequently transferred to another party (upon any such transfer of claims, the obligation to refund would remain with the original Indemnifier) – the JOLs accordingly say that they do not understand Credit Agricole's purported concern in that respect. Further, the JOLs affirm that they will carefully consider and, only where they consider appropriate, execute the DOI and Surety, and do so upon the advice of counsel.

ii) The JOLs acknowledge that there is a risk that a replacement surety bond on equivalent terms may not be available in the market, should the Surety Bond itself expire or become less valuable in light of a credit downgrade of CEG. With a view to mitigating (to some extent) the associated risk from the Company's perspective, the JOLs have provided that the obligation to replace the Surety Bond in the relevant circumstances falls upon the Indemnifier and that the latter is required to repay the early distribution if it cannot (or in any event does not) comply with that obligation. As regards the referenced *"monitoring risk"*, the JOLs understand the point here to be that there is a risk they will fail to appreciate that a credit downgrade (giving rise to a right, on the Company's part, to require that the Surety Bond be replaced) has occurred. Mr Dickson confirms that the JOLs will actively monitor the credit rating of CEG (and/or the provider of any replacement surety bond) during the relevant period and that he does not consider such monitoring to be an onerous task in the circumstances.

iii) Mr Dickson understands the referenced risk of *"missed notification periods"* to be the possibility that the JOLs might accidentally omit to exercise their rights under the DOI on a timely basis, bearing in mind that certain key rights under it can only be exercised within particular timeframes following the occurrence of specified events. Mr Dickson confirms that the JOLs will carefully monitor (and, where they consider appropriate, exercise) their rights under the DOI and, as applicable, the Surety Bond. Again, having regard to the terms of the DOI and the Surety Bond, Mr Dickson confirms in Dickson 19, that he does not consider the monitoring of (and adherence to) such notification periods to be an onerous task in the circumstances.

iv) As he affirms, (at Dickson 19 [79.iv]), the JOLs do not understand Credit Agricole's reference to *"missed information rights"* pursuant to Clause 8 of the DOI. That clause affords the Indemnifier certain rights to information in connection with claims by the JOLs to be indemnified pursuant to Clause 2 of the DOI, in respect of personal liabilities incurred by the JOLs as a result of the declaration or payment of any early distribution. If the JOLs commit a material breach of their obligations to provide such information (and thereafter fail to remedy that breach), Clause 8 of the DOI stipulates that they lose the benefit of the indemnity at Clause 2, in respect of the relevant liabilities. It does appear, as Dickson 19 asserts [ibid] that none of this has any impact upon the Indemnifier's (entirely separate) obligation, at Clause 3 of the DOI, to repay the early distribution in relevant circumstances; or any impact upon the Surety Bond.

v) In reference to Credit Agricole's concern of potential 'gross up' of withholding tax, according to Dickson 19 [79.v)] , the JOLs do not consider it likely that any withholding tax will arise upon any payment otherwise due under the Surety Bond. They have nonetheless declined to agree to cap the requirement to *"gross-up"*. According to Mr Dickson, the manner in which this issue is to be addressed remains subject to negotiation between the parties, as at the time of his affidavit. He avers that if appropriate, the JOLs will seek advice as to the degree of risk that any form of withholding tax might arise, prior to providing their agreement to the final form of the Surety.

76. As explained at Dickson 19 [80], on 9 May 2019, Mr Dickson spoke with a Credit Agricole representative about the structure for raising their objections with the Court, and whether or not this application would proceed by way of representative parties. Credit Agricole confirmed that i) it does not wish to take a representative party role in the Distribution Application (i.e. as representative of those unsecured creditors who oppose the Distribution Application); ii) is nevertheless keen for its points to be raised in his affidavit to be fully considered. Mr Dickson avers that the same representative has since confirmed that he has accurately done this upon reviewing his affidavit in final draft; and iii) has no objections to the Distribution Application being determined by this Court on the papers.

Balancing the Interests of the Proprietary Claimants and the Unsecured Creditors

77. The JOLs accept that in light of the on-going appeal, AHAB's proprietary claims against SICL, despite having been comprehensively dismissed by this Court at first

instance (AHAB being held as complicit in the very fraud of which it complained), should also be considered by this Court in deciding whether to make the orders sought. However, it is noted by the JOLs that the Court has recently considered those interests in the context of the earlier application in this Cause (Ruling delivered on 30 September 2019), and gave them little weight[8].

78. Nevertheless, for the sake of completeness, and given the unusual nature of this liquidation, I am reminded of the principles relied upon by the JOLs in the 30 September 2019 Ruling (and discussed below) which allowed distributions (albeit of far less magnitude or potential consequence) to be made in the face of uncertain, unquantified, and not yet established proprietary claims.

