

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

Cause No.: FSD 111 of 2017 (RPJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

**AND IN THE MATTER OF THE WIMBLEDON FUND, SPC (IN VOLUNTARY
LIQUIDATION)**

RULING



1. On 5 February 2018 I delivered a judgment upon the Petition seeking to place the voluntary liquidation of the Wimbledon Fund SPC (the Fund) under Court supervision. The sole issue in relation to that judgment was the identity of the joint official liquidators.
2. I invited the parties to address me by way of written submission on the form of the order to be made pursuant to that judgment and as to costs. They duly did so and I now provide my ruling on those written submissions having carefully considered them. The joint official liquidators of the Wimbledon Financing Master Fund Ltd (in official liquidation) (the creditor) nominated two different persons for appointment and objected to the incumbent voluntary liquidators. In the event I decided that the incumbent voluntary liquidators be appointed as joint official liquidators of the Fund for the reasons expressed in that judgment.

The draft Supervision order

3. Since the joint official liquidators (JOLs) of the Fund agree to the amendments proposed to paragraph 5 (which relates to the treatment of the voluntary liquidator's remuneration and expenses), the only substantive issue relates to paragraph 6 whereby the JOLs seek authority to exercise certain powers specified in Part 1 of the third schedule to the Companies Law (2016 Revision) without the further sanction or intervention of the court.

4. Those powers relate to the engagement of staff, agents and/or consultants and the engagement of attorneys and other professionally qualified persons to assist the JOL's in the performance of their functions.
5. The creditor objects to paragraph 6 on the basis that it affords the JOLs of the Fund a "blanket sanction". It argues that is not appropriate where powers are sought by liquidators that can only be exercised with the specific sanction of the court (see s.110(2)(a) of the Companies Law).
6. The creditor relies on the decision of Justice Jones in *Re UCF Fund* [2011 (1) CILR 305] as authority for the proposition that the grant of such sanction would be contrary to principle. The JOLs of the Fund argue that the powers sought are quite limited and are indeed appropriate in the present case.
7. In *UCF*, Justice Jones held that the purpose of subjecting official liquidators to the general supervisory jurisdiction of the court is to place upon them the onus to make a sanction application in every case where a power can only be exercised with the specific sanction of the court (in accordance with the Companies Winding Up Rules), whether or not the exercise of the power is controversial. The court would not ordinarily make an order granting 'blanket authority' to exercise powers contained in Part I of the third schedule of the Companies Law. To do so would be to allow the liquidator to exercise powers as they saw fit (without further reference to the court) on the basis that it might become appropriate to exercise such power:
 - a) without an application having been made based on specific circumstances or transactions which the exercise of the relevant powers related to; and
 - b) without the need for relevant evidence in support of the application.
8. On the facts of *UCF* the liquidator's application in respect of various powers which required the sanction of the court was refused on the basis of this principle and because it was premature, unsupported by relevant evidence and insufficiently particularised.
9. Order 11 of the Company's Winding Up Rules (CWR) governs sanction applications and requires, among other things, that notice of such applications be given to the liquidation committee or specific creditors/contributories as the court may direct (Rule 2(1)). This affords the right to creditors to be heard in respect of such applications and provides a proper basis for the court exercising its supervisory power. In this case, from the applications that have been made to date, it is clear that the creditor seeks to make use of all possible rights to be given notice and to be heard on such applications (if afforded by the court).
10. There is no doubt that there is a wide-ranging scope of work to be carried out by the JOLs of the Fund in this case. There is also no doubt that the engagement of extra people (staff, agents and/or consultants) to assist, and attorneys and other professionally qualified persons may well be necessary. It is also the case that there is plenty of evidence filed in the proceedings to date setting out the scope of work that



is likely and with good reasons given for each work stream. Such work streams obviously change in the fluid environment of a liquidation and so decisions and the necessary approvals will consequentially also change as events take their course.

