IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 0050 OF 2009 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF DD GROWTH PREMIUM 2X FUND (IN OFFICIAL LIQUIDATION) ("the Company")

IN OPEN COURT
THE 27TH DAY OF JUNE 2013 AND 23RD OCTOBER 2013
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Jeremy Walton and Mr. Jeremy Snead of Appleby (Cayman) Ltd. ("Appleby") for the Joint Official Liquidators (with them Ms Tammy Fu of Zolfo Cooper, one of the Joint Official Liquidators, "JOLs").

REASONS FOR JUDGMENT

1. The JOLs applied for the court's sanction of two arrangements into which they proposed to enter:

   (i) A funding amendment agreement ("the F.A.A.") which amends a Funding Agreement between the Company and UBI Banca S.C.P.A., the Lender;

   (ii) a conditional fee agreement for the continued retention of Appleby in respect of the conduct of litigation of "a claw back" claim brought against a redeemed shareholder of the Funds, continuing under cause number FSD 33 of 2011 (ASCJ) ("the Appleby CFA").

2. On 27th June 2013 I sanctioned the entering into both arrangements pursuant to section 110 of the Companies Law (2012 Revision) ("the Law"). These are the reasons for so doing.

3. I need say no more as to the reasons for sanctioning the F.A.A. other than that it is clearly in the interests of the Company and its investors that the F.A.A. be entered into. This is the determination of the JOLs themselves in the exercise of their commercial judgment, a judgment that the Court will usually support unless there are good reasons for not doing so.

4. The real question for the Court in respect of sanction of the F.A.A. and in respect of sanction of the Appleby CFA, is whether the interests of the creditors of the Company in liquidation are likely to be best served by permitting the Company to enter into the proposed compromise or not: *see* ***Re Greenhaven Motors Ltd. (In Liquidation)***[1].

5. There are however, the further public policy concerns that arise in respect of sanctioning the Appleby CFA because of its nature as a conditional fee arrangement. I therefore examined the reasons for the Appleby CFA and considered its compliance with the public policy concerns.

6. The circumstances which gave rise to the need both for the F.A.A. and the Appleby CFA appear from the following summary provided by Mr. Walton.

7. Following the initial appointment of Goronwy James Cleaver and Richard Fogerty as provisional liquidators of the Company on 20 March 2009, they were appointed official liquidators and the Order was made for the winding up of the Company on 29 May 2009. The terms of the Order included the ability of the Liquidators to appoint attorneys, solicitors, counsel and other professional advisers both in the Cayman Islands and elsewhere. The firm of Orrick and David Marks QC were appointed in England and the firm of Appleby in Cayman.

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[1] *[1999] 1 BCLC 365*

8. It soon became apparent to the Liquidators that there was no cash on hand but that the Company had potential claims against its former Investment Manager and against redeemed shareholders of the Company who were substantially overpaid by reason of the massively over-inflated NAV calculations. The Liquidators brought the need for funding to the attention of the creditors and shareholders and indicated that without funding there would be little likelihood of any recoveries for creditors or shareholders. Proposals were considered resulting in the Original Funding Agreement which set up a regime for the investigation and funding of claims considered to be meritorious and which provided that the Lender shall receive from any litigation recoveries in accordance with an agreed "payment waterfall":

(i) repayment of the Funding together with accrued interest and all other amounts paid to it from the litigation recoveries as a liquidation expense.;

(ii) the accrued interest at Margin (3%) plus LIBOR; and

(iii) an amount equal to 28% of the litigation recoveries after repayment of the Petition costs (the "Lender's Profit Element").

9. The Original Funding Agreement was accordingly agreed and was sanctioned by this Court on 18 December 2009.

10. Following a period of investigation, the Lender elected to provide further funding pursuant to the terms of the Original Funding Agreement by way of a Further Funding Notice dated 8 June 2010. In the Further Funding Notice, the Lender indicated that it wished to fund claims against a number of parties, including in relation to redemptions paid to RMF Market Neutral Strategies (Master) Limited ("RMF"). The Lender also entered in a conditional fee arrangement with Orrick and

David Marks QC with a fee conditional on success and a success fee to be paid out of the Lender's Profit Element (the "Orrick CFA").

11. In a sequence of summonses RMF applied to the Court in both Causes FSD 50 of 2009 (ASCJ) and FSD 33 OF 2011 (ASCJ) to restrain the Liquidators from bringing an action against it. The Liquidators concurrently applied for sanction to issue proceedings in England and Wales.

