

CP 2008/94

**IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
CHANCERY DIVISION**

IN THE MATTER of THE COMPANIES ACT 1931

and

**IN THE MATTER of KAUPTHING SINGER &
FRIEDLANDER (ISLE OF MAN) LIMITED**

and

**IN THE MATTER of THE JOINT PETITION of
KAUPTHING SINGER & FRIEDLANDER (ISLE OF MAN) LIMITED
and the FINANCIAL SUPERVISION COMMISSION dated
9th October 2008 (the "Winding Up Petition")**

**Transcript of judgment delivered by
His Honour the Deputy Deemster Corlett at Douglas
on the 19th day of February 2009**

[1] I have had the opportunity to study the papers in a little bit more detail, in light of submissions made this morning, over the lunch adjournment and I have come to a decision in this matter and also in light of the submissions I have heard this afternoon from members of the public.

[2] Just very briefly relating the history of this matter, for the record. On 9th October 2008 the Provisional Liquidator was appointed over this company and on 25th October 2008 the hearing planned to put the company into liquidation was adjourned at a time when it was said there were certain high-level meetings taking place between governments to try and resolve the matter; those, unfortunately, didn't bear fruit. On 20th November 2008 an additional Provisional Liquidator was appointed. On 27th November 2008 the matter came before the Court again and was

adjourned for the consideration of a Section 152 Scheme of Arrangement; a similar adjournment was granted on 29th January 2009 and the matter comes before me today when a third adjournment, fourth in total but a third adjournment on what I might call Section 152 grounds, has been sought by the Treasury.

[3] Going back to fundamental matters this company is on any basis insolvent and there is no evidence provided to the contrary. *Prima facie* therefore a Winding Up Order should be made and I understand from both the Financial Supervision Commission and the Company itself that their position has not changed in that regard. A Liquidator, of course, has very well established roles and duties under Isle of Man Company Law. Our Company Law has dealt with, I think it is, two substantial bank liquidations certainly in the last twenty or thirty years and the legislative framework, despite its age, seems to deal with those quite satisfactorily, and has dealt with those satisfactorily in the past. A Liquidator is an Officer of the Court, he is subject to the directions of the Court. The Committee of Inspection, which is a well established body, can give consent to the carrying out of particular functions and the function of that Committee is to assist and supervise the acts of the Liquidator.

[4] Returning to fundamental matters, when a bank as with any company becomes insolvent, generally speaking, a compulsory Winding Up Order would be made. The Isle of Man does not, unfortunately, have any halfway house such as Administration. The extra complication as the Attorney has just said is in relation to banks where the Depositors Compensation Scheme is there to assist the small depositors. But the Liquidator in insolvencies is there to pursue recovery for the benefit of the company

and its creditors with the benefit of the extensive powers available to him and with the guidance and assistance of the Court and the Committee of Inspection.

[5] Now in this case as I have noted in my previous Judgments a Scheme of Arrangement has been proposed and since the last Court there have been significant developments in fine-tuning it, if I may put it that way. There is no doubt that the most eminent practitioners have become involved in this matter to the benefit of all concerned. Mr Moss QC is well known to anyone who has ever dealt with insolvency matters; he is an extremely learned gentleman whose textbooks are regarded with great respect in the Courts. We also see that Herbert Smith, a leading firm of City Solicitors, are involved in the matter so there is no doubt that any Scheme which is put before this Court will, I am sure, be of a high quality.

[6] There are, however, certain fundamental matters of concern which were raised at the last Court and the question before me now is whether those have been addressed adequately. In many ways the key point so far as I was concerned at the last Court, and to some extent now, is the question of claims against third parties, and there is also the question of timescale. So far as claims against third parties are concerned it is, I must say, a little disappointing that the draft Scheme does not at present address this at all and I think this is unfortunate. There is no doubt that claims against third parties in this particular case will assume significant importance. It is likely that there may well be claims against regulators, other governmental bodies, possibly directors, I don't know, but claims against third parties are a key matter of concern for the body of creditors. Now, we have had the benefit of Mr Moss' affidavit on this point and if I could very briefly refer to it. At paragraph 30 of his affidavit, (he has in the previous paragraph identified the various claims which

the company could raise against third parties) and as the Attorney said the most important category of those claims undoubtedly is the first category identified by Mr Moss. In short, what Mr Moss says is that the company would be able to bring such claims notwithstanding the sanction of the Scheme and even if the Winding Up Petition was dismissed and the Joint Liquidators Provisionally left office. If necessary or desirable the Scheme could make provision as to who was to bring such claims, how they were to be funded and how any proceeds were to be dealt with.

[7] As I say, I think it is unfortunate that the Scheme documentation currently before the Court did not at least make some attempt at outlining how those matters were to be dealt with. Paragraph 33 deals with the matter in slightly more detail and deals with the legitimate concern raised by Mr Wright on behalf of his clients about the shareholder in this company, which would appear to be Kaupthing hf or its directly-owned subsidiary. The question is raised as to whether that company or its subsidiary could interfere in the affairs of this company thus, I suppose, torpedoing any attempt to bring effective litigation. Paragraph 33 of Mr Moss' affidavit, as the Attorney has just said, makes it clear that in Mr Moss' view the company would remain at all times under the control of the Joint Liquidators Provisionally or the Scheme's supervisors (and as I understand it those would be the same people) and control will not revert to the company's directors or shareholders. So it seems to me that, bearing in mind that very learned opinion from Mr Moss, the Scheme as it currently stands as outlined in Mr Moss' opinion is sufficient to deal with the concerns which have been raised. In other words it will still be open to this company, under the control of the Provisional Liquidators, to take action against whichever third parties they consider are relevant in order to achieve fuller, or perhaps even full, recovery for the depositors. Of course the company through its Liquidators could

always seek directions from the Court and the powers of the Joint Liquidators could be enlarged to deal with any specific matters which are necessary.