79. I accept that it is in principle well-established, that a court may authorise a trustee or insolvency officeholder to make a distribution out of a fund, notwithstanding that a third party has an unresolved proprietary claim against that fund.

80. By way of illustration, in *Finers v Miro* [1991] 1 W.L.R. 35 (CA), a firm of English solicitors held monies in its client account on trust for a client. The firm became aware that the monies may have been the proceeds of a fraud, and that the victim of the fraud might be beneficially entitled to them. Faced with notice of the alleged fraud and competing demands from the client for access to the fund to meet the costs of defending his entitlement to it, the firm applied to the court for directions. The English Court of Appeal held (overturning the judge below) that the client was

[8] In that application, the JOLs applied for and obtained sanction to authorize them to enter into a settlement agreement and mutual release between SICL, AB Ltd and XY Ltd (in voluntary liquidation); by which AB Ltd would be paid dividends, in the amount of USD17 million, in settlement of its proven claims both in the liquidation of SICL and of XY Ltd for USD23 million, thereby saving the SICL estate (and that of XY Ltd as a SICL subsidiary) some USD6 million. (Written ruling delivered in *FSD 15 of 2010 (ASCJ) on 1 May 2019*, with reasons released on 30 September 2019.)

entitled to a payment out of the client account in order that he could pay for legal representation, notwithstanding the third party potential proprietary claim to the funds (see pages 41-42 and 46). In the case, the English Court of Appeal permitted USD100,000 to be released immediately without notice to the third party (it was needed urgently in order to pay for legal representation), but held that the third party should be put on notice before a direction was made for further funds to be released.

81. *Finers v Miro* was applied in *Re MF Global UK Ltd (No 3)* [2013] 1 W.L.R. 3874. In that case, the company (an insolvent investment bank) had entered special administration in England, and the relevant legislation (CASS 7) had given rise to a statutory trust in favour of the bank's clients. The legislation did not, however, set out a procedure whereby claims to client money could be made and adjudicated or a process whereby client money could be distributed among those entitled to it (paragraph 8). Without such a mechanism, the administrators would have been required to provide in full for claims which had been rejected, significantly drawing out the distribution process to the detriment of all clients (paragraph 13). The administrators therefore proposed a procedure for adjudicating creditor claims and distributing assets to clients, which had been based on the rules applicable under the UK Insolvency Rules to insolvent estates generally, and asked the court to give its blessing (paragraph 16). The procedure was intended to allow the administrators to make distributions without the need to provide for claims which had either been rejected, or not notified to the administrators at all (paragraph 20).

82. After referring to *Finers v Miro*, David Richards J noted at paragraph 26 that:

> "*The inherent jurisdiction of the court does not enable the court to vary beneficial interests in trust property but, as part of the jurisdiction to*

supervise and administer trusts, it permits the court to give directions to trustees to distribute trust property on particular bases when the court is satisfied it is just and expedient to do so. A well-established example of the exercise of the jurisdiction in this respect is the making of In re Benjamin orders: In re Benjamin [1902] 1 Ch 723. In those cases where the trustees are faced with a practical difficulty in establishing the existence of possible beneficiaries or other claimants, the court will give a direction to the trustees enabling them to distribute the trust property on an assumption of fact that there is no such beneficiary or claimant. As Nourse J explained in In re Green's Will Trust [1985] 3 All ER 455, 462, an In re Benjamin order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities. It protects trustees but it equally preserves the right of any person who establishes a beneficial interest to pursue such remedies as may be available to them."

83. David Richards J went on to say at paragraph 31 that if an order of the sort made in *Finers v Miro* is appropriate in a case where the third party's proprietary claim has been asserted, but not yet determined, it must equally be appropriate in a case where the proprietary claim has already been rejected. At paragraph 32, the judge balanced the need to make timely distributions of client money to the bank's clients, with the interests of purported creditors whose claims had not yet been resolved, and held that it was appropriate to make the order sought.

84. In *Re MF Global (No. 3),* the mechanism proposed by the administrators involved providing for claims which had been rejected where the relevant claimant had appealed the rejection to the court. In the present case, I am told that the JOLs do not intend to make provision for AHAB's unproven proprietary claim. However, I accept that in any event, the following factors justify dispensing with any need to make provision for AHAB's proprietary claim:

(a) Providing for AHAB's alleged proprietary claim to all the assets would prevent any distributions *at all* until AHAB had exhausted its rights of appeal, potentially all the way to the Privy Council, which could yet take years.