12. The result was that, on 26 April 20ll, this Court sanctioned the issue of proceedings in the Grand Court of the Cayman Islands. At the same time, a Consent Order was filed staying Cause FSD 33 of 2011 (ASCJ).

13. In January 2012 the principal legal advisors to the Liquidators left Orrick to join Dewey & LeBoeuf LLP ("Dewey"). It was agreed that the Original Funding Agreement and the Orrick CFA should remain in force but apply to Dewey instead of Orrick. In April 2012, RMF sought to recommence the action in Cause FSD 33 of 2011 (ASCJ) and it was ordered by consent that the action be continued with certain amendments. This action is on-going and is currently the main focus of the Liquidators' recovery strategy.

14. Unfortunately, Dewey went bankrupt in the United States and into administration in the United Kingdom and is no longer a viable legal adviser. Under the circumstances, the Liquidators decided to continue without English solicitors, but with Appleby and David Marks QC alone. David Marks QC has now retired from practice. Appleby is not operating under any conditional fee agreement. The Lender is unwilling to provide further cash funding and accordingly the Liquidators have negotiated the Appleby CFA.

15. A condition of the Appleby CFA is the payment of US$293,000 of Appleby's outstanding fees out of the remaining funding from the Lender. In order to permit this, the Lender and the Fund need to enter into the F.A.A.

16. The terms of the Appleby CFA and the F.A.A. are agreed between all the parties to the agreements and by three out of four members of the Liquidation Committee (the fourth having asked for more time to consider the documents). The Liquidators therefore propose to sign the documents in substantially the forms exhibited, subject to the Court sanction.

The Law

17. In *Quayum and others v Hexagon Trust Company (Cayman Islands) Limited*[2], I undertook an analysis of the appropriateness of conditional fees, including a conditional uplift fee arrangement, in this jurisdiction. I concluded that it would not fall foul of the law against maintenance and champerty or run contrary to the modern public policy behind the application of that law to the lawyer/client relationship.

18. Practice Direction No. 1/2001 issued pursuant to Grand Court Rules Order 62 ("GCR Order 62") ("the Guidelines") came into force in January 2002 and contained guidelines relating to the taxation of costs. The Guidelines apply to the taxation of the costs of Liquidators' Lawyers since CWR Order 25 rule 3 provides that these shall be governed by and conducted in accordance with GCR Order 62.

19. Following the introduction of the Guidelines, there was uncertainty as to whether the Guidelines or the guidance issued in ***Quayum*** applied. In ***Bennett v Attorney General***[3], Justice Henderson sought to reconcile the two and interpreted the Practice

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[2] *2002 CILR 161*

[3] *[2010](1) CILR 478*

Direction to mean that the Section 7.2 makes the hourly rate basis the only permissible manner of taxation but "it does not prohibit uplifts which are themselves calculated on the hourly-rate basis".

20. The Cayman Islands Court of Appeal criticised this decision in ***Latoya Barrett v Attorney General of the Cayman Islands***[4] but the President, Sir John Chadwick recognised that:

> (at paragraph 55) "*...the issue in [**Quayum**] was whether the fees payable under a conditional uplift fee agreement could be recovered in the context of a salvage claim against trust assets. The relevant question was whether the client was liable to pay his lawyer; not whether the client could recover from an unsuccessful opponent.*"

21. And at paragraph 66:

> *"Given the conclusion which we have reached as to the effect of paragraph 7.2 of the Guidelines, the question which was the subject of decision in Quayum does not arise in the present appeal. Whether or not conditional fee agreements are enforceable as between the lawyer and his client, the amounts (if any) to be paid by the conditional fee client to his lawyer under such an agreement are not recoverable from the client's opponent in the litigation. In those circumstances, as it seems to me, anything we may say as to the decision of the Chief Justice on that question must be considered obiter dicta...."*

22. Accordingly, notwithstanding the decision in ***Latoya Barrett v The AG***, it is submitted that I should accept that ***Quayum*** is still applicable law in a situation as

[4] (Unreported CICA 19 of 2010, written judgment delivered on 14th February 2012)

between a lawyer and his client. In the prevailing absence of legislation to address the public policy implications of conditional fee arrangements (and in the absence even of a public proposal for legislative reform) I consider that I am obliged to apply the case law as it presently stands. Paragraph 5.2 of the Appleby CFA explicitly states that *"the Client confirms having been advised by Appleby that, under current Cayman Islands law, the success fee is not recoverable from RMF"*. That explicit recognition of the decision in ***Barrett v The Attorney General*** as it applied paragraph 7.2 of the Guidelines, determines that the question now before me then becomes only whether it is permissible for Appleby to recover the success fee from its client.