11. On behalf of the JOLs of the Fund, it is argued that not only will it be time consuming and expensive to make an application for sanction each and every time they require further people (whether they be staff, agents/or consultants) to assist, the interests of the Fund itself and its stakeholders will be severely prejudiced if it is deprived of legal representation and advice until it is able to obtain sanction from the court by way of separate application. It is suggested that the creditor's concerns will be allayed by a provision providing liberty to the Fund's liquidation committee, once appointed, allowing the committee to raise any concern it has regarding the manner in which the JOLs exercise their Part 1 powers.
12. The legislation, in my view, does not require the court's authority to embark upon the work which might ultimately lead to a decision or transaction, the implementation of which requires the court's sanction. The legislation requires official liquidators to obtain the sanction of the court before implementing such decisions and transactions.
13. Where certain powers have been made subject to the general supervisory jurisdiction of the court as a result of s.110 (2) of the Companies Law such that an official liquidator may exercise the powers contained in Part I of the third schedule only with the sanction of the court, it is for the official liquidator to satisfy the court that the exercise of such power is appropriate in every case using the procedure designated under the CWR. By contrast, in respect of Part II powers the onus is on the creditors or contributories to make an application if they disapprove of the way in which the official liquidator has exercised or intends to exercise powers.
14. If the JOL's of the Fund wish to retain people, the sanction application must be supported by evidence which explains why the people sought to be retained are thought to be appropriate and which sets out the proposed terms and conditions which have been negotiated and agreed upon. In relation to the power to retain lawyers and other professionals, as Justice Jones in *UCF* made clear, it is not for the court to sanction the threshold court decision to engage or not to engage lawyers. It is assumed that lawyers and other professionals will be needed. The role of the court is to ensure that the chosen firm or firms are independent and free from conflicts of interest and that the terms of their engagements are appropriate in the circumstances of the case. Of course as a practical matter, the retention of attorneys should not hold up urgent work and an order sanctioning the engagement of the law firm will take effect retrospectively from the date upon which the firm started work.
15. The JOL's of the Fund submit that if a sanction application were to be made today, the court would find having regard to the evidence already submitted in this liquidation that it is in the best interests of the Fund to grant the requisite sanction required. I express no view on that.



16. However, it would be wrong in principle to circumvent the applicable procedure by which such sanction must be obtained in respect of Part I powers by giving authority to the JOLs of the Fund to engage staff, agents consultants and attorneys pursuant to paragraph 6 .
17. The court will rely on all involved to conduct themselves in accordance with the Overriding Objective and will be prepared in appropriate cases to determine such applications as expeditiously as possible making use of the procedures whereby applications may be dealt with on the papers and by video link as necessary.

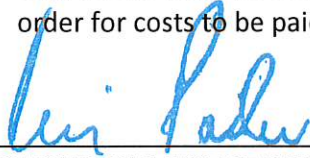
Costs

18. The JOLs of the Fund set out what, in their view, is unreasonable conduct on the behalf of the creditor and seek an order that it pays the costs of the Petition and reimburses the Fund in respect of the costs thrown away as a result of the necessity of responding to an unmeritorious and unwarranted opposition over a protracted period. They argue that such costs should be taxed on an indemnity basis up to 30 August 2017 (being the date on which the creditor first abandoned its initial proposal that Mr Robinson be appointed as an official liquidator of the Fund and communicated its nomination of BDO as official liquidators) and on the standard basis thereafter. It does so for three reasons. In summary: First, but for the position taken by the creditor, the Petition would have been determined on the papers. Instead it was heard over three separate hearings; Second, that the creditor did not act on behalf of or represent the interests of any other creditor or the general body of stakeholders of the Fund; Third, that the creditor did not obtain the relief sought and the Fund prevailed.
19. It also relies on a number of what it describes as aggravating factors.
20. The creditor argues against any order being made in favour of the JOL's of the Fund and requests payment of its own costs from the Fund.
21. In deciding how I should exercise my discretion as to costs, I bear in mind that the general principle is that costs should follow the event in adversarial litigation providing that it has been conducted in an economical, expeditious and effective way, unless there is a good reason to decide otherwise. I exercise that discretion pursuant to the inherent jurisdiction of the court, there being some debate as to the jurisdictional basis to make an order under the CWR in respect of the particular issue in dispute in this case, namely the identity of the liquidators.
22. The substantive challenge to the appointment of the JOLs failed and therefore the JOLs of the Fund should have their reasonable costs of defending that challenge. It would not, in my judgement, be appropriate that the general body of stakeholders of the Fund should bear the costs caused by the challenge the creditor brought as there is no evidence that they supported the creditor or that the creditor was acting in their



interests. Those costs should be taxed on the standard basis if not agreed within 21 days. There is an insufficient basis, in my view, to make an indemnity costs order.

23. I can see no basis for exercising my discretion in favour of the creditor, which seeks an order for costs to be paid by the Fund. The creditor should bear its own costs.



THE HONOURABLE JUSTICE PARKER
JUDGE OF THE GRAND COURT
1 March 2018

