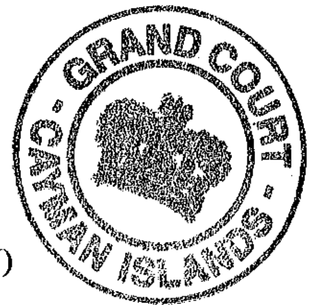

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF CENTAUR LITIGATION SPC
Cause No. FSD 53 of 2014 (IMJ)

AND IN THE MATTER OF CENTAUR LITIGATION LIMITED
Cause No. FSD 54 of 2014 (IMJ)

AND IN THE MATTER OF CENTAUR LITIGATION UNIT SERIES 1 LIMITED
Cause No. FSD 55 of 2014 (IMJ)

IN CHAMBERS

Appearances: Ms. Gemma Lardner and Ms. Jessica Williams of Harneys on behalf of the Joint Official Liquidators

Mr. Simon Dickson and Mr. Rocco Cecere of Mourant Ozannes on behalf of the respective Liquidation Committees of Centaur Litigation SPC and Centaur Litigation Unit Series 1 Limited.

Before: The Hon. Justice Ingrid Mangatal

Heard: 6 July 2017

Supplemental Skeleton Arguments Received from the Liquidation Committee on 6 July 2017 and from the Joint Official Liquidators on 10 July 2017 a Second Supplemental Argument received from the Liquidation Committee on 12 July 2017.

Draft Judgment
Circulated: 14 November 2017

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Released for Publication: 28 November 2017

HEADNOTE

Company Law – Insolvency - Sanction applications by JOLs in relation to complex distribution model - Principle of Cash is King - What is Just and Equitable Distribution - Allocation of Funds Between Segregated Portfolios- Priority of Claims by former members in respect of redemption proceeds versus claims by continuing members regarding other liabilities - Foreign Exchange Gain Issues.

JUDGMENT

1. On 6 July 2017 I heard an application on behalf of Mr. Hugh Dickson, Mr. Said Jahani, and Mr. David Bennett, the Joint Official Liquidators (the **"JOLs"**) of three entities, which are collectively referred to as "the **Centaur Entities**", being Centaur Litigation SPC (**"CLSPC"**), Centaur Litigation Limited (**"CLL"**) and Centaur Litigation Series 1 Limited (**"CLUS1"**).

2. The Centaur Entities were Cayman Islands investment vehicles involved in the litigation funding business. It was subsequently discovered that the Companies were the victim of a fraud perpetrated on them by their human controllers, who had comingled investor's monies on a wide-scale basis and misappropriated some US $ 27 million of it.

3. Pursuant to the Summons dated 29 May 2017, the JOLs seek the following relief:

   a. Sanction of a complex distribution model that the JOLs have formulated which they say will equitably allocate and distribute the assets of the Centaur Entities (the **"Distribution Model Issue"**);

   b. Retrospective sanction of the JOLs' Amended Statement of Claim filed in proceedings underway in the Federal Court of Australia (which proceedings have already been sanctioned by this Court), in order to add Defendants (the **"FCA Proceeding Issue"**);

   c. Approval of the JOLs' remuneration as JOLs of the Centaur Entities for the period 1 November 2015 to 31 March 2017 (the **"Remuneration Issue"**);

   d. Directions as to the treatment and allocation of certain funds received by the JOLs (in their capacity as joint provisional liquidators "**JPLs**") in respect of their remuneration, due to

foreign exchange rate fluctuations (the **"Foreign Exchange Issues"**).

4. In support of the relief sought in the Summons, the JOLs have filed, and rely upon, the Sixth Affirmation of Said Jahani (**"Jahani 6"**) and its accompanying exhibit SJ-5.

5. On the 6 July, I granted the relief sought at sub-paragraph 3 b above, thereby disposing of the FCA Proceedings Issue. The Minute of Order for that hearing reflects that I had also dealt with the Remuneration Issue. However, I have now realized that the formal Order filed and signed only reflected disposal of the FCA Proceeding Issue. Accordingly, the general remaining issues are those set out at sub-paragraphs (a), (c) and (d). Sub-paragraph (a) breaks down into a number of issues discussed further within this Judgment. I will deal with the Remuneration Issue (sub-paragraph (c)) briefly at the end of this Judgment.

6. I set out below the relevant background to this application, which I have gratefully taken from the JOLs' thorough Skeleton Argument (**"SKA"**).

Background - *The Centaur Entities*

7. The Centaur Entities are Cayman Islands mutual funds which were incorporated in 2011 to carry on business as litigation funders through:
    a. The provision of funding for commercial litigation matters in the United Kingdom, Australia, New Zealand, and Asia; and
    b. Investing in other funds which undertake litigation funding.

8. The Companies were originally managed by two individuals, Mr. Brendan Terrill and Mr. Trent Strong (also known by the alias Scott Williams). A third person, Mr. Duane McGaw, was an associate of Mr. Terrill, and Mr. Strong and was the

controller of the administrator and investment manager of the Argentum group of companies. The Centaur Entities own 100% of the B Class shares of Argentum Capital Limited, a Jersey domiciled litigation funder.

9. There were essentially two ways in which investors could invest in the Companies:

   a. by subscribing for shares which would give the investor a pro-rata return by way of dividend in the usual way of the profits made by the company in which that person was invested; or
   b. by subscribing for shares or notes for which the investor had an entitlement to receive a fixed return on their investment (the fixed rate of interest varied between 8% and 15% per annum) plus an additional variable return based on the success of the litigation cases.

10. In the period August 2011 to 31 March 2014, approximately £85 million in investor subscriptions were raised by the Centaur Entities through multiple share series issues.

11. In mid-2013, the Centaur Entities faced financial difficulties and engaged (through intermediaries) Mr. Klaus Selinger ("**Mr. Selinger**") to advise on strategic issues and to undertake financial investigations into the Centaur Group. Mr. Selinger formally replaced Mr. Terrill as the sole director of Centaur Subscription Holdings Limited on 9 April 2014 (although the Register was not updated until 28 May 2014). Mr. Selinger has cooperated with the JOLs since their appointment to the Centaur Entities.

12. The JOLs were initially appointed as JPLs of the Centaur Entities on 27 June 2014 on the basis that they were insolvent and the JPLs intended to present a compromise or arrangement to their creditors. As a compromise or arrangement

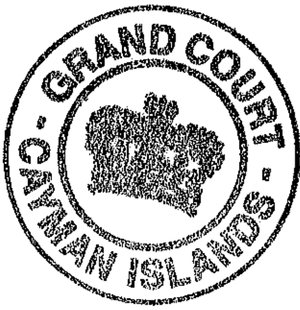
was unable to be achieved (due to, among other things, serious financial irregularities within the Centaur Entities), the JOLs were appointed as official liquidators on 25 June 2015.

Financial Position of the Centaur Entities

13. The JOLs indicate that they have encountered significant difficulties in determining the financial position of each of the Centaur Entities throughout their tenure as JPLs and JOLs. These difficulties stem, they say, from gross mismanagement by the former managers of the Centaur Entities which includes, but is not limited to, intermingling of assets between each of the Centaur Entities (including intermingling of assets between the segregated portfolios of CLSPC), failure to prepare financial statements, and providing inaccurate and misleading reporting to investors.

14. The JOLs assert, that, based upon the information available to them, it is clear that cash coming into the Centaur Group was essentially pooled and used to pay whatever expenses might be payable at a given time (whether they were expenses of the Centaur Entities or personal expenses of members of management). By way of example, they cite that monies received from investors as part of a fund-raising for one investment series would on occasions be used to pay outstanding expenses or funding commitments for other litigation cases. The JOLs have also identified approximately £27 million of outflows of questionable value to the Companies, in respect of which the JOLs have been unable to identify the ultimate beneficiaries or alternatively, the JOLs suspect that they are the subject of misappropriation or transactions for which the Companies received inadequate consideration.

15. The JOLs have for over a year, been engaged in a complex forensic exercise aimed at unravelling the assets and business activities of the Centaur Entities (the **"Forensic Accounting Review"**). The JOLs say that the only independent information which they have been able to reasonably rely on in conducting this



exercise are the cash flow records maintained by the Centaur Entities' Administrator.

16. Having now completed the Forensic Accounting Review, the JOLs state that they have been able to trace to a fair degree of accuracy the source and use of funds for each of the 11 Investment Series within the Centaur Entities.

17. In the course of these investigations, the JOLs say that they have also identified the following:

    a. approximately 2,407 separate investments into the Centaur Entities between 2011 and 2013;
    b. 1,295 separate investors (both individuals and corporate entities) who would be eligible to submit claims in the liquidations of one or more of the Centaur Entities;
    c. claims against the estates of the Centaur Entities amounting to approximately £136 million; and
    d. net assets of £42 million available for distribution to creditors and investors.

18. The investors and creditors of the Centaur Entities are spread across 79 countries around the world and the JOLs say that they are predominantly unsophisticated investors. In addition, a number of investors have passed away since the JOLs' appointment, such that the JOLs are also engaged with a number of deceased persons' estates.

19. The JOLs indicate that, in the context of this investor profile, the fact that it has now been three years since the JOLs were appointed as JPLs, and that the JOLs have recently (as of April) received recovery from the RBS case, the JOLs are under significant pressure from investors to declare a dividend and make an interim distribution.

Consultation with the Liquidation Committees

20. The evidence is that the JOLs have engaged in an extensive and detailed consultation process with the Liquidation Committees (“**LCs**”) of the Centaur Entities on each of the issues currently before the Court and in particular, in relation to the variables within the Distribution Model.

21. This process has included the following:

a. preparing a detailed report to the LCs addressing every aspect of the proposed Distribution Model in November 2016 (the “**November Report**”), which was supplemented by an equally detailed report in April 2017 (the “**April Report**”);
b. considering and stress testing various alternative proposals for the Distribution Model put forward by the LCs ;
c. discussing details of the Distribution Model, Australian legal proceedings and remuneration with the LCs at a two-day meeting in Bangkok on 28 and 29 November 2016 (the “**November Meeting**”) and during an approximately three hour teleconference with all members of the LCs on 13 April 2017 (the “**April Meeting**”);
d. providing the LCs with copies of legal advice provided to the JOLs by their Cayman Islands attorneys and making both Cayman Islands and Australian Attorneys available to the LCs to answer questions during the November and April Meetings;
e. extensive email exchanges, telephone calls and video conferences between certain members of the LCs and the JOLs; and
f. discussions between the JOLs’ attorneys, Harneys, and independent counsel retained by the LCs of CLSPC and CLUS1, Mourant Ozannes in respect of the issues on which the JOLs and LCs disagree.