23. CWR Order 25 rule 4(3) provides that taxation of official liquidators' lawyers' fees is to be on the indemnity basis. It is submitted that paragraph 7.2 of the Guidelines should be read in the context of Paragraphs 7.1 – 7.3:

> *"7.1 The amount of attorney's fees allowable on taxation on the standard basis shall be determined on the basis of time spent. The unit of time used in a bill of costs may be 1/10 hour or ¼ hour.*
>
> *7.2 Amounts claimed on the basis of brief fees, refreshers, lump sums, percentages, conditional fee agreements, contingency agreements or any basis other than hourly rates will be disallowed.*
>
> *7.3 In the case of taxation on the standard basis, the hourly rates to be applied will be determined on the basis of the post qualification experience of the persons engaged as follows..."*

24. Paragraph 7.4 then provides that (emphasis added):

> "7.4 *In the case of taxations <u>on the indemnity basis</u>, the hourly rate <u>or scale of rates</u> will be that agreed between the attorney and his client provided that*

such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable."

25. Paragraphs 7.1 to 7.3 relate to the limits that are put on the standard basis of costs: only hourly, calculated in a basic unit and capped at a certain rate. Paragraph 7.4 then provides that for taxations on the indemnity basis it is the agreement between the attorney and the client which is important, and that this may be an hourly rate or scale of rates, provided that this is not unreasonable.

26. Support for this interpretation may be found in CWR O.25 rule 1(3) which includes (emphasis added):

"Every engagement letter or retainer shall contain particulars of the basis upon which the lawyers will be remunerated, <u>including, if applicable</u>, a statement of the agreed hourly rates."

27. It is therefore open to official liquidators to agree <u>the basis</u> on which the lawyers will be remunerated, subject to the Court's sanction. The prohibition in Paragraph 7.2 of the Guidelines against conditional fee agreements does not extend to indemnity fees which may be payable not on the party and party basis, but on the attorney and own client basis. In fact, this Court has on occasion, sanctioned official liquidators in the Cayman Islands to engage US Counsel on a contingency fee basis. See, for example, the Order of Mr. Justice Jones QC in Cause FSD 200 of 2011 (AJJ) – ***In the matter of AJW Master Fund Limited (In Official Liquidation)*** dated 18 December 2012 and order made by me in ***The Matter of SPhinX Group of Companies*** (in liquidation), Cause 258 of 2006 (now FSD 16 of 2009 ASCJ) on the 14th January 2007.

28. Once the principle of conditional fee agreements qua Lawyer and client is accepted, then the principles set down in ***Quayum*** provide helpful guidance as to the appropriateness of a particular agreement (at paragraph 61):

> *"(i) All such arrangements must first receive the sanction of the court to be considered in the context of the client and of the case.*
>
> *(ii) The court is best placed to consider the reliability and reputation of the attorney, and will do so.*
>
> *(iii) Where there is to be an enhanced fee – a requirement for submission to taxation on the solicitor and own client basis will be imposed and, if appropriate, a cap may be placed upon the quantum of fees recoverable.*
>
> *(iv) In an appropriate case the court, as a matter of the exercise of its discretion, can disallow the whole or such part, as it sees fit, of any enhanced fee from the amounts which, upon taxation, the unsuccessful opponent may be required to pay. That is, the fee will be limited to what is reasonable in the circumstances.*
>
> *(v) In appropriate cases, depending, among other things, upon the potential value and size of the litigation, the circumstances of the client and the proposed terms of the conditional fee agreement, the client should be encouraged to take independent legal advice about it. The court may so require before granting its approval.*
>
> *(vi) The agreement must be in writing and there must be a mechanism by which the client can discharge the attorney.*
>
> *(vii) The overriding objective is that the conditional fee arrangement must, from beginning to end, be governed in principle and in practice by what is fair and*

reasonable. To this end, notwithstanding the prior approval of the court, the court must always be able to oversee its execution, by reference, in particular to the manner of the conduct of the proceedings by the attorney."

