IN THE GRAND COURT OF THE CAYMAN ISLANDS

FSD 16 OF 2009
(ORIGINALLY CAUSE NO: 258 OF 2006)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF THE SPHINX GROUP OF COMPANIES (IN OFFICIAL LIQUIDATION) AS CONSOLIDATED BY THE ORDER OF THIS COURT DATED 6TH JUNE 2007

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
ON THE 24TH DAY OF JANUARY 2014

APPEARANCES: Mr. Tom Lowe QC, instructed by Ms. Cherry Bridges of Ritch & Conolly for the Joint Official Liquidators (the "JOLs") of the SPhinX Group of Companies.

Mr. Mark Phillips QC, (from London via video link) instructed by Ms. Andrea Dunsby in London and Mr. Alan Turner on behalf of the Liquidation Committee (the "LC").

Mr. Guy Manning and Mr. Guy Cowan of Campbells for DPM Mellon LLC and DPM Mellon Limited (collectively, ("DPM").

Mr. Marc Kish of Maples and Calder for Refco Public (an investor).

Scheme of arrangement to compromise investor claims and permit distributions while creating reserves to meet contingent claims of indemnity claimants – whether reserves should include settlement sums recovered from third party defendants to protect indemnity claimants from possible claims by those defendants for contributions.

RULING

1. Claims brought by the JOLs in actions in New Jersey and New York have been consolidated into a single action in New York (the "NYAction"). In the NYAction many former providers of fiduciary and professional services to the SPhinX Companies, including DPM, were joined as defendants. If they succeed in defending the claims they would, on the basis of contractual indemnities, be entitled to be

indemnified by the JOLs for their costs and expenses and for recovery of any contributions they may be required to make to the liability of other defendants in the event such defendants, though not they themselves, are found to be liable in the NYAction.

2. Defendants entitled to indemnities ("indemnity claimants" or "ICs") could also, at least in theory, be liable to make contributions to other defendants who have made a settlement payment in the NYAction and who may sue for recovery of contributions from them.

3. As a pre-requisite to the grant of sanction to the Scheme of Arrangement for the compromise of investor claims in the Sphinx liquidation ("the Scheme"), an indemnity reserve to meet the claims of ICs has been set by the Court[1].

4. The concern raised by DPM now, is that another defendant to the NYAction could sue DPM for a contribution to any settlement sum or award paid to the JOLs by such a defendant. To meet such an eventuality, DPM contends that any such recoveries received by the JOLs should be added to the ICs' indemnity reserve.

5. To the extent however, that a settlement agreement with a defendant contained a release of contribution claims, DPM acknowledges that such a release would preclude a contribution claim being brought by that defendant.

6. PriceWaterhouseCoopers(Cayman) and PriceWaterhouseCoopersLLP ("together "PWC"), and Schulte Roth& Zabel ("Schulte") are the only identifiable defendants who could sue for a contribution claim (having settled with the JOLs without giving a

[1] The subject of three written judgments - see: 2010(2) CILR 234; In re Sphinx Group, unreported judgment delivered on 9TH July 2013, per Sir Andrew Morritt and In re Sphinx Group, unreported judgment delivered on 18th October 2013 per Smellie CJ (reissued on November, 8th 2013)

release of contribution claims), and who might therefore sue DPM for a contribution to their respective settlement payments.

7. PWC are the former auditors of the Sphinx Group and Schulte, their former New York lawyers. Both fall within the group of ICs but their indemnities have been released as a term of their settlements with the JOLs. Any right to sue for a contribution would arise as a matter not of contract, but of New York or United States Federal law.

8. But for DPM's objections, (citing the JOLs obligation to ensure that provisions are made to meet their proper claims for indemnities), the JOLs would be obliged to distribute all assets of the SPhinX estate, including settlement recoveries, to investors in keeping with time frames set by the Scheme.

9. In responding to DPM's concern, it is important to note that DPM is the only remaining defendant to the NYAction; all others, including those who were ICs, have either been discontinued against or have settled. If the action is continued as against DPM, it must be tried unless earlier settled. It is also important in this context to note, that although PWC and Schulte have not released any right either might have to seek contribution, neither has intimated an intention to do so. A contribution claimant would be well advised to act quickly, given the age of the NYAction and well known statutory limitation periods.

10. There is, moreover, a real issue, already mentioned above, over whether defendants like PWC and Schulte who settled in the NYAction, would be barred in any event by operation of law from bringing a claim for contribution against DPM.

11. The question is whether the New York General Law of Obligations section 15-108 or Federal Rules of Civil Procedure would govern the right of defendants to bring

contribution claims in circumstances such as those involving PWC or Schulte, where there has been a settlement precluding a trial to judgment.

12. The answer seems to depend on whether the settlement was entered into before or after any judgment is recorded in the same action for or against the particular defendant. If before judgment, no liability to contribute to the judgment payment could arise; if after, then a possibility of liability for a contribution payment could arise.

13. There is competing expert evidence on this issue from the New York lawyers Mr. Karlinsky for DPM and Mr. Barron for the LC.

14. However, for the reasons which follow, I do not consider it necessary to resolve the issue in order to resolve the concern raised by DPM now; which again, is whether the Indemnity Reserve may be reduced by the payment under the Scheme to investors of the amounts of the PWC and Schulte settlements or whether those amounts should be retained to cover possible claims from them for contributions.

15. That question, as Mr. Manning rightly submits, depends on whether I can be satisfied, to the necessary high degree of assurance, that the Indemnity Reserve has been set at the "maximum sums that might reasonably be incurred"[2], and so that there is no real risk that PWC or Schulte (or any other as yet unidentified contribution claimant) could bring a successful contribution claim against DPM that could not be indemnified.

16. In assessing that risk, I must, of course, have regard to the amounts involved in the respective settlement sums. And I must consider not only how those amounts might reflect the likelihood or otherwise of contribution claims from PWC and Schulte,

[2] See cases cited at foot note 1 above.

including the maximum sums that might reasonably be incurred as liability for such contributions; but also how the settlements compare as against the amount of $10 million specifically directed to be added to the Indemnity Reserve by Sir Andrew Morritt in his judgment[3] to meet any contribution claims to be brought against ICs.

17. I am satisfied that even were PWC and Schulte to bring contribution claims, their claims could not exceed the sum of $10 million reserved to meet such claims[4].

18. As to other possible contribution claims by other as yet unidentified claimants, I continue to share the view expressed by Sir Andrew Morritt[5], that the risk *"is small (although not) so small as to be ignored" and that "a supplement of $10 million is ... most likely to be more than is, in fact, required*".

19. This is a view which has only been bolstered by the developments so far in the NYAction. I also have in mind the already very large sum of the Indemnity Reserve now set at over $60 million to cover the ICs' costs. A significant portion is reserved to cover the costs of successful defences of contribution claims.

20. I conclude and direct that the JOLs may treat the sums received from the PWC and Schulte settlements as released from the possibility of contribution claims and as available for distribution to investors under the Scheme.

Hon. Anthony Smellie
Chief Justice

Dated the 24th January 2014

GRAND COURT – CAYMAN ISLANDS

[3] Foot note 1 above, op. cit at para 45

[4] I note that I was shown the settlement sums during the hearing in DPM's absence, for the obvious reason that the claim against DPM is yet to be tried or settled.

[5] Also above, at para 45, op cit.