22. Ms. Lardner, who appeared for the JOLs, indicated to the Court that wherever possible, the JOLs have sought to accommodate the views of the LCs on the Distribution Model and agreement has been reached (with compromises on both sides) on most issues.

23. However, there are a number of residual (narrow, but significant,) issues on which the JOLs and LCs were unable to come to an agreement and in respect of which the LCs of CLSPC and CLUS1 sought independent legal advice, in accordance with Order 9, Rule 6 of the Companies Winding Up Rules.

Residual Issues

24. These remaining issues, (the "**Residual Issues**"), are as follows:

   a. The allocation of funds as between the segregated portfolios of the CLSPC entity.

   b. The relative priority of claims by members and former members in respect of redemption proceeds (claimed by former members) versus other liabilities such as unpaid dividends (claimed by continuing members).

   c. The appropriateness of the JOLs declaring a post-appointment variable return in respect of the RBS case, which was only triggered due to a third party investment into the case.

   d. The FX issue, namely the retention by the JOLs of certain funds paid in respect of their remuneration incurred and approved (by both the LCs and the Court) as provisional liquidators.

Distribution Model Issue

Introduction to & Underlying Principles

25. Ms. Lardner pointed out, that due to the diversity and complexity of the investment instruments and case assets within the Centaur Entities, the JOLs

identified a number of 'guiding principles' from the Forensic Accounting Review in order to develop the Distribution Model.

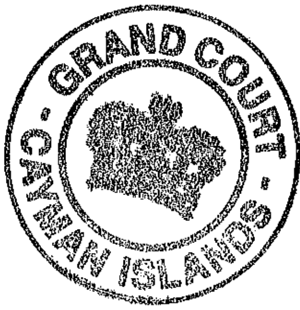
26. Counsel submitted that the first and most important of these principles is that "*cash is king*". Given the mismanagement and poor record keeping of the Centaur Entities, it was thought that tracing cash movements was the most reliable way for the JOLs to re-construct the financial records of the Centaur Entities and to understand how they operated. Further, in circumstances where the JOLs repeatedly found that the limited records that were maintained by management of the Centaur Entities were inconsistent with cash flow records, the JOLs have sought to rely in the Distribution Model upon cash flows, instead of company documents.

27. Secondly, as the JOLs were able to undertake this tracing exercise, they do not propose to pool the assets of the Centaur Entities. It would seem that the LCs broadly agree with this decision.

28. Thirdly, for the purposes of calculating creditors' claims under Part V of the Companies Law, the JOLs have adopted 12 June 2014 as the "relevant date", being the date on which winding up petitions were presented in respect of the Centaur Entities.

29. Fourthly, in circumstances where the Centaur Entities transacted in numerous currencies (including US Dollars, Australian Dollars and British Pounds) for the purpose of calculating claims in foreign currencies, the JOLs have adopted the applicable rate of the mid-market rate on the date of the winding up petitions, being 12 June 2014.

30. Following the Forensic Accounting Review and identification of these key principles, the JOLs then went on to identify 18 key variables, the adjustment of which would influence the outcome of the Distribution Model. The treatment of



these variables has, in turn, informed the distribution waterfall set out at pages 13 and 14 of Jahani 6.

31. The JOLs say that, broadly speaking, they have followed the "cash is king" principle, as well as the well-established insolvency law principles in developing the Distribution Model and payment waterfall. The JOLs are of the firm view that the resulting Distribution Model is the most equitable distribution of the assets of the centaur Entities.

Allocation of Funds between the Segregated portfolios of the CLSPC Entity

32. A significant Residual Issue on which the LCs and JOLs disagree is the treatment of claims within the liquidation of the CLSPC. CLSPC is a segregated portfolio company registered under Part XIV of the ***Companies Law***, which established five segregated portfolios comprising:

    a. Centaur Litigation SPC Centaur Income Accelerator Series 1;
    b. Centaur Litigation SPC Centaur Income Accelerator Series II;
    c. Centaur Litigation SPC Centaur Income Accelerator Series III;
    d. Centaur Litigation SPC Centaur Income Accelerator Series IV; and
    e. Centaur Litigation SPC Centaur Income Accelerator Rights 2013.

33. Having applied the "*cash is king*" principle to the CLSPC Investment Series, there are a range of returns to investors depending on the series to which the investors subscribed (from 1% of the value of principal investment to 55%). Ms. Lardner explains that this is due to the fact that the funds invested in the later series were not used to fund cases, but instead, were either directly misappropriated by management or used to temporarily "*prop up*" the Ponzi scheme.

34. Accordingly to the JOLs, unfortunately there are a number of inconsistent and misleading statements in the offering memoranda for each of the CLSPC Investment Series, the CLSPC Master Memorandum and Articles of Association which, together with the misinformation provided to investors by former

management, have resulted in confusion as to the structure and operation of CLSPC.

35. The key issue of contention is that some of the CLSPC documents indicate an intention to establish what is described as a "*Master Portfolio*" of cases. The JOLs point in particular to the following:

a. The Master Memorandum states that: "*Centaur intends to create a master portfolio which will be a segregated portfolio of the company. The master portfolio will comprise a pool of diversified litigation investments funded by the capital raised through supplementary offer memorandums to this master memorandum. Funds raised pursuant to each share offer will each form a segregated portfolio whose capital will be invested forming part of the master portfolio of investments.*"

b. *There are statements in the Offering Memoranda for CLSPC Series I, III and IV to the effect that "the Segregated Portfolio Funds will be invested as part of Centaur's Master Portfolio pool of investments."*

36. Because of the statements outlined above some investors, according to Counsel, understandably thought that their investment funds would be provided to CLSPC and invested, together with the funds from other series, in a range of cases comprising the Master Portfolio.

37. Given this thought process, the LC's position is that the JOLs should honour the *intention* expressed in the Offering Memoranda and Master Memorandum, and allocate the assets of CLSPC as if a Master Portfolio had existed. For practical purposes, this would mean notionally pooling the proceeds of all cases funded by CLSPC and allocating them pro rata across the 5 Investment Series.

38. However, notwithstanding the representations which had been made to investors, the JOLs' investigations have confirmed that no Master Portfolio ever existed. Instead, CLSPC invested in cases by way of:

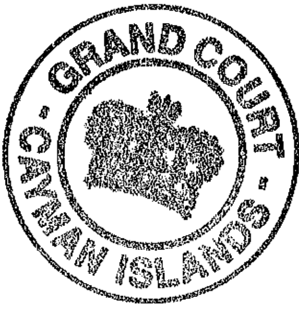
a. Investing in shares or extending loans to separate entities and special purpose vehicles within the Centaur Group such as Aequitas Litigation Limited and Argentum Centaur El Funding Private Limited;
b. Funding a separate legal entity, Argentum Capital Limited, to invest in a portfolio of cases; and
c. Direct investment into cases.

39. It is the JOLs' position that no Master Portfolio could ever have existed as contemplated by the CLSPC Master Memorandum because it contemplated a structure that is fundamentally contrary to Cayman Islands Law.

Analysis of Variables

40. There are eighteen variables in the Distribution Model, four of which the JOLs characterize as being relatively straightforward. They are as follows:

a. Variable 2 - allocation of funds received from the ACL B Class Share Purchase, AREF case and Baghat case to each of the Centaur Entities/ Investment Series pro rata according to their respective investments.
b. Variation 3 - allocation of funds recovered from a security for costs payment in the course of the Equine case to each of the Centaur Entities/ Investment Series *pro rata* according to their respective investments.
c. Variable 15 - trade creditor claims to be classified as class 1 claims on the distribution waterfall.
d. Variable 17 - in accordance with CWR Order 16, rules 11 and 12, statutory interest is to be calculated (i) on note holder investment



amounts at the prescribed rate in the relevant offering memorandum up to the date of maturity and (ii) in respect of all other creditor claims at the prescribed rate under the Judgment Debts (Rate of Interest) Rules.

41. The remainder of the variables have been agreed between the LCs and the JOLs.

Variable 1 - Amendment of Functional Currency

42. It is the JOLs' position that, in accordance with ***CWR*** O. 16, r. 13(3) and section 150(3) of the ***Law***, they determined the currencies of the liquidations to be US$ in respect of CLL and CLSPC and pounds sterling ("**GBP**") in respect of CLUS1, based on the primary denomination of the majority of the funds raised by each entity. However, apparently the JOLs have since realized that the majority of the funds recovered from successful cases on behalf of the Centaur Entities are denominated in GBP.

43. What the JOLs explain, is that if they are required to convert these funds into USD for CLL and CLSPC, which account for 90% of the claims within the estates, there is a risk of loss of funds due to a combination of the following:

   a. The spread between the mid-market rate adopted by the JOLs in accordance with statutory requirements and the exchange rate charged to the JOLs by the relevant financial institutions; and

   b. The imposition of additional fees and charges at the time of transfer of funds.

44. The JOLs say, that in circumstances where ***CWR*** O. 16 r. 13(3) provides that the currency determination "*shall be final and binding upon the company's creditors for all purposes*", in the interests of providing certainty in the liquidations of the Centaur Entities and avoiding loss to the estates, the JOLs seek the sanction of the Court to amend the functional currencies of CLL and CLSPC to GBP.

Variable 4 - Allocation of RBS Proceeds

45. Some of the issues involved in relation to this Variable, have already been the subject of consideration by this Court on a previous occasion. The RBS case was a class action brought by shareholders in relation to a breach of UK legislation by RBS due to inadequate and/or misleading disclosure in relation to the prospectus it issued in 2008. The case was initially funded by Aequitas Litigation Limited ("**Aequitas**"), a special purpose vehicle within the Centaur Group, which funded an amount of GBP £1,869,375 prior to the JOLs' appointment in respect of an ATE insurance policy ("**Insurance Premium Funding**"). The Centaur Entities also indirectly invested into the RBS case through a second investment vehicle, Argentum Capital Limited ("**Argentum**").