29. Applying these principles to the evidence set out in Ms Fu's Second Affidavit:

(i) The Liquidators are seeking the sanction of the Court to enter into the Appleby CFA and the Funding Amendment Agreement. In addition to the sanction required in ***Quayum*** it is submitted that the principles applicable to the exercise of a sanction under section 110 of the Companies Law (2012 Revision) are also applicable. These are addressed at paragraphs 31 to 41 below.

(ii) The proposed law firm is Appleby. The Partner with conduct in charge of the case is Jeremy Walton, the Cayman Office head of Litigation and Insolvency, a well known practitioner of litigation and insolvency in the Cayman Islands.

(iii) There is an enhanced fee under the Appleby CFA (see clause 5), charged as an additional percentage of the Basic Charges. The appropriateness of this percentage is discussed at paragraphs 31 to 41 below. In relation to taxation, Clause 4.9 expressly preserves the Liquidators' entitlement to apply for taxation pursuant to CWR Order 25. Additionally under Clause 4.10, Appleby agree to submit regular invoices for the approval of the Liquidators and the Liquidation fee, subject always to taxation and the approval of the Grand Court. For the reasons set out in paragraph 31 to 41 below, it is submitted by Mr. Walton that it is not appropriate to put a cap on the quantum of fees to be recovered as the success fees are proportionate and fair.

(iv) For the reasons set out in paragraph 31 to 41 below, it is submitted that the proposed Basic Charges and the Success Fee are appropriate in the circumstances.

(v) The Liquidators have taken separate legal advice from Harney Westwood & Riegels (see paragraph 36 of Ms Fu's Second Affidavit) in negotiating the Appleby CFA and incorporated some additions from them based on industry practice in England and Wales. A third set of lawyers, Allen & Overy LLP, acting for the Lender, have also been involved in settling the documentation. Further, the Liquidators are professional accountants experienced in dealing with lawyers and litigation; they have also submitted the Appleby CFA to the Liquidation Committee which is comprised of experienced professionals used to dealing with lawyers. Two of the three 'independent' Liquidation Committee members (i.e. excluding the Lender for these purposes) have approved the documents; the final member has asked for more time to consider the documents, but had previously indicated that he is likely to support the documents if the other committee members do.

(vi) The agreement is in writing and pursuant to clause 9.1 the Fund and the Liquidators may terminate the Appleby CFA.

(vii) For the reasons set out below as to why sanction should be given and as to why the uplift is fair, it is submitted and I accept that the overriding objective is satisfied, as the Appleby CFA is fair and reasonable. The Court continues to oversee the conduct of the liquidation, including the taxation of any legal fees incurred by Appleby as legal advisers to the Liquidators and, as such, the

Court will be able to oversee the execution of the CFA and the manner of the conduct of the proceedings by Appleby.

Requirement for the exercise of sanction in relation to Official Liquidators' powers

30. The legal principles applying to the exercise of sanction of a liquidators' powers are well known:

(i) The decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Law is a decision for the Court (see ***Re Greenhaven Motors Ltd (in liquidation)***[5]. The decisions of the Liquidators to enter into the F.A.A. and the Appleby CFA fall within the exercise of such powers.

(ii) In exercising its discretion as to sanction, the Court must consider all the relevant evidence (see ***Re Universal and Surety Co. Limited***[6].

(iii) 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***[7].

(iv) The Court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so (***Re Edennote No. 2 at 92***.

(v) The liquidator is usually in the best position to take an informed and objective view (***Re Greenhaven*** (above) ***at 643h***).

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[5] **[1999] 1 BCLC at 642h**)

[6] ***[1992-3] CILR 149, at page 152***)

[7] ***[1997] 2 BCLC 89, at 95***)

(vi) Unless the Court is satisfied that, if the Fund 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 (***Re Greenhaven*** (above) **at 643h**).

31. Applying these principles to the evidence set out in Ms. Fu's Second Affidavit with respect to the engagement of Appleby under the Appleby CFA and the F.A.A.; I am satisfied that:

(i) The Liquidators have no other funding and the RMF action is currently the main focus of the liquidation strategy.

(ii) The Lender is unwilling to provide any further funding.