(b) AHAB's claim has not only been rejected by the JOLs, it has also been rejected by this Court following a lengthy trial, on the basis of findings of fact which, in the view of the JOLs, are very unlikely to be overturned on appeal. When balancing AHAB's rights against the rights of other creditors, the weakness of AHAB's claim when compared to the proven claims of other creditors is a powerful consideration. As David Richards J noted at paragraph 26 of *Re MF Global (No. 3),* the jurisdiction which the JOLs invite the court to exercise "*permits the court to give directions to trustees* [and by analogy liquidators qua statutory trustees][9] *to distribute trust property on particular bases when the court is satisfied it is just and convenient to do so... such an order does not vary or destroy beneficial interests but merely enables trust property to be distributed according to the practical probabilities*".

85. I accept that the JOLs seek the comfort of this Court's sanction not only because it is necessary given their powers as limited by the 2010 Order (and possibly by section 99 of the Companies Law) but also because they will make the Distributions

[9] The real nature of the statutory trust was discussed fully. In *Re Caledonian Securities* 2016(1) CILR 309 at [57] when considering the entitlement of liquidators to apply funds held strictly on trust for meeting expenses of the liquidation estate generally. The present application relates differently to the assets of the SICL liquidation estate interests and so are held by the JOLs as statutory trustee on behalf of SICL.

only if they can do so without risk of being held to have acted in breach of trust by so doing in the event (in their view unlikely) of AHAB's appeal succeeding.

86. It is submitted on behalf of the JOLs and I accept that the Court has the inherent jurisdiction to make such an order. As further noted in paragraph 30 of *Re MF Global (No 3)(above)* and *Lewin on Trusts*, 19th Ed. (2015), paragraph 26-033:

> "*It is the practice of the court not generally to permit a trustee to distribute without notice to a claimant.* ***But the court has jurisdiction to permit or direct a trustee to distribute notwithstanding the existence of claims or potential claims from third parties.*** *That will not have the effect of destroying a proprietary right of third parties, but may afford protection against personal claims against the trustees by third parties.*" (Emphasis added).

87. This was also supported by Balcombe L.J. in *Finers v Miro (above)* at 46E where he said:

> "*In my judgment the court undoubtedly has jurisdiction to authorise payment out by a trustee who, as in this case, prima facie holds his assets on trust for a named person absolutely, although with the possibility that there may be other persons interested in those assets. The court may authorise the release of some part of those assets to the named beneficiary, even in the absence of the other potential claimants. However, it is a jurisdiction which must be exercised sparingly when those other claimants have not had an opportunity to be heard.*"

88. That last mentioned caveat does not apply in the present circumstances where AHAB and Barclays have both been notified and AHAB has given its conditional consent, while Barclays has not confirmed its position one way or the other.

Conclusion

89. For the reasons discussed above, I decided to sanction the JOLs' proposal for the interim Distribution. I recognise that the JOLs have (inter alia) a duty, in keeping with section 110 (1)(a) of the Companies Law, to distribute the assets to creditors who are entitled to them; these being prima facie, the proven and admitted creditors of the estate. While this duty is curtailed by the 2010 Order (as amended) in deference to AHAB's proprietary claim (and that of Barclays' which is contingent on AHAB's), AHAB's claim has been resoundingly rejected by this Court for reasons which the JOLs reasonably regard as unlikely to be disturbed on appeal. And while AHAB has appealed as of right, it has not sought or obtained a stay upon the operation of the Judgment or upon the operation of the liquidation. Given the massive nature of the AHAB claim, whatever the outcome of the current appeal, the appellate process is likely to run for a long time yet, all the way to the Privy Council. In the meantime, absent approval of the Distribution, the creditors will continue to suffer the withholding of their funds. It is therefore accepted that the interests of the Company, and of the creditors of the Company, are best served by the JOLs being permitted and authorised to make the Distributions.

90. The case law discussed above also recognises that the JOLs, in their capacities as statutory trustees of the assets of the SICL liquidation estate, are allowed to seek the sanction of the Court for the distribution of the trust assets on particular bases, where the Court is satisfied that it is just and convenient to do so. These may include a basis, such as presented here by the JOLs, which does not vary or destroy

beneficial interests but merely enables trust property to be distributed *"according to the practical probabilities"*[10] presented.

91. In this regard, it is also accepted that the interests (such as they may be) of AHAB/Barclays are also appropriately protected by the measures that the JOLs have put in place by way of the DOI and surety bond, all as extensively discussed above and including as the JOLs carefully address the objections of Credit Agricole.

92. That being so, in no sense then can it be said that the JOLs' proposal is unreasonable, let alone so patently absurd such as to justify, in keeping with the settled case law, refusal of the Court's sanction.

93. In the circumstances therefore, I granted the orders in the terms sought.

GRAND COURT CAYMAN ISLANDS

Hon Anthony Smellie
Chief Justice

1st October, 2019

[10] In Re MF Global UK (No. 3) (above).