46. In mid-2015, Aequitas was required but unable to make a second payment for the balance of the funding amount of GBP 2.75 Million ("**Indemnity Funds**"). In order to maintain the Centaur Entities' legal interest in the case asset, the JOLs raised capital during the liquidation for the purposes of, among other things, paying the Indemnity Funds, from Chiron Litigation Funding Limited ("**the Chiron Loan**"). The Chiron Loan was guaranteed jointly and severally by all three Centaur Entities and the JOLs' entry into the Chiron Loan on behalf of the Centaur Entities was sanctioned by an order of this Court on 25 June 2015.

47. Under the terms of the RBS funding agreement, Aequitas was entitled to payment of a success fee which was to be calculated as four times the Insurance premium amount and three times the Indemnity Funds amount. However, in the course of negotiating payment of the Indemnity Funds and retention of the legal interest in the RBC case, the JOLs had to agree to a reduction in the success fee multiplier assigned to the Indemnity Funds (from three (3) times, to two point four five (2.45) times success fee multiplier). This Court sanctioned this compromise by order dated 4 February 2016, after considering the objections advanced by the LCs.

48. The JOLs have indicated that the first issue arising out of this arrangement for the purposes of the Distribution Model is that the LCs consider that the reduction of the success fee multiplier for the Indemnity Funds (from x3 to a 2.45), without any adjustment to the success fee multiplier for the Insurance Premium Funding (x4) unfairly prejudices investors whose funds were used (together with the Chiron Loan) to make the Indemnity Funds payment. In the LCs' view, as Aequitas failed to meet all of its obligations under the funding agreement with the RBS case lawyers, any reduction in a success fee multiplier should be 'switched' and applied to the Insurance Premium Funding (to reduce it from x4 to x3.45) instead of the Indemnity Funds (which they consider should remain at x3).

49. As Ms. Lardner points out, when this issue previously came before me, I made an Ex Tempore Ruling on 4 February 2016. In that Ruling, I stated as follows:

> *"The Liquidation Committees have expressed opposition to the compromise and in so doing they propound the views of the creditors of the Centaur Entities to which the Court must give weight. This is particularly so for the reasons given by Chadwick L.J. in* ***Re Greenhaven Motors Ltd*** *[1999] 1 BCLC 635 at page 643d-h:*
>
> > *"...[T]he court will give weight to the wishes of creditors and contributories whose interests it has to consider, for the reason that creditors and contributories, if uninfluenced by extraneous considerations, are likely to be good judges of where their own best interests lie."*
>
> *The liquidation Committees, in my view, brought up a number of important points at the December meetings as well as in the emails which the JOLs have correctly and candidly, as promised to the Liquidation Committees, provided to the Court. These matters caused me to reflect and consider the matter overnight. However, as stated by Chadwick L.J. in* ***Re Greenhaven*** *.... 643 g-h:*
>
> > *"For the same reason, the court will give weight to the views of the liquidator, who may, and normally will, be in the best position to take an informed and objective view."*
>
> *The JOLs' counsel submitted that in the present case the JOLs painstakingly considered all relevant circumstances and concluded that a settlement of the dispute is in the commercial best interests of the stakeholders. At paragraphs 32 and 33 of the of the Fourth*

Affirmation of Said Jahani the JOLs set out in some detail the considerations which weigh with them, in particular the potential risks. There is no question in reaching this conclusion that the JOLs have acted other than objectively and in good faith, and nor can it be said that the conclusion is flawed. I afford considerable weight to the opposing view of the Liquidation Committee that there be no compromise and no discount given by the Centaur Entities to their original entitlement from the Funding Agreement, based on, inter alia, the advice on the prospects of success received from two barristers.

I agree with Counsel's submission that, in a commercial sense, the contest is between: (a) accepting an offer which gives the Centaur Entities approximately 90% of what they would otherwise stand to receive under the Funding Agreement; or (b) referring the dispute with G&E/Stewarts to arbitration, which would appear to have good prospects of success but which may result in substantial losses for the Centaur Entities in the event that it results in adverse findings for the Centaur Entities.

I have considered the opposing views. Bearing in mind that the JOLs' views should be given considerable weight I have decided, on balance, that the views of the JOLs should prevail. In all of the circumstances I am satisfied that the Court ought to exercise its discretion to approve the JOLs causing Aequitas to enter into the settlement…."

50. The JOLs say that accordingly, they did not accede to the LCs' request to reconsider this issue in circumstances where:

   a. The Court has already sanctioned the terms of the funding in respect of the Indemnity Funds, including the reduced success fee multiplier in respect of the Indemnity Funds;

   b. There were no other funding alternatives available to preserve the interest in the RBS case.

51. I do not intend to revisit this issue.

52. The JOLs say that they intend to distribute the GBP £32.35 million in proceeds from the RBS case as follows:

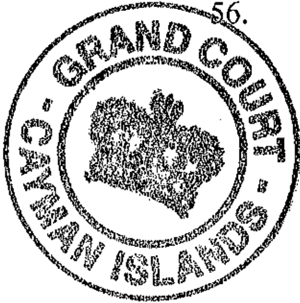
a. Return in respect of the Insurance Premium Funding paid by Aequitas of approximately GBP £1.87 million;
b. Return in respect of Indemnity Funds paid by Aequitas of GBP £2.75 million (to be applied to 'make whole' the ACL Class Share Purchase recoveries which were used to repay the Chiron Loan);
c. Success fees in relation to the Insurance Premium Funding and Indemnity Funds paid by Aequitas of approximately GBP£14.21 million;
d. Return of investment into the case via Argentum of GBP £3.39 million; and
e. Success fees in relation to the investment into the case via Argentum of approximately GBP £10.13 million.

53. The JOLs say that they intend to treat any returns referable to the Argentum direct investment into the RBS case (being approximately GBP £13.52 million) as a separate asset to the amounts available to the Centaur Entities for the Insurance Premium Funding and the Indemnity Funds Investments.

54. According to the JOLs, the LCs have raised a question about the appropriateness of declaring a variable return in respect of the RBS case in respect of amounts owing as a result of the Centaur Entities' guarantee of the Chiron Loan, as this was not a *direct* investment in the RBS case and the Chiron Loan (which facilitated the successful case) was not in place at the relevant date. However, in response, the JOLs say that they have considered the terms of the relevant offering memoranda which provide that a variable return may be declared in respect of any "*investment return*". "*Investment returns*" are broadly defined in the offering memoranda, and as such, the JOLs consider that it is appropriate to declare a post appointment variable return in respect of these funds.

Variable 5 - Allocation of returns referable to Pre-Centaur Investors

55. The JOLs have identified and recovered approximately GBP £378,327 from Funded Cases which were originally funded by pre-Centaur investors and which are not attributable to investors in the Centaur Entities.



56. The JOLs have indicated that they understand that :

   a. There was a commonality of management between the pre-Centaur and Centaur Entities; and
   b. A large proportion (but not all) of pre-Centaur investors rolled over their investments into the Centaur Entities.

57. It is further the JOLs position that, to the extent that they are able to identify funds as attributable to pre-Centaur Investment Series, the JOLs intend to allocate the funds pro rata between:

   a. The appropriate Centaur Entity or series, to the extent that the pre-Centaur investment roll-over can be traced into a current Centaur Entity; and
   b. A separate pool for pre-Centaur investment vehicles which were managed by a number of BVI-registered LLCs.

58. The JOLs also indicate that they intend to withhold from distribution the amounts due to pre-Centaur investors who have been identified as not having rolled over into an Investment Series operated by the Centaur Entities until the JOLs have undertaken further investigations into the current status of the pre-Centaur entities.

Variable 6 - Allocation of proceeds from litigation and investigations

59. The JOLs have indicated that, where proceeds from litigation and investigations are not directly referable to a particular entity within the Centaur Group, the JOLs propose to distribute these amounts by reference to the "net claim" of each entity or Investment Series approach.

60. This is not a strict pari passu distribution, but the JOLs say that the purpose of this approach is to enable those entities who have received lower returns to recover a higher proportion of the funds. The LCs agree with this approach.

Variables 7 and 8 - Treatment of the JOLs' Costs and Expenses

61. On 25 June 2015, the JOLs obtained an order which allowed them to pool the cash held by the Centaur Entities for the purposes of remuneration and to split their fees equally between the Centaur Entities where the nature of the work undertaken was to benefit all three Centaur Entities or where the ultimate benefit of the work undertaken could not be traced to one of the Centaur Entities. However, the JOLs now propose an alternative remuneration model which they consider provides a more equitable allocation of their costs to each entity or investment series.

Variable 9 and 10 - Treatment of Intercompany Loans

62. As a result of the intermingling of assets among the Centaur Entities, the JOLs have identified numerous undocumented cash movements between Centaur Entities and Investor Series, as well as frequent payments by one Centaur Entity or Series for another Centaur Entity or Investment Series liabilities. The JOLs have classified any such payments made by one Investment Series or Centaur Entity on behalf of another (i.e. general administration costs or the payment of monies to investors in a different Investment Series from which the funds were being transferred) or direct cash transfers, as being an intercompany loan between the two Investment Series.

63. This approach was discussed at the November meeting. Originally the LCs had advocated an approach whereby the JOLs leave the funds "*as is*". However, ultimately the LCs resolved to agree with the JOLs' approach, which is based upon the "*cash is king*" principle, as well as the well accepted principle that an appropriate way to deal with fraudulent transactions in an insolvency scenario is through tracing- See ***Foskett v McKeown*** [2001] 1 A.C. 102, and ***AHAB v Saad***

Investments Company Ltd, unreported, delivered by Smellie CJ on 22 February 2013.

64. The JOLs consider that an "*as is*" approach is a form of extra-judicial quasi pooling, which is not justified in this case where the JOLs are able to undertake the tracing exercise. Ms. Lardner argues that the available mechanisms under Cayman Islands Law are a Scheme of Arrangement under section 86 of the ***Companies Law*** which the JOLs are permitted to promote under paragraph 5 of Schedule 3, Part II to the ***Companies Law***, or a compromise under paragraphs 5 and 6 of Schedule 3, Part I to the ***Companies Law***.

Variables 11, 12 and 18 - Allocation of APPS proceeds and calculations of returns

65. The JOLs initially proposed to distribute in accordance with the "*cash is king principle*" by issuing to each of CLL, CLSPC and CLUS1 proportionate to their investment. However, the LCs were concerned that this would result in an inequitable outcome.

