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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 29 OF 2011 (AJJ)

THE HON MR JUSTICE ANDREW J. JONES QC
IN CHAMBERS, 11TH NOVEMBER 2011

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF EMERGENT CAPITAL LIMITED (IN LIQUIDATON)

Appearances:

Mr. Michael Roberts instructed by Walkers for RAAL Limited ("RAAL")

Mr. Jayson Wood of Appleby for Australian World Trading Pty Ltd, AWT LLC, Mr. Andrew Kelly, Mr. James Frawley and Mr. Ashley Palm ("the Creditors")

Mr. Nigel Meeson QC of Conyers Dill & Pearman for the Joint Official Liquidators of Emergent Capital Limited (In Liquidation) ("ECL")

RULING

By a Summons dated 4th November 2011 RAAL applied for an order that it be allowed to appear on the appeals brought by five creditors against the rejection of their respective proofs of debt by the joint official liquidators of ECL ("the Liquidators"). RAAL is a shareholder of ECL and has a financial interest because the surplus available for distribution will be reduced if any of these appeals are allowed.[1] The Summons is opposed by counsel for the Creditors and the Liquidators have taken a neutral position, being content to abide by whatever order may be made.

It is an official liquidator's function to investigate and adjudicate upon the proofs of debt. In so doing he is acting in a quasi-judicial capacity, as specifically recognized by CWR O.6, r.1(4) . If

[1] There is an entirely separate unresolved dispute about the amount of RAAL's shareholding, but the outcome of that dispute has no bearing upon the issues which arise on this Summons.

the proof of debt is rejected, CWR O.16, r.17 confers a right of appeal upon the dissatisfied creditor and the appeal takes the form of an adversarial proceeding between the appellant and the official liquidator who represents the interests of the general body of creditors or shareholders whose dividends or distributions will be reduced if the appeal is allowed. For this reason the Companies Winding Up Rules make no provision for admitted creditors or shareholders to appear on such appeals. The issue is whether any such power exists as part of the inherent jurisdiction of the Court and, if so, whether I should exercise the Court's discretion to allow RAAL to participate in the particular circumstances of this case.

RAAL relies upon the dictum of Smellie CJ in *Re Sphinx Group* [2009] CILR 178. This was a case in which a liquidation committee had been allowed to participate in the early interlocutory stages of a complicated appeal against the rejection of a proof of debt and the issue before the Court was whether, having done so, the committee's costs of that appearance should be paid out of the assets of the company as an expense of the liquidation. The Court was referred to a decision of an Australian court in *Australian Consol Invs. Ltd v. Woodings* (1996) 16 WAR 388 which is relied upon in *McPhearson's Law of Company Liquidation* (1st Edition) at paragraph 12.60 for the proposition that under United Kingdom law an admitted creditor is not entitled to oppose some other creditor's appeal against rejection of his proof.[2] The Chief Justice rejected this proposition and said (at paragraphs 18 and 19) that –

> *"18 I am not satisfied on the basis only of the foregoing discussion that so wide a proposition is acceptable. It is true that an appeal against a rejection of proof of debt is joined peculiarly as between the particular appellant/claimant and the liquidator. There could well, however, be circumstances in which the interest of a third party stakeholder or claimant in the outcome cannot be properly or fully represented by the liquidator and in which it may be only fair that the third party be heard.*
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> *19 The silence of the Rules should not in such circumstances be deemed to operate as an obstacle to fairness. Viewed in the light of such potential unfairness, the Australian case must, in my view, be seen as one decided based on its own particular facts and circumstances."*

For this reason the Chief Justice concluded that he could make an order that the liquidation committee's costs be paid out of the company's assets.

The circumstances in which the Court has an inherent power, or is entitled to exercise its inherent power, in the context of winding up proceedings were explained by the Court of Appeal in *HSH Cayman I GP Limited –v- ABN Amro Bank* [2010] CILR 114. It was held that the Court's inherent power can be exercised to supplement the Companies Winding Up Rules in a way which is not inconsistent with their overall scheme. As I have already said, the overall scheme of CWR Order 16, Part III is that the official liquidator represents the interests of the

[2] The scheme for proving debts applicable to insolvent liquidations under the UK Insolvency Rules 1986 is substantially the same as that contained in CWR Order 16. The UK 1986 Rules are also silent on the question whether an admitted creditor may participate in the appeal of any claimant whose proof has been rejected.

estate on an appeal and I think that it would be contrary to this scheme to allow creditors to participate in appeals as a matter of course. However, I am satisfied that the Court does have an inherent jurisdiction to allow an admitted creditor to appear on another claimant's appeal against the rejection of his proof of debt, in circumstances where it is not suggested that the official liquidator has acted in breach of duty in connection with the adjudication. The same consideration applies to a shareholder if the company is solvent. In my judgment this power is limited to, or should only be exercised in, circumstances where there is some special circumstance or peculiar reason which leads the Court to conclude that the official liquidator is unable to represent the interests of the general body of creditors or shareholders in the usual way. No such special circumstance or peculiar reason arises in this case and it seems to me that these Liquidators are perfectly well able to represent the interests of the shareholders whose distributions will be reduced if any of these appeals are allowed.

RAAL accepts that the Liquidators made the right decision in rejecting the Creditors' claims and did so for the right reasons. Nevertheless, Mr Roberts argues that RAAL should be allowed to participate in these appeals for two reasons. First, he points to the fact that the Creditors appear to have co-operated together, engaged the same attorneys and supported each other's claims. He did not seek to develop this point in his oral argument and I do not think that it has any bearing upon the Liquidators' ability to conduct these appeals. At best, the co-operative way in which these appeals have been prepared gives rise to various forensic points which the Liquidators are well able to make if they consider it appropriate to do so. Secondly and more importantly, it is said that because the evidence of Mr Roderic David (who owns and controls RAAL) is highly relevant to the appeals, RAAL should be allowed to participate. Mr David has sworn affidavits in opposition to these appeals and counsel for the Liquidators has confirmed that these affidavits (and the exhibited documentation) will be put in evidence. However, the mere fact that Mr David is a material witness and that his company has a material financial interest in the outcome of the appeals, does not lead to the conclusion that RAAL should be allowed to participate in them.

The inherent jurisdiction to allow an admitted creditor or shareholder to participate in an appeal is limited. It does not empower me to allow RAAL to take over conduct of these appeals or become a party or otherwise participate in them, merely because Mr. David thinks that this course would best serve his interest. In principle, it is the official liquidators' duty to defend the appeals in the interests of the estate and it seems to me that the Creditors are entitled to have the case against them put by the Liquidators, who are independent officers of the court subject to the rule in *Ex Parte James* (1874) 9 Ch. App 609. The essence of this rule is that conduct which is lawful and would be open to a private litigant such as RAAL is not open to an official liquidator where that conduct is less than exemplary. I should only allow some other creditor or shareholder, who would not be bound by this rule, to conduct or participate in an appeal if there is some special circumstance or peculiar reason why the official liquidator is unable to fulfill his duty, or at least to fulfill it effectively. No such circumstance arises in this case and I therefore dismiss this application.

I make the usual order that the Liquidators' costs of the Summons be paid on the indemnity basis out of the company's assets as an expense of the liquidation. I make an order for costs in the cause as between the Liquidator and the Creditors. As regards RAAL, having been unsuccessful, I make an order that it will pay the Liquidators' costs of the Summons on the standard basis. There will be no order for costs as between RAAL and the Creditors.

DATED this 11th day of November 2011

The Hon Mr Justice Andrew J. Jones QC
JUDGE OF THE GRAND COURT

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