[8] I accept what Mr Moss says that the procedure of combining a Scheme of Arrangement with a Provisional Liquidation, especially in the context of insurance companies, prior to the extension of the administration remedy to such companies, is well established. I agree with Mr Wright that there is some doubt as to whether the analogy with insurance companies is particularly apposite but, as I say, the procedure of combining a Scheme of Arrangement with a Provisional Liquidation seems to have been well established in England prior to legislative changes.

[9] Mr Moss also deals with the issue of classes which was a matter which was raised at the last Court. I am satisfied that this is not a matter which should deflect from the principle of the Scheme of Arrangement; there is some uncertainty as to which regime should apply, whether it is the 1934 regime as has been outlined, or the more modern regime as applied in England but I am assured by the representatives from the Treasury that if there is a need to deal with the questions of classes sooner rather than later then that would not impede the timetable, the indicative timetable which has been put in Mr Lovett's affidavit.

[10] There was also some uncertainty expressed at the last Court concerning whether there would be a need to apply to the English Courts and the knock-on effects which that might have on timetabling. As has been pointed out by Mr Moss, the Cambridge case which went to the Privy Council has reinforced the well-established rules relating to co-operation in international insolvency matters and I do not see, as presently advised, why that should be an impediment to the Scheme.

[11] So far as the issue of timescale is concerned this was a matter which caused me concern at the last Court. Again, I express some slight concern that the issue of timescale was not specifically addressed in the papers before me but I have been assured today that the existing timescales remains, that is the indicative timetable annexed to Mr Lovett's previous affidavit. I express some concern about Mr Moss' reference to repeated adjournments and the time taken to prepare and implement a Scheme of Arrangement but I am assured that work is well advanced on the relevant documentation and there is no doubt that these matters are complex but the timescale must be adhered to.

[12] So far as the timescale for payments is concerned, I have had a useful affidavit from Mr Simpson which was sworn yesterday. That, in very short terms, says as follows that the combination of the Liquidation and the DCS [Depositors Compensation Scheme] would produce a total of £226m by 30th October 2009, that is £160m by 31st May 2009 and £66m by 30th October. A Scheme, however, would produce a total of £212m, the first payments being made some time in July or August 2009.

[13] So when one looks at those figures and that indicative timescale, and bearing in mind that none of these timescales can be necessarily written in stone, one does see that what had been a clearly identified advantage of expedition, speed that is, in relation to this matter is not perhaps as clear as it was previously.

[14] However, today it has been emphasised to me that a main advantage of the Scheme being propounded today is its security, i.e. that there will be certainty with

payments because these payments are guaranteed and the payment dates are virtually guaranteed. That relates to the fact that the Depositors Compensation Scheme may be affected by subsequent bank insolvencies; these are indeed exceptional and uncertain times in which we live and I accept that there must be taken into account the possibility that the Depositors Compensation Scheme could be affected by subsequent bank insolvencies and therefore remove the security which might otherwise be available to depositors under that Scheme. I am also informed that the Scheme being propounded by the Treasury would in fact produce a small additional financial benefit to the depositors described as 1.2 pence in the pound but nevertheless that is a benefit which should not be discounted in any way, shape or form.

[15] I return to Mr Moss' affidavit at Paragraph 12 where he says that he understands the intention of the Scheme is to replicate the financial treatment which creditors would receive in a Liquidation and under the DCS but provide for payments to be made in a more efficient and timely manner whilst not prejudicing any claims which the company may have against third parties.

[16] In my view the interests of the creditors are protected under this proposed Scheme, or seem likely to be protected under this proposed scheme, and as has been said the devil will indeed be in the detail and the creditors will have an opportunity to examine the Scheme in great detail and have a hearing to determine whether in fact the Scheme is of benefit to them. This is not a hearing to determine whether the Scheme is in fact going to be approved, it is merely to allow further time for it to be developed.

[17] There were some other issues raised, quite rightly, by Mr Wright and others. There were issues over how the creditors might participate in the process. There is a very brief reference in the papers to a Creditors' Committee, at Paragraph 13.2 of the document produced by Herbert Smith. Again it is a very brief reference and I think it would have been helpful if greater detail had been provided at this stage. There is no doubt that a Creditors' Committee must be set up in order for them to have meaningful input into the process.

[18] Concern has been raised by Mr Wright concerning the powers of a Liquidator or Provisional Liquidator as against a Scheme Administrator. He points to the fact that the provisions in Section 207 of the Act which relate to the investigation of fraud would not be available to the Provisional Liquidators acting under a Scheme. However, it is undoubtedly the case as Mr Moss points out that the Section 206 investigatory powers would remain available to the Provisional Liquidator and of course the Liquidators Provisionally can come to the Court to ask for additional powers, as I have said before. I do not rule out and I do not discount the point that Mr Wright makes that perhaps the fraud powers under Section 207 won't be available but this does, as currently advised, appear to be one of those cases where fraud is unlikely to be an issue. If it is, of course, the matter can be looked at afresh.

[19] So my ruling therefore is that a Scheme should be allowed to be developed further and I am prepared to grant the adjournment sought by the Treasury, such that the matter will come before the Court on 9th April 2009, which is the date which the Attorney suggested the matter be re-listed for, and at that stage the Petition for

the approval of the Scheme would be before the Court. So that is my ruling on the application which is before me today.

Deputy Deemster Corlett