66. The JOLs proposed an alternative modelling (with which the LC agreed at the April Meeting) to allocate the GBP £8 million return from the APPs case as follows:

  a. £5.2 million of principal be returned in full to each of CLL, CLSPC and CLUS1;
  b. This would leave a residual £3 million (approximately) for distribution;
  c. The CLUS1 variable return will be paid from the £3 million profit; and
  d. Any residual funds shall be distributed among CLL, CLSPC and CLUS1 in the proportions in which they invested.

Variables 13 and 14 - Treatment of Post-Appointment Variable Returns

67. All of the investment Series operated by the Centaur Entities have provisions for payment of a 'special dividend' or 'variable return' in their respective offering memoranda based on a formula driven calculation of the Net Asset Value ("NAV") or return on investment from the Funded Cases that the Investment Series Funded.

68. The JOLs say that they have reviewed the offering memoranda for each of the Investment Series operated by the Centaur Entities and, based on information to hand, consider that there may be variable returns due to certain CLL Investment Series and to CLUS1, should a sufficient quantum of recoveries be secured, consequent on their investment in the APPS case, the ACL B Class Shares, and the RBS case.

69. The JOLs indicate that they do not propose to pay any discretionary dividend in respect of the CLSPC Investment Series, since this is to be calculated with reference to the NAV of the shares held by an Investor and no NAV was ever declared.

Redemptions

70. The JOLs have identified approximately 61 unpaid redemption requests across the three Centaur Entities, of which 29 are they say likely to be accepted on an adjudication (on the basis that they comply with the legal requirements and the provisions of the relevant Articles of Association or Offering Memoranda). Of the residual redemption requests, the majority did not comply with the relevant documentary or timing requirements of the respective Centaur Entity or Investment Series.

71. The LCs agree with the approach that the JOLs intend to take in respect of redemptions, however one of the Residual Issues between the JOLs and the LCs is the relative priorities between claims of redeemed shareholders in respect of

redemption proceeds and claims of continuing shareholders in respect of chrystallised debts.

72. In their written skeleton arguments, both sides had referred to the decision of the Court of Appeal in ***Michael Pearson v Primeo Fund (in official liquidation)*** (Unreported, Court of Appeal, 29 July 2016) (***Herald***). However, on the very day of the hearing, i.e. 6 July 2017, a decision of the Judicial Committee of the Privy Council in respect of an appeal to the Board was handed down. The appeal was dismissed.

73. The LCs filed a Supplemental Argument on 6 July and the JOLs with the Court's permission were allowed to file their Supplemental Argument in response on 10 July 2017. The LCs also filed a response on 12 July 2017, which the Court had had allowed them to file in response to any new points raised by the JOLs. However, in all fairness, I do not consider that the LCs Arguments filed 12 July 2017 addressed any new points, so I do not think it right to consider them (in any event they seem to just repeat the arguments made previously).

74. It would appear that both parties agree, based on the obiter of the Court of Appeal in **Herald** that:

   a. Redemption Creditors' claims fall behind outside/ third party creditors;
   b. Amounts payable to Redemption Creditors includes everything that can be categorized as a "*redemption payment*" under the terms of each offering memorandum. For instance, in respect of CLUS1, this expressly includes the Principal Amount as well as fixed returns, declared dividends and variable returns.
   c. When it comes to determining claims of members as between themselves, Redemption Creditor claims take priority over the claims of what the Court describes as "*current shareholders in their capacity as shareholders*".

75. The key difference between the JOLs' and LCs' respective interpretations of the distribution waterfall and **Herald** decision is the classification of claims that are characterized as "*shareholders claiming in their capacity as shareholders*".

76. The JOLs consider that claims of "*shareholders claiming in their capacity as shareholders*" in the context of **Herald** means claims by continuing shareholders for return of the subscription price paid for their shares (i.e. return of capital).

77. Thus, the JOLs consider that as both redemption proceeds **and** other debt claims by members for debts owing to them in their capacity as members are all "liabilities" of the company payable to them in their capacity as a member, they should be characterized in the same class of the distribution waterfall.

78. In their Supplemental Arguments, the JOLs submit (as do the LCs in their Supplemental Argument) that the Board confirmed that Redemption Creditor Claims:

   a. Do not fall within section 37(7) of the Companies Law; and
   b. Are subordinated to claims of ordinary/outside creditors, as they are claims "*due to any member of a company in his character of a member*".

79. The JOLs go on to say that, save for confirming this principle, (which was not in any event in dispute between the LC and the JOLs), the JOLs do not consider that the Privy Council decision is otherwise instructive in respect of the waterfall issues before the Court in these proceedings.

80. Ms. Lardner reminds, that section 37(7) relates to situations in which redemption or purchase should have been, but was not for some reason, effected by the company before the commencement of the winding up. In those circumstances it allows the relevant shareholder to enforce the terms of redemption or purchase

notwithstanding the winding up (subject to the exceptions set out in section 37(a)(i) and (ii).

81. The JOLs assert that, in circumstances where it is common ground between the JOLs and CLUS1 LC that:

   a. there are (to the best of the JOLs' knowledge), no claims in this liquidation falling under section 37(7); and
   b. the Shareholder Creditor Claims which are in dispute, do not fall within the type of claims contemplated by section 37(7)(a);

   the JOLs' view is that the priority waterfall set out in section 37(7)(b) is not engaged at all and the only statutory provision governing the distribution waterfall is section 49(g).

82. For these reasons, the JOLs consider that there remains no statutory or common law basis on which to distinguish Shareholder Creditor Claims and Redemption Creditor Claims within the distribution waterfall, and submit that both claims should fall within Class 2 of the JOLs' distribution waterfall set out at pages 13-14 of Jahani 6.

83. At pages 13-14 of Jahani 6, paragraph 34, the JOLs describe the proposed waterfall, the "**Creditor/Shareholder Claim Priorities and Distribution Waterfall**" as follows:

   "34. The JOLs have classified the following anticipated types of claims in the liquidations of the Centaur Entities, along with the prima facie priorities afforded to each claim.

   (a) Class 1 claims (first priority all sub-categories (i) –(v) will rank pari passu) -

   i. Trade creditors.

   ii. Intercompany loans (pre-appointment).

   iii. Noteholders claims: principal investment (CLL investors only).

iv. *Noteholders claims: fixed returns/variable returns/ interest accrued prior to the liquidations (CLL investors only).*

v. *Noteholder claims: post-appointment variable returns declared by the JOLs (CLL investors only).*

(b) *Class 2 claims(second priority-paid after Class 1 claims receive 100%-all sub-categories(i)-(iii) will rank pari passu) - Debt claims by equity holders in their character as equity holders being:*

i. *Fixed returns/ dividends declared/ variable returns accrued prior to the relevant date, being 12 June 2014 (CLUS1 & CLSPC investors);*

ii. *Redeeming shareholders whose shares were redeemed prior to the relevant date, being 12 June 2014, but which were not paid redemption proceeds (CLUS1 & CLSPC investors).*

iii. *Post-appointment variable returns declared by the JOLs (CLUS1 & CLSPC investors).*

(c) Class 3 claims (third priority-paid after Class 2 claims receive 100%):

i. Statutory interest on the debts owing to creditors (including debts owing to equity holders' interests as creditors) subject to meeting the requirements of CWR O. 16, r.12 (CLL, CLUS1 & CLSPC investors)

(d) *Class 4 claims (fourth priority-paid after Class 3 claims receive 100%):*

(i) Equity holder claims: principal investment (CLUS1 & CLSPC investors)."

<u>Form of Proof of Debt</u>

84. The JOLs also discuss in their Skeleton Arguments, the format for proof of debts. They indicate that they have proposed the use of an online portal for completion and submission of proofs of debt which departs from the traditional approach under Cayman Islands Law. However, the JOLs are of the view that the approach taken regarding the use of an online portal nevertheless complies with the ***Companies Winding Up Rules*** in circumstances where:

a. CWR O.16, r.2(1) allows for the JOLs prescribing their own form of proof as it provides that "*A proof of debt shall be in CWR Form No. 24 or such other form or forms as the official liquidator may prescribe having regard to the nature of the claims against the company*".

b. The portal will require (or auto-complete) the statutorily prescribed creditor details set out in CWR O. 16, r.2 (3) and (4).

85. The JOLs say that they consider that the approach they intend to adopt for the preparation and lodgment of proofs of debt is the most efficient and cost effective way to manage the adjudication of creditor claims and therefore, is in the best interests of the creditors of the Centaur Entities.

86. They additionally say, that given the complexities in the distribution model, they propose to adopt a process akin to a "*proof of debt*" in respect of investor claims. The JOLs consider it to be prudent to provide investors with a calculation of their interests having applied the model rather than impose on them the requirement to apply the model themselves. By doing this, the JOLs say, investors can check their calculations and methodology and simply agree or disagree.

FCA Proceeding Issue

87. The JOLs commenced proceedings on 24 June 2015, in the New South Wales District Registry of the Federal Court of Australia ("the **FCA Proceedings**") against Mr. Trent Strong, as well as a number of companies with which it is

alleged Mr. Strong is related or connected. This Court's sanction was granted on 27 June 2016, retrospectively. Mr. Strong and his related companies are believed by the JOLs to have assets which are traceable proceeds of the fraud perpetuated on the Centaur Entities.

88. Ms. Lardner advises that, since the commencement of the FCA Proceedings, the JOLs and their Australian solicitors have identified evidence which suggests that Mr. Strong was assisted in his perpetration of fraud against the Centaur Entities by a number of parties. Further, that there are parties that are liable for "*knowing assistance*" to Mr. Strong under Australian Law. The JOLs also undertook a tracing exercise which indicated that Mr. Strong's brother and sister-in-law, received up to AU$373,781.44 of misappropriated Centaur Entity investor funds from various bank accounts controlled by Mr. Strong.

89. These parties are collectively referred to as "the **New Defendants**".

90. For a number of reasons set out in the affidavit evidence, and in the Skeleton Arguments, having received advice from Leading Counsel and solicitors in Australia, the JOLs have concluded that it is in the best interest of the creditors of the Centaur Entities that each of the New Defendants be joined to the FCA Proceedings.

91. After discussion and consideration of the November Reports and further advice, and information, the LCs subsequently resolved at the April Meeting to approve the JOLs' expansion of the claim to add the New Defendants.

92. The JOLs on 9 May 2017 filed an Amended Statement of Claim in the FCA Proceedings, joining the New Defendants.

93. The JOLs explain that they unfortunately did not have sufficient opportunity to seek the sanction of the Court prior to the amendment to the Pleading, because of

the relevant time lines imposed by the Federal Court for filing and serving amendment applications and the Amended Statement of Claim, as well as the time at which the LCs approval was obtained.