(iii) Appleby have been involved in the running of the action from the beginning, and to change law firms at this stage would require a considerable number of man hours to get to the same position as Appleby.

(iv) The terms of the Appleby CFA and the F.A.A. have been negotiated with the Lender and, in the opinion of the Liquidators, are fair.

(v) The Liquidators consider that engaging in the Appleby CFA is in the best interests of the Funds, failing which it is likely that they will not be able to continue to pursue a substantial claim. The evidence does not reveal any "substantial reasons" as to why the Liquidators' views should not be given weight. Accordingly the Liquidators' views should, I accept, be given considerable weight.

(vi) The F.A.A. is a prerequisite of the Appleby CFA and does not, in itself, worsen the position of the creditors. Appleby have agreed to a priority lower

than their statutory entitlement (as legal advisers engaged by the Liquidators) in favour of the Lender, which has the largest stake in recoveries.

(vii) The Liquidation Committee have been kept informed about the status of negotiations. Two of the three 'independent' Liquidation Committee members (i.e. excluding the Lender for these purposes) have approved the documents; the final member has asked for more time to consider the documents, but has previously indicated that he is likely to support the documents if the other committee members do.

Reasonableness of the Uplift

32. It fell to be considered by the Court whether the proposed Success Fee Uplift is appropriate, particularly in circumstances where it is not recoverable from RMF and therefore falls to be borne out of any recoveries achieved by the Liquidators. The factors taken into consideration in determining the Success Fee in this case are set out in paragraph 5.2 of the Appleby CFA. It is common ground in England and Wales that there are two elements to a success fee (see for example ***Spiralstem Ltd v Marks & Spencer Plc)***[8].

(i) The "Risk Element", which the Courts of England have accepted may be calculated by a "Ready Reckoner" based on "F is the chance of failure to win the claim; S is the chance of success. You divide F by S and then multiply that figure by 100 which gives you the success fee." (see ***Spiralstem*** paragraph 7); and

[8] [2007] EWHC 90084.

(ii) The "Postponement Element", which is accepted as only recoverable from a client and not from his opponent (see ***Spiralstem*** paragraph 1)

33. The "Ready Reckoner" quoted in ***Spiralstem*** is replicated in Chapter 45 paragraph 45.7 of *Cook on Costs*[9]. Table A below replicated from the textbook, shows the outcome for a variety of chances of winning further to the formula set out above, with the higher the chance of winning, the lower the success fee becomes:

READY RECKONER

Chance of winning	Success Fee	Chance of winning	Success Fee
50	100%	75	33%
51	96%	76	32%
52	92%	77	30%
53	89%	78	28%
54	85%	79	27%
55	82%	80	25%
56	79%	81	23%
57	75%	82	22%
58	72%	83	20%
59	69%	84	19%
60	67%	85	18%
61	64%	86	16%
62	61%	87	15%
63	59%	88	14%
64	56%	89	12%
65	54%	90	11%
66	52%	91	10%
67	49%	92	9%
68	47%	93	8%
69	45%	94	6%
70	43%	95	5%
71	41%	96	4%
72	39%	97	3%
73	37%	98	2%
74	35%	99	1%

TABLE A

[9]By Michael J. Cook, Lexis Nexis Butterworths 2012 Ed.

34. In ***Quayum***, the plaintiff's Cayman firm of lawyers sought an increased fee of 28.5% in the event of success (notionally reflecting a 78% chance of winning if one were to correlate to Table A). A similar agreement was entered into in that case between the firm and English Counsel, with a 50% uplift in the event of success (representing 67% chance of winning). These were considered appropriate as *"a conditional fee arrangement which provides for an increase in fees to reflect the exceptional nature of the risk undertaken, is not based in any true sense upon the notion of sharing in the spoils of the action. In the case before me, I regard it as based upon a recognition of the exceptional risks being undertaken by counsel in accepting a complex and difficult case without the assurance of any fee whatsoever."*[10]

35. In the present case, the parties have not negotiated a flat "uplift" fee. Paragraph 5.1 provides for a scale of fees (based on a claim for $23,014,300.67 plus interest and costs) as follows:

Total amounts awarded/agreed to be paid from RMF	Appleby Success Fee
$15,000,000 and more	100%
$11,000,000 – 14,999,999.99	75%
$6,000,000 – 10,999,999.99	40%
$3,000,000 - 5,999,999.99	20%
Below $3,000,000	Basic Charges – i.e. zero uplift

TABLE B

[10] At page 184, para. 53 of the Judgment.