94. The JOLs urge, that in circumstances where the Court was satisfied that the requirements for sanction were met when it granted same in June 2016 in respect of the FCA Proceedings, the Court also sanction the joinder of the New Defendants to the FCA Proceeding.

Remuneration Issue

95. The JOLs also sought approval of remuneration as set out in the Summons. The LCs have granted unanimous approval of the claimed remuneration at various meetings. It is plain that extensive work has been undertaken by the JOLs.

96. Whilst by previous orders the Court had allowed equal division of certain expenses across the three Centaur Entities, the JOLs assert that they no longer consider that the most equitable approach. This is because of the significant variance in the assets available for distribution between each Investment Series.

97. The JOLs have therefore proposed an alternative allocation of costs, with which the LCs unanimously agreed. The proposal is to allocate in accordance with the following waterfall:

    a. Costs specifically related to dealing with or recovering a particular asset are to be deducted from the funds recovered from that particular asset. For example, the JOLs propose that the costs of recovering the proceeds of the RBS case be deducted from the RBS case winnings, before any distribution is made.

    b. The balance of the costs incurred by the JOLs will be allocated pro-rata based upon the quantum of assets available for

distribution for each of the relevant Investment Series (in the case of CLSPC) or Centaur Entities.

c. Should there be a shortfall for any of the Investment Series or Centaur Entities due to the allocation of costs as set out at a and b, the JOLs will reallocate the amount of the shortfall against all other Investment Series or Centaur Entities.

98. The JOLs seek the Court's sanction of this amended proposal, as part of Variables 7 and 8 within the Distribution Model.

Foreign Exchange Issue

99. Following their appointment to the Centaur Entities, the JOLs:

a. First, in their capacity as JPLs, entered into a remuneration agreement dated 11 December 2014 which was effective for periods commencing from 27 June 2014;

b. Then, in their capacity as JOLs, entered into a remuneration agreement dated 25 June 2015 which was effective for periods commencing from that date.

100. Ms. Lardner submits, that under the terms of these agreements, and with the intention of simplifying the billing and administrative process across the liquidations, it was intended that all Grant Thornton offices would bill in a single currency, being US$, rather than each billing in their local currency. Under the terms of this arrangement:

a. The remuneration figures for all Grant Thornton offices for the relevant period were converted to US$ using the spot rate as at the date of appointment of the JPLs (being 27 June 2014) in respect of the JPLs remuneration and the spot rate as at the date of appointment of the JOLs (being 25 June 2015) in respect of the JOLs' remuneration.

b. The JOLs understood that they would bear the risk of any currency fluctuations between the spot rate applicable at the date on which remuneration was approved and paid.

c. The JOLs sought and obtained approval of their remuneration for the period to 31 October 2015 (Court approval was granted by order dated 4 February 2016).

d. Following Court approval, the JPLs and JOLs fees were drawn and paid at the US$ rate.

101. The JOLs have indicated that in April 2016, it came to their attention that there was an error in the wording of the two remuneration agreements issued and approved by the LC and director of the Centaur Entities. In both versions of the remuneration agreement, there are Appendices which set out Grant Thornton's actual (not indicative) charge-out rates in $USD for work undertaken through Grant Thornton's foreign offices. However, the JOLs say that in error, the words "*for comparison purposes only*" were included in the heading to each table.

102. While each of the local Grant Thornton offices was paid the exact amount in $US as had been approved by the Court, due to fluctuations in the relevant exchange rates between the spot rate on the dates used for the purposes of calculating charge out rates and the actual time of payment of invoices in US$, some Grant Thornton offices were paid amounts that differed from the local rates. In particular:

a. As a result of a significant decline in the value of the Australian Dollar as against the USD, Grant Thornton Australia Limited realized a total foreign exchange gain of AUD$283,251 in respect of the Provisional Liquidation Period ("**JPL Remuneration Funds**") and AUD$56,295 in respect of the Official Liquidation period up to 31 October 2015 ("**JOL Remuneration Funds**").

b. As a result of an increase in the value of the Hong Kong dollar as against the USD, Grant Thornton Recovery and Reorganisation Limited (Hong Kong) incurred an exchange loss of HK $11,367 during the Provisional Liquidation and exchange rate loss of HK$18,454 in respect of the same Official Liquidation period.

103. In the interests of transparency and in accordance with their duties as officers of the Court, as soon as the JOLs became aware of the irregularity in the language of the remuneration agreements, the JOLs brought this issue to the attention of the LCs (in their report dated 24 May 2016) and to the attention of Mr. Selinger in his capacity as director and sought their approval to retrospectively amend the relevant remuneration agreements to align the remuneration approval with the intention of the parties at the time the remuneration was agreed.

104. Mr. Selinger approved the retrospective amendment in respect of the JPLs' remuneration agreement. However, the LCs declined to do so. By way of compromise with the LC following the meeting on 2 June 2016, the JOLs agreed to:

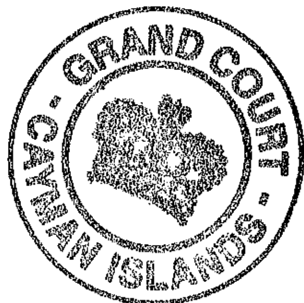
a. Amend the remuneration agreement applicable to the JOLs' tenure as official liquidator to provide that each Grant Thornton office should bill and be paid in their local currency (to avoid the impact of exchange rate fluctuations); and
b. Reimburse the JOLs Remuneration Funds.

105. The JOLs say that, notwithstanding that:

a. The JOLs received the JPL Remuneration Funds in accordance with the approval of the Court; and
b. Mr. Selinger approved the retrospective amendment of the relevant JPL remuneration agreement, the LC has asked the JOLs to bring this issue to the attention of the Court.

Business Decision

106. Ms. Lardner argues that the decision by the JOLs to retain the JPL Remuneration Funds, with the approval of the Director of the Centaur Entities, is not a decision that involves the exercise of a power requiring sanction of the Court. Thus, the JOLs are asking the Court to exercise its jurisdiction to review a business judgment. In those circumstances, Counsel states that the Court is being asked to apply the perversity test as described by Peter Gibson LJ in ***Mahomed v Morris*** [2001] BCC 233(at 241D). Reference was made to the discussion of that test in ***Leon v York-o-Matic*** [1966] 2 All ER 277, as adopted by the Court of Appeal in ***Re Edennote Ltd.*** [1996] 2 BCLC 389 (at 394b-i) that:



> *"the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."*

107. Reference was also made to ***Buckingham International plc (no.2)*** [1998] BCC 943 at 961A, where Robert Walker LJ explained that the rationale for this approach is that :

> *"...the court will be very slow to substitute its judgment for the liquidators' on what is essentially a businessman's decision".*

108. The JOLs take the position that, in circumstances where there is no suggestion that the JOLs deliberately sought to procure payment of the JPL Remuneration Funds, and the JOLs bore the risk of the foreign exchange fluctuations and as a result sustained both foreign exchange losses and gains (noting that there was a net gain), this is not an instance that satisfies the perversity test and does not therefore warrant intervention of the Court.

The Arguments on behalf of the LC for CLSPC

109. The arguments advanced on behalf of the LC for CLSPC, addressed in particular, the following two residual issues:

a. The allocation of funds as between the segregated portfolios of the CLSPC entity.

b. The appropriateness of the JOLs declaring a post-appointment variable return in respect of the RBS case, which was only triggered due to a third party investment into the case.

110. Mr. Dickson, who appeared for the LC, submitted that in order to make any lawful distribution, the JOLs must first properly identify the assets belonging to each segregated portfolio within CLSPC. It was argued that this is critical, because a segregated portfolio will only have recourse to its assets when satisfying its claims of creditors and shareholders of that segregated portfolio. This exercise, it was submitted must be done by reference to the existing legal and contractual arrangements into which the CLSPC and its segregated portfolios entered. It is these arrangements which demonstrate to whom the assets in question belong and, as a result, to which assets a particular segregated portfolio will have recourse to satisfy its liabilities.

111. The difficulty which the LC says it has with the JOLs' Proposed Methodology is that it is based, not upon the proper allocation of assets to individual segregated portfolios, but upon a methodology which ignores these arrangements. The LC therefore opposes the Proposed Methodology and requests that the Court direct that the JOLs comply with section 218 of the ***Law*** and properly identify and allocate assets belonging CLSPC and/or its segregated portfolios.

112. The LC contends that, once a proper allocation of assets is undertaken, the result will be that the assets in question, namely the proceeds of the various litigation funding arrangements, are to be treated as the joint assets of each of the CLSPC's segregated portfolios in such proportion that each of the segregated portfolios are able to share those assets pro rata based upon the sums raised by those segregated portfolios.

CLSPC's Constitutional Documents

113. As expressly provided for in CLSPC's constitutional documents, CLSPC's purpose was to invest in the third party litigation funding market in the UK and other markets such as Australia, New Zealand, Singapore and Hong Kong.

114. Mr. Dickson submitted that it is clear from CLSPC's constitutional documentation that the parties intended that CLSPC's shareholders would have the benefit of investment in a diversified portfolio of litigation cases with a range of risk profiles. As such, the submission continues, the legitimate expectation of investors in the various SPs of which CLSPC was to have their investment risk "hedged" by investment across a single portfolio of cases in which each Investment Series would share pro-rata. In other words, the investors believed that, on investing into CLSPC, they were obtaining an interest in the total portfolio of diversified investments and therefore stood to share in the gains and losses of all the litigation cases.

115. CLSPC, as well as the other Centaur Entities, invested in a number of litigation cases ("**the Funded Cases**').

116. The way investors intended to invest in the Funded Cases, so as to hedge their risk, was by the creation of a "*Master Portfolio*" segregated portfolio ("the **Master SP**"). It was this Master SP that should have entered into the litigation funding arrangements. Counsel asserts that, as each of the Investment Series would invest into the Master SP, they would have had the benefit of hedging their risk by sharing in the diversified portfolio of cases.

117. However, the Master SP was apparently not created. Instead, it would appear that CLSPC invested in the Funded Cases, amongst others.

118. The fundamental issue between the CLSPC LC and the JOLs is the appropriate distribution methodology to be used in distributing the proceeds of the litigation

funding arrangements to CLSPC's various SPs in circumstances where the Master SP was not created.

119. The LCs say that they do not consider the JOLs Proposed Methodology lawful or appropriate in the circumstances.

The LC's Methodology

120. Mr. Dickson submits that it is well settled law that a company will only be able to make distribution to its members out of the company's property- section 140(1) of the ***Law***. This limitation also exists with respect to segregated portfolio companies. However, Counsel submits that there is an additional limitation placed upon distribution to individual segregated portfolios within an SPC.

121. Reference was made to section 217(4) of the ***Law***, which provides as follows:

> "*Segregated portfolio dividends or other distributions shall be paid on segregated portfolio shares by reference only to the accounts of and to and out of the segregated portfolios assets and liabilities of the segregated portfolio in respect of which the segregated portfolio shares were issued and otherwise in accordance with the rights of those shares.*"

122. Reference was made to section 223 which provides that the JOLs must adhere to these provisions. Accordingly, the LC considers that the first, and arguably most critical, step which the JOLs must undertake is the allocation of assets to particular Investment Series. Counsel submits that it is only then that a proper distribution in accordance with sections 217(4) and 223 of the ***Law*** can be made.

Statutory Requirement to Allocate

123. Counsel submitted that section 218 of the ***Law*** is of central importance.

124. The LCs assert that in relation to the RBS Case, as well as the other litigation cases, there are deficiencies in that no evidence has been produced which demonstrates that CLSPC expressly contracted on behalf of a particular Investment Series.

Process of Allocation

125. The LC contends that CLSPC's management appear to have breached section 218(1). They say that the approach of the JOLs is plainly wrong because the JOLs must accept that contract(s)/ agreement(s) do in fact exist, even if no documentary evidence of its terms is readily available. They say that it cannot be realistically argued that there is no obligation to make the "*correct*" attribution simply because the relevant contractual documentation cannot be found.

126. Mr. Dickson submitted that the fact that CLSPC did not create the Master SP did not absolve it of its contractual obligations to diversify its shareholders' investments. It was further submitted that indeed, on a proper analysis, the true nature of the obligation owed by CLSPC was diversification and the creation of the Master SP was only a means of doing so.

127. The LC submits that, in circumstances where there is no evidence to suggest that contracts were entered into on behalf of a particular Investment Series, the case proceeds of the Funded Cases (being the fruits of the various contracts entered into by CLSPC on behalf of the Investment Series) should be treated as the assets of the Investment Series, prorated based upon the investment sums raised by each Investment Series. Each Investment Series would therefore be entitled to a pro rata distribution from each Funded Case.

128. The LC argues that the investors must be taken to have intended to invest into a range of cases, with the consequence that they would have a legitimate expectation that they should share in the case proceeds from that range of cases in the form of proceeds from the Funded Cases. As expressly provided for by section

218(3) of the ***Law***, the Court should take the intention of the parties into consideration.

129. The LC goes on to submit that this type of allocation would not result in any breaches to the prohibitions contained in the Law as it would importantly, not require any pooling of segregated portfolio assets. If the proceeds from the Funded Cases were treated as attributable to each Investment Series rateably described above, each Investment Series would only have recourse to the shares of the case proceeds which are attributable to that series.

Flaws with JOLs Proposed Methodology

130. It was argued that an important factor to take into account is that the LCs' proposed attribution would avoid a number of the flaws inherent in the JOLs Proposed Methodology.

131. Mr. Dickson goes on to suggest that the reconciliation process between i) the Cash Books and ii) the Portfolio Tracker was only possible in respect of movements between the underlying investors and CLSPC; it does not appear to have been possible in respect of movements between CLSPC and the litigation cases (because the Portfolio Tracker information could only be relied upon for the former). Reference was made to evidence extracted from SJ-5.

132. The LCs say that indeed, the JOLs' own evidence suggests that the results from the cash flow analysis are entirely dependent on what they accept to be dubious information: see Jahani 6, paragraphs 13, 14 and 18. In these circumstances the LCs say that on the JOLs' Proposed Methodology the evidence is incomplete, and at worst, unreliable.

133. The LCs make the point that the 'cash is king" approach would appear to produce unfair results. This they say is because investors will be lucky or unlucky depending on whether CLSPC's management so happened to use their monies to

invest in a case. They repeat that it is difficult to understand how the JOLs propose to distribute proceeds based upon an entirely random and arbitrary decision of what they allege to be fraudulent management. They urge that the most just and equitable result is to shield investors from the capricious decisions of the CLSPC's management.

The Foreign Exchange Issue

134. The JOLs request that the Court validate a retrospective amendment to the 2014/2015 JPLs remuneration agreement to reflect what the JOLs say was the true intent of the agreement, according to the LC. The LC does not agree with this request and asks the Court to reject it.

135. Pursuant to the appointment of the JPLs, a Remuneration Agreement dated 11 December 2014 ("the **Remuneration Agreement**") was entered into. Clause 3 states:

> "*[t]he charge out rates at which the JPLs and their staff are seeking remuneration for the reporting period are set out in Appendix 2…The table shows the JPLs' rates being charged both in the* ***agreed currency of payment*** *and as a percentage of the maximum allowable IPR rate for ease of comparison. Further in respect of the rates of remuneration for Australia and Hong Kong,* ***for comparison to the minimum and maximum rates set out in the IPR, conversion of those rates to US$ have been calculated at the exchange rates between those currencies at the date of the JPLs' appointment.***
>
> *…The rates disclosed in Appendix 2 of this agreement were approved by the Companies on 10 December 2014.*"
>
> (Counsel's emphasis)

136. When the JOLs discovered the windfall they sought and obtained Mr. Selinger's agreement to enter into a revised remuneration agreement on 27 May 2016 ("the **Revised Remuneration Agreement**").

137. The LC disagrees with the JOLs' position, as stated in their written submissions, that the decision to retain the exchange rate gain is a simple business decision. They say that it is the Remuneration Agreement that governs the JOLs' entitlement. They remind that when ascertaining the terms of a contract, it must be remembered that an agreement must be interpreted objectively, by reference to what a reasonable person in the position of the parties would have understood the words to mean. It was also submitted that the current approach of the Courts is to give weight to the natural and ordinary meaning of the words, particularly where the parties are commercially experienced. Reference was made to the well- known decision in ***Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd.*** [1997] AC 749, ***Investors' Compensation Scheme Ltd. v West Bromwich Building Society*** [1998] 1 WLR 896, and ***Rainy Sky SA v Kookmin Bank*** [2011] UKSC 50.

138. The LC also submits that any reliance on the Revised Remuneration Agreement is not valid because Mr. Selinger had no authority to act on behalf of the Company at the time, since it was at that time in official liquidation. Reference was made to the decision of Foster J in ***In the Matter of Laurus Master Fund Limited*** **[2010](2) CILR 132.**

Prior Court Sanction

139. The LCs say that in so far as the JOLs appear to suggest that the Court ought to validate the retrospective amendment to the Remuneration Agreement because the remuneration had already been approved, this is not correct. They submit that at the time of the previous fee approval hearing, and given the clear terms of the Remuneration Agreement, the Court must have been operating on the assumption that the fees were presented to it in USD for comparison purposes only (as

expressly permitted by the Remuneration Agreement) and that the JOLs were intending to draw down the fees in AUD as required.

140. They sum up by saying that the JOLs have already agreed to refund the estate the exchange rate gain obtained during the course of the official liquidation i.e. June 2015 onwards, presumably in acknowledgement that it would be inappropriate to retain it. The LCs say there is no conceptual difference between the gain and the gain obtained in relation to the provisional liquidation.

141. I should just add for completeness that in response on behalf of the JOLs, Ms. Lardner has indicated that the JOLs are not saying that the terms of the Remuneration Agreement were unclear or ambiguous. What the JOLs are saying is that there was mutual mistake and she is therefore asking for rectification.

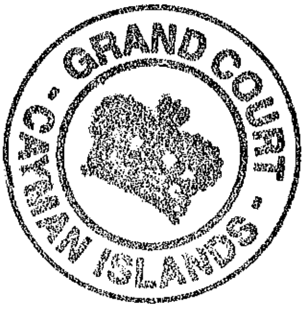
The Submissions of the LC of CLUS1

142. The scope of the dispute between the JOLs and the LC of CLUS1 in relation to the waterfall is narrow. In essence, Mr. Cecere pointed out on behalf of this LC, that it objects to the priority proposed between the two classes of creditor *inter se* in the JOLs proposed waterfall:

(a) The claims of former members who have redeemed from CLUS1 in accordance with CLUS1's articles of association and other constitutional documents, but who have not received any moneys in accordance with their valid redemption request (**Redemption Creditors** and **Redemption Creditor Claims**); and

(b) The claims of current members (i.e. members who were not redeemed at the commencement of the winding up) to unpaid income, such as the right to unpaid dividends (**Shareholder Creditors** and **Shareholder Creditor Claims**).

143. The LC's view is that the JOLs say (incorrectly and inconsistently with the decision in ***Herald***), that the Redemption Creditor Claims (Class 2(ii) in the



JOLs' Proposed Waterfall) and the Shareholder Debt Claims (Classes 2(i) and (iii)) are both Class 2 claims which should take pari passu.

144. The LC submits, that the correct analysis, having regard to the Cayman priority regime prescribed by the ***Companies Law*** and the comments of the CICA in ***Herald,*** is that Shareholder Debt Claims are subordinated to Redemption Creditor Claims.

145. Mr. Cecere opines that the JOLs' case is based on the premise that a shareholder claiming for an unpaid dividend does not claim in their *capacity as a member.* However, he submits that that premise is incorrect, since it is well-established that a shareholder's claim for unpaid dividends is a claim brought by a shareholder in their capacity as a shareholder. Properly understood, Counsel submits, it becomes clear on the face of the CICA's unanimous decision in ***Herald*** that Shareholder Creditors are subordinated to Redemption Creditors.

146. The LC asserts, that if further support is needed for their position, it can be found in the statutory waterfall set out, amongst other things, in s.49(g) and s. 37(7)(b) of the ***Law***.

<u>The LC'S Proposed Waterfall</u>

1. Class 1 (as per the JOLs' Proposed Waterfall) (i.e. Ordinary Creditor Claims);
2. Class 2 Redemption Creditor Claims (i.e. Class 2(ii) of the JOLs' Proposed Waterfall);
3. Class 3 Shareholder Creditor Claims (i.e. Classes 2(i) and (iii) of the JOLs' Proposed Waterfall;
4. Class 4 (as per Class 3 of the JOLs' Proposed Waterfall);
5. Class 5 (as per Class 4 of the JOLs' Proposed Waterfall).