36. Blended across the different levels with a weighted average (i.e. the average of the percentages taking account of the breadth of each success fee bracket), this "uplift" equates to 59%, ignoring any "Postponement Element".

37. In the English Case of ***Callery v Gray***[11], the House of Lords endorsed the view (against a backdrop that the maximum uplift was 100%) that the level of uplift should include an element corresponding to the risk of failure. Ignoring any "Postponement Element", a blended uplift of 59% on the "Ready Reckoner table" in paragraph 33 equates to 63% chance of winning: i.e. applying the standard hypothesis that if Appleby took 100 cases on the basis of basic fees plus a 59% uplift for success or nothing for failure, then Appleby would need to win 63% of its cases to break even. This is illustrated in Table C:

Cases	Assumed Cost per case	Total Cost	Wins	Uplift fee at 59%	Basic fee	Net to Appleby
100	$10,000	$1,000,000	75	$442,500	$750,000	$192,500
100	$10,000	$1,000,000	63	$371,700	$630,000	$1,700
100	$10,000	$1,000,000	62	$365,800	$620,000	-$14,200
100	$10,000	$1,000,000	50	$295,000	$500,000	-$205,000
100	$10,000	$1,000,000	25	$147,500	$250,000	-$602,500

TABLE C

38. It can be seen from the pleadings in Cause FSD 33 of 2011 (ASCJ) that there are a number of substantial grounds of dispute. I recognize that it is a complex and difficult case and the outcome may not be a question of "all-or-nothing" – as can be seen from paragraph 48 of the Fund's Statement of Grounds there are 5 separate

[11] ***[2002] 1 WLR 2000***

payments made to RMF by the Fund, each of which is argued to be, inter alia void as preferences or payments out of capital. It is possible, therefore, that the Fund may succeed in relation to certain payments and not succeed in relation to other payments. It is therefore submitted by Mr. Walton to be appropriate to consider the success fee as follows in Table D:

Total amounts awarded/agreed to be paid from RMF	Appleby Success Fee	Ready Reckoner corresponding chance of winning.
$15,000,000 and more	100%	50%
$11,000,000 – 14,999,999.99	75%	57%
$6,000,000 – 10,999,999.99	40%	71%
$3,000,000 - 5,999,999.99	20%	83%
Below $3,000,000	Basic Charges – i.e. zero success fee	the Spiralstem table only goes to a 99% chance of winning corresponding to a 1% uplift

TABLE D

39. Table D illustrates a graduated scale of fees relative to size of recoveries which seems fairly to reflect the notional risks involved in the case.

40. Costs of official liquidators' lawyers fall to be paid out of the liquidation estate fund and to be taxed on the indemnity basis (CWR O.25 r.4 (3)). Paragraph 7.4 of the Guidelines provides that: *"In the case of taxation on the indemnity basis, the hourly rate or scale of rates will be that agreed between the attorney and his client provided that such rate or scale is not unreasonable. The mere fact that the agreed rate is higher than the maximum rate(s) allowable on a taxation on the standard basis shall not be regarded as evidence that it is unreasonable*". However, as a comparison to the Guideline Rates in Financial Services matters, the effective hourly rates pursuant

to the Appleby CFA will be as follows in Table E using the two principal lawyers engaged (with the rates for Queen's Counsel to be factored as well when applicable):

Lawyer	PQE	Guidelines/ FSD	Standard Charge-out	Below $3m	$3-6m	$6-11m	$11-15m	$15m+
Jeremy Walton	15 to 20	$900	$850	$850	$1,020	$1,190	$1,487	$1,700
Jeremy Snead	5 to 10	$625	$450	$450	$540	$630	$787	$900

TABLE E

41. The second element that it is submitted should be taken into account, is the "Postponement Element". Appleby is said to be effectively funding its own costs (including some disbursements) for the period of the claim in the same way that the Lender has funded certain other costs. Upon success the Lender is recompensed accrued interest calculated at Margin (3%) plus Libor (Clause 4.3). Appleby's Terms of Engagement[12] provide that invoices should be settled within 14 days and late payment will incur interest at 2% above local base rate per month. The restriction on Appleby's cash flow by deferring any payment until (successful) conclusion of the case, is said to be equivalent to lending to the Fund at interest 2% over the base rate. It is submitted that this should be taken into consideration within the success rates set out above. Paragraph 45.8 of *Cook on Costs* provides a further table demonstrating the percentage of a success fee which would be called for to obtain the annual interest rates shown at the head of the table.

42. Table F is modelled on that and is presented on the basis that the success fee is used as a mechanism to cover not only risks but also for recovering the cost of waiting for

[12] Tammy Fu 2nd Affidavit Exhibit page 57

payment and calls for an accurate prediction of the length of time which will elapse before the conclusion of the case. Table F also recognises that the costs to which it applies will not all have been outstanding for the whole of the time that the case runs. Thus, it would be inappropriate to apply the uplift of the success fee as if the basic costs of the litigation were all incurred and outstanding from day one.

Interest Rate (%) Month	6.0 %	8.0 %	10.0 %	Interest Rate (%) Month	6.0 %	8.0 %	10.0 %
9	4.5	6.0	7.5	23	11.5	15.3	19.2
10	5.0	6.7	8.3	24	12.0	16.0	20.0
11	5.5	7.3	9.2	25	12.5	16.7	20.8
12	6.0	8.0	10.0	26	13.0	17.3	21.7
13	6.5	8.7	10.8	27	13.5	18.0	22.5
14	7.0	9.3	11.7	28	14.0	18.7	23.3
15	7.5	10.0	12.5	29	14.5	19.3	24.2
16	8.0	10.7	13.3	30	15.0	20.0	25.0
17	8.5	11.3	14.2	31	15.5	20.7	25.8
18	9.0	12.0	15.0	32	16.0	21.3	26.7
19	9.5	12.7	15.8	33	16.5	22.0	27.5
20	10.0	13.3	16.7	34	17.0	22.7	28.3
21	10.5	14.0	17.5	35	17.5	23.3	29.2
22	11.0	14.7	18.3	36	18.0	24.0	30.0

TABLE F

43. The Statement of Grounds was lodged in August 2012. Assuming that the case takes 18 months, then with a base rate of 3.75% the interest rate would be 5.75% (taking account of Abbleby's standard levy of 2%); 6% at 18 months, according to the table in *Cook on Costs* equates to a 9% Postponement Element. Even allowing 8% Postponement Element given the .25% reduction (i.e.: 6% - 5.75%), this affects the percentages in Table D as follows in Table D.2; with a revised chance of winning

according to the Ready Reckoner reflecting the fact that the Postponement Element would not be recoverable.

Total amounts awarded/agreed to be paid from RMF	Appleby Success Fee (equals Uplift minus Postponement Element)	Ready Reckoner corresponding chance of winning.
$15,000,000 and more	92%	52%
$11,000,000 – 14,999,999.99	67%	60%
$6,000,000 – 10,999,999.99	32%	76%
$3,000,000 - 5,999,999.99	12%	89%
Below $3,000,000	-8%	The table only goes to a 99% chance of winning to a 1% uplift.

TABLE D. 2

44. It may be argued that, if the Success Fee is not recoverable from RMF, it is inequitable to order it to be paid by the Company. However, I recognize that it has been common practice in England to permit elements to be charged in a conditional fee agreement that are not recoverable from the other side: see for example ***Spiralstem Ltd v Marks & Spencer Plc*** (above), where it was accepted that the Postponement Element was not recoverable. Further, this Court has, in instances, agreed to the engagement of foreign lawyers for litigation overseas by official liquidators where it is allowed on a contingency basis (subject to CWR Order 25 rule 1(4))(tab 9), and notwithstanding that such contingency fees are similarly not to be recoverable from the opposition.

45. In the present case, the Lender's Profit Element will similarly not be recoverable from RMF. However, the majority of the Liquidation Committee and the JOLs have taken the view that it is better to sacrifice a proportion of the recoveries in funding costs than to have no funding and therefore no recoveries. I accept that it is unlikely that any firm would accept a conditional fee to litigate any claim without an upside corresponding to the factors outlined above. In the circumstances, the JOLs and the majority of the Liquidation Committee have concluded that the benefit of engaging lawyers is worthwhile to the Company notwithstanding the fact that the Uplift is not recoverable from RMF (see clause 5.2).

46. I regard that view as being commercially sound and reasonable and as being clearly in the interest of the Company and of those having the real financial interests in it.