147. The LC states that there are a number of passages in CICA's judgment in ***Herald*** which indicate the Court's view that Redemption Creditor Claims take in priority to claims of creditors seeking debts *due to them in their capacity of members.* (Counsel's emphasis)

148. Reference was made to page 18 of the judgment, in which Field JA, in his fourth conclusion states as follows:

> *"The December Redeemers and the KYC Redeemers* [i.e. Redemption Creditors] *have provable contingent claims in Herald's liquidation, those claims ranking behind Herald's unsecured creditors but ahead of the entitlement of other Herald shareholders to be paid* ***sums due to them in their capacity as members*** (Counsel's emphasis) .

149. Reference was also made to paragraph 54, where, after construing s.49(g) of the ***Law***, the learned Justice of Appeal noted:

> *"However, the Claimants'* [i.e. Redemption Creditors] *claims would rank ahead of the entitlement of other Herald shareholders to be paid* ***sums due to them in their capacity of members****. As Mitchell JA said in reference to section 197 of the BVI Insolvency Act in the* ***Somers Dublin decision****, any adjustment within s. 197 must give higher priority to former members who have become creditors as a result of redemption than to mere continuing members."* (Counsel's emphasis)

150. Mr. Cecere submits that it is well settled law that sums due to a member in their capacity as a member include both the return of equity back to shareholders as well as debts owed to shareholders including unpaid dividends (i.e. Shareholder Creditor Claims).

The LC's Submissions on the Privy Counsel's decision in *Herald*

151. The LC further submits that the Board's judgment makes it clear that on any construction of the waterfall set out in s. 37(7)(b) of the ***Law***, Shareholder Creditor Claims will be subordinated to Redemption Creditor Claims.

152. It was submitted that the Board has dismissed Mr. Pearson's appeal, upholding the Court of Appeal's finding that:

1. The December and KYC Redeemers (i.e. Redemption Creditors) do not fall within s.37(7) of the ***Law*** ; and
2. Pursuant to s.49(g) of the ***Law***, the December and KYC Redeemers' respective claims are subordinated to ordinary or trade creditors (see paragraph 22).

153. Reference was made to paragraphs 34 and 35 of the Judgment, as noting that the effect of the s. 37(7)(b) waterfall is that a Section 37(7) Creditor:

1. Would rank behind *all other debts and liabilities of the company (other than any due to **members** in their character as such)* (i.e. s.37(7)(b)(i); and
2. But ahead *of any amounts due to **members** in satisfaction of their rights (whether as to capital or income) as members (i.e. the last sentence of s. 37(7)(b).* (Counsel's emphasis).

154. The Board then considers the meaning of the term *member* in (1) and (2) above. It rejects the notion that member could mean former and current member in both (1) and (2) because that would lead to the result (which the Board indicated it did not find acceptable) that a section 37(7) Creditor would take ahead of a Redemption creditor (see paragraph 34 of the judgment).

155. The Privy Council concluded that there were two possible alternatives to the proper construction of the term *member* (1) and (2) above. The first is that member in both (1) and (2) is given its usual meaning of current member. This is the position contended for by the LC.

156. This construction would result in the following waterfall:

1. Ordinary Creditors (s.37(7)(b)(i) and s.49(g);
2. Redemption Creditors (s.37(7)(b)(i) and s.49(g);
3. Preferred creditors pursuant to s.37(7)(b)(ii);
4. Section 37(7) creditors;
5. Shareholder Creditors (s.37(7)(b); and
6. Return of equity to shareholders (s.140(1)).

157. The Privy Council noted that such a result (in so far as Redemption Creditors would take in priority to Section 37 Creditors) would not be incongruous.

158. The third and final possibility considered by the Privy Council is that member in (1) means current and former member but only current member in (2) (see paragraph 35 of the Judgment). This would result in the following waterfall:

1. Ordinary Creditors (s.37(7)(b)(i) and s.49(g));
2. Preferred creditors pursuant to s. 37(7)(b)(ii);
3. Redemption Creditors and Section 37(7) Creditors (s.37(7)(b));
4. Shareholder Creditors (s.37(7)(b); and
5. Return of equity to shareholders (s.140(1)).

159. The LC submits that on either construction, Shareholder Creditor Claims are subordinated to Redemption Creditor Claims. The LC also accepts that the comments of the Board with regard to the s.37(7) waterfall are *obiter*, however, they submit that:

(a) they are highly persuasive and, particularly in the absence of any contrary precedent, it would be appropriate for this Court to follow them;

(b) the JOLs must distribute the assets of CLUS1 in accordance with the statutory waterfall set out in the ***Law***, including s.37(7)(b).

DISCUSSION AND ANALYSIS

The Law in relation to Sanction of the Distribution Model

160. Reference was made by Ms. Lardner to the oft-cited decision of Smellie CJ in ***Re DD Growth Premium 2X Fund*** [2013] (2) CILR 361 where considerations relevant to sanction applications are discussed at page 371 as follows:

(a) The decision whether to sanction the exercise of a power falling within Part 1 of the Third Schedule to the Law is a decision for the Court (see ***Re Greenhaven Motors Ltd.*** (7) [1999] 1 BCLC at 642).

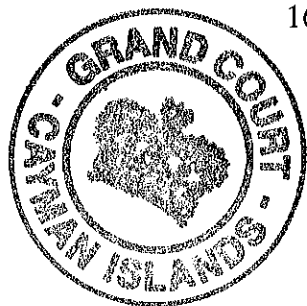
(b) In exercising its discretion to sanction, the court must consider all the relevant evidence (see ***In re Universal & Surety Co. Ltd.*** *(11) (1992-93 CILR at 152).*

(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) (6).

(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)*** ([1997] 2 BCLC at 92).

(e) The liquidator is usually in the best position to take an informed and objective view (see ***Re Greenhaven Motors Ltd.***[1999] 1 BCLC at 643).

161. The JOLs submitted, that in circumstances where they have extensively considered each of the variables comprising the Distribution Model and determined that the model currently before the Court is the more equitable means of allocating and distributing the assets of the Company, and there is no evidence before the Court to the contrary, it is appropriate for the Court to give considerable weight to their opinion.



162. I have given close consideration to the many points and variables not in dispute, or agreed, between the JOLs and the LCs. In relation to Variables 2, 3, 4, 15 and 17 where there was no express agreement with the LCs, I am satisfied that the JOLs have given careful consideration to these matters and applied uncontroversial insolvency law principles.

163. As regards the FCA Proceeding Issue, I was satisfied that it was appropriate to grant the retrospective sanction sought in sub-paragraph 3 of the Summons.

164. In my view, the JOLs have plainly and wherever possible, sought to accommodate the views of the LCs on the Distribution Model , resulting in agreement being reached (with compromises on both sides), on most issues.

165. I am satisfied that the proposed transactions, approach, and uncontested variables are in the commercial best interests of the Centaur Entities, reflected prima facie by the commercial judgment of the JOLs. They are in line with well-established insolvency law principles. I see no reasons why the JOLs' views should not be given considerable weight and I therefore grant the Court's sanction on these factors and elements of the Distribution Model as being the most equitable manner in which to make distributions and allocate funds.

166. As regards the Form of Proof of Debt proposed by the JOLs, I also grant the Court's sanction with regard to the Form suggested as it seems an appropriate, efficient and cost-effective way of managing creditor claims. In addition, I approve a form akin to this Form for the JOLs to handle investor claims, given the complexities of the Distribution Model.

Residual Issues

167. I therefore turn my attention to deal specifically with the Residual Issues.

a. The allocation of funds as between the segregated portfolios of the CLSPC entity.

168. In relation to the Distribution model generally, as the JOLs were able to undertake the cash tracing exercise, they did not propose to pool the assets of the Centaur Entities. It would seem that the LCs broadly agree with this decision.

169. However, for practical purposes, what the CLSPC LC proposes in relation to this issue would mean notionally pooling the proceeds of all cases funded by CLSPC and allocating them pro rata across the 5 Investment Series.

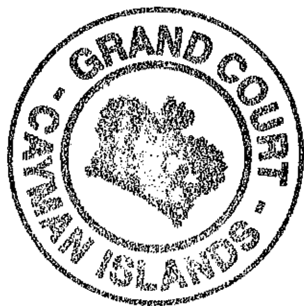
170. This is a very unfortunate situation and to my mind there is no easy solution to it. However, in my judgment, the JOLs are correct that no Master Portfolio could ever have existed as contemplated by the CLSPC Master Memorandum because it contemplated a structure that is fundamentally contrary to Cayman Islands Law.

171. I accept the JOLs' claim that they cannot give effect to this structure because:

(a) under Cayman Islands Law, segregated portfolios within the same segregated portfolio company are not permitted to invest in, hold shares in or loan money to one another pursuant to section 216(1) of the ***Law***;

(b) if any assets are transferred between segregated portfolios, it must be for full value (pursuant to section 219(6)(c) of the ***Law***) and there is no suggestion in the Master Memorandum that funds would have been transferred from each Investment Series into the Master Portfolio for full value;

(c) The same provision also prevents transfer of assets between segregated portfolios and the general assets of the company other than at full value (so the JOLs cannot circumvent the language in the Master memorandum by pretending that the funds were all put into "*general assets*" as the "*Master Portfolio*").



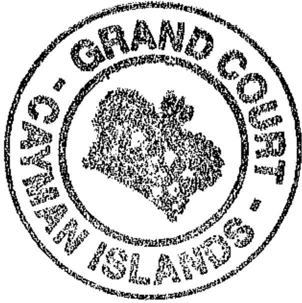
172. One can fully understand the LC's query whether the JOLs have made the necessary enquiries to properly attribute case proceeds to each segregated portfolio within CLSPC in accordance with section 218 of the Companies Law. However, as Ms. Lardner pointed out unfortunately, this concern presupposes that documents exist which would assist the JOLs in such an allocation process. The Court has been told that in point of fact, no such documents exist. Further, that there is no documentary recognition of the segregated portfolios within the CLSPC that the JOLs have been able to identify after the creation of each portfolio.