Sealing of the Court file

47. Finally, due to the confidential and privileged nature of the documents referred to in, and exhibited to Ms Fu's Second Affidavit filed in support of this application, the JOLs have requested that the Affidavit and the Order made on 27th June 2013 be filed under seal pursuant to CWR O.24 rule 6 and remain sealed until further order. I so order.

48. I have, however, declined to seal these reasons for judgment having regard to the public interest nature of the application and the concern that RMF would be entitled to know that the Company acts under a conditional fee arrangement. This carries the implication that RMF, if successful, may be unable to recover its ordinary costs of the action. I am also of the view that nothing in these reasons violates the legal privilege of the Company or of Appleby in relation to the advice either would have acted upon in entering into the Appleby CFA.

49. I do not consider that the consideration of the "risk element" undertaken at paragraphs 37-39 above unfairly discloses the thinking of the parties to the Appleby CFA. The "risks" discussed there are reflected only in the graduated scale of fees relative to the size of recoveries which are regarded as fairly reflecting the notional risks involved in the case.

Conclusion

50. For these reasons, the JOLs' request for the sanction of the Court of the JOLs' entering into the Appleby CFA and the F.A.A. was granted.

51. In granting sanction, I recognised of course, that the assessment of risk that underpins the Appleby CFA is an assessment that Appleby would naturally have undertaken and regarded as favourable before agreeing. That however, must be regarded in light of the fact that the JOLs are professional accountants who are themselves experienced in the business of commercial litigation and, furthermore, would have considered both the F.A.A. and Appleby CFA with the benefit of independent legal advice.

52. With such considerations in mind, I have also had well in mind the cautionary words of the then Master of the Rolls, Lord Neuberger declared in ***Drake v Fripp*** ***[2011] EWCA Civ. 1282***:

> *"I believe that there may be a regrettable, if understandable, tendency to charge the maximum success fee of 100% in every case. The client with whom the fee is negotiated by the lawyer has no interest in the level of success fee (at least in a case such as this, where he has to pay no more than he is entitled to recover from the paying party), and the lawyer has an obvious and strong interest in the success fee being as high as possible. In many cases, it is easy for a*

lawyer, acting in complete good faith, to persuade himself that the prospect of his client's case succeeding are no better than 50% [(and so a success fee of 100% is justified)] when it is in his interests to do so, and when he has no negotiations with the party who will or may have to pay the success fee. The court has a particular duty, therefore, to be vigilant in considering the reasonableness of the level of success fee agreed, but, as I have said, this does not mean that the court can invoke the wisdom of hindsight or should adopt an unduly harsh approach."

53. In this case, the particular duty that I have to be vigilant is at least not exacerbated by similar concerns. Given the present state of the law, as explained by the Court of Appeal in ***Barrett*** (above), there can be no question of the unsuccessful party here – RMF if that turns out to be the case – being burdened with Appleby's success fee, the liability for which would lie only as between Appleby and the Fund (per the JOLs). It therefore comes back to the reasonableness of the commercial terms of the Appleby CFA as negotiated between the JOLs and Appleby; the crucial matter about which I have already expressed my satisfaction.

54. I end by emphasising the need for legislative intervention in this complex area of litigation costs. One aspect of concern not addressed in this judgment is the possible consequence of the successful defendant (here RMF) not being able to recover its costs from an impecunious plaintiff (here the Company per the JOLs) not being able to meet an obligation in costs for which it may be found liable. It is notwithstanding such concerns that, in the exercise of discretion having regard to all the circumstances – including the very arguable nature of the Company's claim – that I grant the Court's

sanction of the Appleby CFA. Such concerns indicated that notwithstanding my having ventured in this case to apply the modern principles which have been emerging in this field from pronouncements of the English judges, the public interest in the Cayman Islands in having certainty and clarification of policy that only legislation can bring, remains as real as ever.

55. For instance, there is still the concern identified by the President of the Court of Appeal (and suggesting the need for legislative reform) in ***Barrett's*** case above (at page 6) – whether an unsuccessful party could be liable for any costs whatsoever of a successful party, even by way of taxation on the standard basis, where the successful party had proceeded on the basis of a conditional fee agreement.

56. It is hoped that this Judgment will help to inform the discussions that might lead to legislative intervention.

GRAND COURT CAYMAN ISLANDS

Hon. Anthony Smellie
Chief Justice

23rd October 2013