173. The JOLs assert, that whilst the management of the Centaur Entities was content to ignore the segregated portfolio structure of CLSPC, they are unable to do so and as such, maintain that the only means of attributing assets and proceeds of cases to the segregated portfolios of CLSPC is by tracing the cash flows. Reference was made to section 223 of the Law as making clear that a liquidator must " *notwithstanding any statutory provision or rule of Law to the contrary*" deal with CLSPC's assets only in accordance with the procedures set out in section 219(6).

174. I find persuasive the JOLs' indication that a *pari passu* distribution among the CLSPC Investment Series (which would be in contravention of the Companies Law) would in any event not necessarily be the "*fairest*" solution, because :

(a) Any adjustment to the distribution to make it *pari passu* would be detrimental to the investors in the earlier series because they are due to get a better return under the Model than they would under the pooling proposal;

(b) Investors in the latter series could end up "*double dipping*" if they ultimately receive the benefit of this quasi-pooling notwithstanding that their funds may have been invested into (the relevant cases) and also receive the benefit of unwinding intercompany loans;



(c) It is apparent from the SOMs that each series would invest in the Master Portfolio on different terms (e.g. share price, fixed return date, minimum subscription). This occurred where the investments took place at different times (where the risk profile would have changed over time). Therefore, any attempt to distribute the proceeds of the cases on a *pari passu* basis would have to overlook these factors which, again, the JOLs say would be "*unfair*" to the earlier investors whose investments were more risky and were locked up for longer, but had the potential to yield a higher return.

175. I accept the JOLs' view that there is no sufficient justification for them to depart from the "*cash is king*" approach to the distribution model. It seems plain that they reached that conclusion after careful and anxious consideration. I accept that in all of the circumstances, this is the best commercial approach to the complex problem of the allocation of funds as between the segregated portfolios of the CLSPC entity.

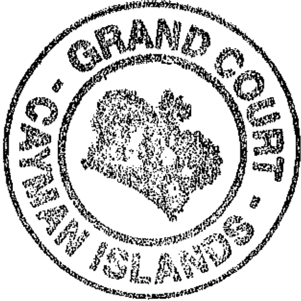
176. At one point during the hearing, Mr. Dickson suggested that the JOLs' application in respect of this aspect of the matter should really be an application under section 218(3) of the ***Law***. However, in my judgment, Ms. Lardner is correct that this application is properly so called, an application by the JOLs for sanction from the Court under Schedule 3 Part 1, section 7 of the ***Law***, which provides as follows:

> *"7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company…."*

b. The relative priority of claims by members and former members in respect of redemption proceeds (claimed by former members) versus other liabilities such as unpaid dividends (claimed by continuing members).

177. Sub-section 37(7) provides as follows:-

"37(7)



a) Where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed or which the company has agreed to purchase have not been purchased, the terms of redemption or purchase may be enforced against the company, and when shares are redeemed or purchased under this subsection they shall be treated as cancelled:

Provided that this paragraph shall not apply if-

i. the terms of redemption or purchase provided for the redemption or purchase to take place at a date later than the date of the commencement of the winding up; or

ii. During the period beginning with the date on which the redemption or purchase was to have taken place and ending with the commencement of the winding up the company could not, at any time, have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased.

b) There shall be paid in priority to any amount which the company is liable by virtue of paragraph (a) to pay in respect of any shares-

i. All debts and liabilities of the company (other than any due to members in their character as such); and

ii. If other shares carry rights whether as to capital or as to income which are preferred to the rights as to capital attaching to the first mentioned shares, any amount due in satisfaction of those preferred rights,

But subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members."

178. Sub-section 49(g) of the ***Law***, provides:

"Liability of present and past members of company

49. In the event of a company being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves:

Provided that:

……

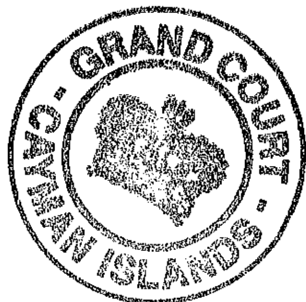
> *(g)"**no sum due to any member of a company in his character of a member** by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such a member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves."* (Counsel's emphasis).

179. I must say that I find this issue a very complicated one. There is dicta in the Court of Appeal's decision in ***Herald*** that may seem to support the waterfall contended for by the LC. However, even then, it would depend what the Court of Appeal meant by "*shareholders claiming in their capacity as shareholders*". On the other hand, I agree with the JOLs' Counsel that it is clear from paragraphs 29 to 35 of the Privy Council's decision in ***Herald*** that the question of priorities as between sections 37(7) and 49(g) is a complex one. Indeed, the Privy Council did proffer three possible interpretations (only one of which was excluded) and ultimately declined to say any more on the question. I accept Ms. Lardner's submission that, in circumstances where one of the Privy Council's interpretations, consistent with the Court of Appeal's approach, requires the application of two different meanings to the word "*member*" within the same legislative section, the waterfall in section 37(7) and its interaction with the balance of the ***Law*** is sufficiently uncertain for it to be reasonable for the Court not to have regard to it unless a liquidator is dealing with claims within that subsection (which I have been told is not the case here).

180. On this basis, (though the question is obviously a difficult one), I consider that there remains no statutory or common law basis on which to distinguish Shareholder creditor Claims within the distribution waterfall, and therefore both Redemption claims and Shareholder crystallised debt claims should fall within Class 2 of the JOLs' distribution waterfall.

c. The appropriateness of the JOLs declaring a post-appointment variable return in respect of the RBS case, which was only triggered due to a third party investment into the case.

181. According to the JOLs, the LCs have raised a question about the appropriateness of declaring a variable return in respect of the RBS case in respect of amounts owing as a result of the Centaur Entities' guarantee of the Chiron Loan, as this was not a *direct* investment in the RBS case and the Chiron Loan (which facilitated the successful case) was not in place at the relevant date. However, in response, the JOLs say that they have considered the terms of the relevant offering memoranda which provide that a variable return may be declared in respect of any "*investment return*". "*Investment Returns*" are broadly defined in the offering memoranda, and as such, the JOLs consider that it is appropriate to declare a post appointment variable return in respect of these funds.



182. On this issue, I also consider that the JOLs are best placed to take an informed and objective view in relation to the declaration of a post appointment variable return and I therefore approve this course.

d. The FX issue, namely the retention by the JOLs of certain funds paid in respect of their remuneration incurred and approved (by both the LCs and the Court) as provisional liquidators.

183. Again, this is quite a complex issue. I do not accept the JOLs' submission that the decision to retain the exchange rate gain is a simple business decision. I agree with the LC that the JOLs' (and the JPLs') entitlement to fees is one governed by the contractual arrangements that the JOLs entered into, and which in turn are subject to the supervision and control of the Court.

184. Indeed, in paragraph 107 of Jahani 6, it appears to be accepted that the Court's sanction of the purported amendment to the remuneration contract is required.

185. Whilst it is true that Mr. Selinger was the relevant authority during the provisional liquidation of the companies, as of June 2015, (being the date upon which CLSPC entered into official liquidation), Mr. Selinger was no longer able to act for

CLSPC. He therefore had no authority to agree the Revised Remuneration Agreement in relation to the JPLs fees.

186. However, more fundamentally, despite the fact that at the previous fee approval hearing the fees were approved, it does seem to me that the Court maintains and retains the supervisory jurisdiction to control the JOLs' remuneration. Indeed, (not that it is directly relevant, but) the language of the Orders made on 4 February 2016 approving the fees, actually was that the fees were approved "*subject to any retrospective adjustment at the conclusion of the liquidation.*"

187. On the one hand, I have regard to the fact that, as the JOLs point out, they were prepared to, and did bear, the risk of fluctuations in exchange rates, which meant both losses and gains. Further, that it may well be that the JOLs sought to simplify the billing and administration process across the liquidations by billing in US$. Additionally, the billing rates of GTAL were well within the range prescribed by Cayman Law. I also bear in mind that this liquidation is a cross-border exercise of considerable complexity. I take into account the fact that there is no suggestion or evidence that the JOLs sought to procure the exchange rate gains. I also bear in mind that the JOLs say that they agreed to reimburse the JOL Remuneration Funds after meetings with the LCs, in the interests of compromise, rather than an admission that they were obliged to do so.

188. However, the Remuneration Agreement did suggest that GT Australia was to charge in Australian dollars and be paid in Australian dollars, and the USD was to be used for reporting and comparison purposes only. Although the approvals were arranged in the USD equivalent, it does seem clear that the actual billing and paying was to be in local currency.

189. Further, it seems to me that simplification of billing is not a good enough answer. It also cannot go unnoticed that it is the JPLs who paid themselves and therefore selected the time at which they actually go to pay their remuneration. For the

avoidance of doubt, let me be clear that I am not at all suggesting anything untoward has occurred, I am merely placing emphasis on who in this scenario controls the point at which payment is made.

190. In my judgment, the more fair and equitable way to deal with this process is, as suggested by one member of the LC during the June 2016 Meeting, for neither the JOLs nor the estates to benefit from exchange rate fluctuations. This is particularly so since it is not as if appropriate adjustments are incapable of being made or impractical at this time. In my view, this net gain is an artificial gain on the JOLs' (JPLs') part, in the sense that, no extra work was done by them, they did not expect to get this profit, and it is therefore in the nature of a windfall. If the JOLs are allowed to retain this sum, that results in a reduction to funds available to creditors in the same amount.

191. I am therefore minded, in exercise of my supervisory functions, to dismiss the JOLs' application at sub-paragraph 2 of the Summons (described as Issue d), and direct that the JOLs reimburse to the estates the JPL Remuneration Funds.

The Remuneration Issue

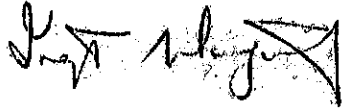
192. I approve the JOLs' Remuneration as sought for the period 1 November 2015 to 31 March 2017 and as unanimously approved by the LCs at their Meetings. I also sanction the JOLs' proposal for an allocation of costs at variance with the previous Court Order dated 25 June 2015, and in accordance with the costs waterfall set out in the amended proposal, forming part of Variables 7 and 8 within the Distribution Model.

Distribution Model

193. All told, the JOLs have extensively considered each of the variables comprising the Distribution Model and determined that the model currently before the Court is the more equitable means of allocating and distributing the assets of the Company. It was appropriate for the Court to give considerable weight to this

opinion. Implementing the rulings that I have made on the Residual Issues (a) - (c), I approve the Distribution Model.

194. The parties shall therefore let me have a draft order that accords with these rulings.



HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT