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
the 9th day of October 2008

and

IN THE MATTER of **THE JOINT PETITION** of
THE TREASURY and **THE JOINT LIQUIDATORS PROVISIONALLY**
dated the 2nd day of April 2009

Transcript of judgment delivered by
His Honour the Deputy Deemster Corlett at Douglas
on the 9th day of April 2009

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[1] I will now give a decision on the matters which have been before me today.

[2] I am asked in essence by the Treasury to order that meetings of the Scheme creditors be convened for a meeting to be held on the 19th May 2009 to consider a scheme which is in a form presently before the Court. The test which I must adopt is whether the scheme is a proper one to put before the Scheme creditors such that the Court should direct the convening of meetings. In relation to that the question of the benefits arising from the Scheme have been considered in some detail yet again today. If this were a stand alone Section 152 application for Scheme meetings

to be held the matter might be dealt with on a different basis but because this Petition is so closely linked with the Winding Up Petition I intend briefly to assess in this brief Judgment the benefits of the Scheme in accordance with the Demaglass test which is an approach I have adopted on previous occasions with this matter so I will be prepared and I am prepared to examine the Scheme on the qualitative basis as Mr Chambers put it.

[3] According to the promoters of the Scheme it offers clear and tangible benefits to the creditors over the alternative of liquidation. As I said earlier, to some considerable extent this is an issue which has already been considered by the Court but to re-iterate the principal benefits of the Scheme as it then appeared to the Court were described in my previous Judgment essentially as relating to security of the payments which were or are proposed to be made to the protected depositors and also the benefit to all creditors arising from the Treasury's agreement to subordinate its pre-liquidation claim against the company.

[4] I also refer as Counsel have referred in some detail today to paragraph 14 of Mr Simpson's affidavit of the 2nd April 2009. Mr Simpson is one of the Provisional Liquidators of Kaupthing Singer and Friedlander (Isle of Man) Limited, an Officer of the Court and of course has an unparalleled knowledge of the Company's affairs. The matter is also summarised in paragraph 41 of Mr Hacker's skeleton. Also examined today by the Court have been the tables in the explanatory memorandum.

[5] Mr Chambers, on behalf of the Depositors Action Group, has mounted a sustained and eloquent attack on various of the perceived benefits of the Scheme. I won't go through these all in detail but if I can briefly refer to some of them. He

says, for example, that 71% of all the depositors are disadvantaged by the Scheme, he says that by the end of October the depositors will have received 67% of their DCS claim. He says in short that the perceived benefits have evaporated. He says essentially that the Court should reject the whole basis of the application and that this matter should not proceed to a vote at all.

[6] However Mr Hacker for the Treasury says that all the protected depositors are not in the same position, he says that the figures on which Mr Chambers mounts his attack, for example in relation to the DCS claims, are wrong and that the assumptions he has made with regard to the quantum of those claims are in fact wrong. I have been presented with competing tables and some graphs which are said to be wrong. On the other hand Mr Hacker says, having considered the matter over lunch, that in fact they're substantially correct.

[7] It is impossible for this Court to decide these matters definitively today on the state of the papers and the evidence, and I've taken the view that this is a matter on which the creditors will have to make up their own minds. Ultimately of course the Court has the final say. If it emerges that there has been misrepresentation or inaccuracy in the documentation, the Court can say at the end of the day despite the fact that there may have been a positive vote that the Scheme is not approved and the company must of course inevitably then go into liquidation. The Scheme will then fail with all the adverse consequences which that would provide for all concerned, particularly the promoters of the Scheme.

[8] Of course the other important thing I should bear in mind is that there is substantial creditor support as evidenced in this Court today. It may not have been

expressed at great length but there is undoubtedly substantial creditor support for the Scheme of Arrangement. Mr Chambers also made various points concerning the Depositors Compensation Scheme and the approach of the Treasury to this matter. He referred, for example, to the fact that he felt that some £80 million was being kept back, as he put it I think, by the Treasury.

[9] This seems to me to be based on a somewhat erroneous interpretation of Regulation 12A of the Depositors Compensation Scheme. It seems to me that the maximum amount which the Treasury can contribute under Regulation 12A is £150 million but the actual amount is dependant upon the profile of the depositors. It is a fund which is called upon as needed depending upon the profile of the depositors. Mr Chambers also mentioned the potential for litigation arising by the FSC seeking an interpretation from this Court as to the remit of Regulation 12A. It seems, from what I've heard from Mr Wild on behalf of the FSC, that they're not seeking directions specifically as to this £80 million fund but rather might be seeking directions as to whether the Treasury funding under Regulation 12A is or should be exclusively for the benefit of a particular bracket of depositors.

[10] It seems to me that in many respects the question of certainty, again, has reared its head quite substantially. It is a factor which was emphasised to me at the last hearing and it is said that, because we are in somewhat turbulent financial waters, the certainty provided by the Scheme of Arrangement is a substantial 'bird in the hand' as it was put by Mr Hacker. It is said by Mr Chambers of course that it is inconceivable that the Isle of Man Government would allow the DCS, the Depositors Compensation Scheme, to fail or simply not meet its claims. I think the point rather is that adverse financial occurrences, other possible collapses of financial institutions,

may alter the timing of payments under the DCS. The DCS itself may not default or fail as such but timing may be affected by other defaults, and I think that is a factor which I bore in mind last time and I bear in mind on this occasion also.

[11] So there has also been some argument about the subordination of the Treasury's claim against the Company which was said to be, I think, rather a larger amount than it now emerges to be. It is a mere 0.3 pence in the pound which is a very minor benefit one might think, but as of course Mr Hacker points out if one has a very substantial deposit that still amounts to a benefit although perhaps a relatively modest one.

[12] If one examines the various factors set out in Paragraph 14 of Mr Simpson's affidavit of the 2nd April 2009, first of all there are four categories which he identifies. Certainty as the provision of lump sum payments to Protected Scheme Creditors within a set time frame equivalent to the amounts they would have received under the DCS had it been triggered. Quicker payments of dividends to all Scheme Creditors of up to 60% of their Scheme Claim after which point the timing and amounts of dividend payments to Scheme Creditors will be the same as in the liquidation of the company, and I've heard it said that in fact the position under that benefit, if I can put it that way, has not changed despite submissions to the contrary. The subordination of the Treasury's claim against the Company in an amount of at least £2.8 million I've already dealt with and the fourth perceived benefit was for the Scheme Creditors as a whole, if the total dividend paid to Scheme Creditors is less than 60%. It is said by Mr Chambers that this is a misconceived assessment benefit because the evidence establishes that the total dividend is almost certainly going to

be more than 60%. Well that again cannot be certain, no one can guarantee this and I am not prepared to disregard that perceived advantage also.

[13] It seems to me on balance having looked at all the submissions and considered the matter carefully that this is not a Savoy Hotel type case, if I can put it that way, in other words it is not a scheme which is incontrovertibly bound to fail. It does have some prospect of success and should be allowed to go forward to the various classes of creditors.

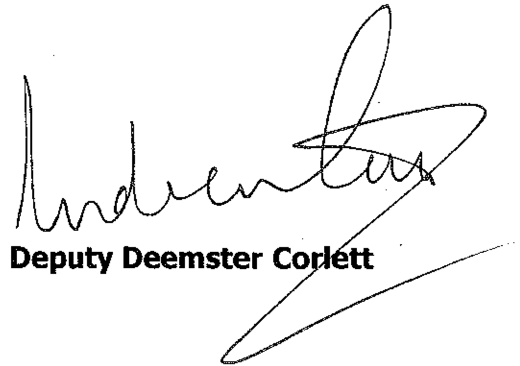
[14] As to the question of meetings and classes, I'm very pleased to note that there has in fact been a degree of agreement on this. It is a difficult question as I think the copious case law makes it clear it is always difficult for the Court to assess what should be the proper constitution of the various classes. There has been agreement that there will in fact be three classes or three separate meetings of three separate classes which I can identify using the wording given by Mr Chambers. There will be a meeting of the non-protected depositors, that is people such as trade creditors who have no rights at all under the DCS. There will be a second class consisting of what are called 'basic DCS claimants' – that is people whose whole entitlement falls entirely within the DCS limit. There will be a third class consisting of those claimants who are described as 'large DCS claimants' – that is people the value of whose claim exceeds the DCS limit. It seems to me that that is a perfectly proper decision to have been taken by the Treasury who were urging that there should in fact only be two meetings.

[15] As to the practice to be adopted I'll say very little about that because it perhaps doesn't fall to me for decision, but it seems to me that it is highly desirable that

issues of classes be resolved at an early stage rather than later on at the third sanction stage when the whole matter can be very difficult because the Court might resolve it had no jurisdiction. So although there is merit on both sides in relation to whether the 1934 or the 2002 practice statements should pertain in this jurisdiction, it seems to me highly desirable that the 2002 practice employed in England and Wales should also be used in this jurisdiction. In any event the matter has been considered effectively on an inter-partes basis and as I say it's highly preferable for the Court to consider matters of class in detail at this stage so as to avoid problems at the third stage. It may also assist with the recognition of the Scheme in England and Wales.

[16] As regards the adjournment of the Winding Up Petition, it inevitably follows from my decision to allow the Scheme of Arrangement to go forward to a vote that the Winding Up Petition be adjourned. The Petition was formerly adjourned to allow the Scheme to be developed, a decision might of course have been taken not to proceed further with the matter but now the relevant preparatory work has been done save for some amendments necessitated by the need for the third class of creditors which I'm sure will be very minor and must not impede the timescale which has already been indicated to the Court. So in my judgement we should now move onto the next stage which is for the Court to convene meetings and to allow the depositors formally to express their views. It is of course perfectly possible for a Scheme to run in tandem with a Winding Up Order, a full Winding Up Order, that is, but this is not possible in this case because the Scheme is predicated on the basis that a Winding Up Order will not be made and the DCS will not be triggered. The Treasury agreement to fund is conditional on this, therefore in my judgement the Winding Up Petition must be adjourned.

[17] Can I finally thank members of the public for attending today. I thank in particular the individual depositors who have made their views known very eloquently and I must say in a polite and restrained manner in all the circumstances. I know that, obviously, what the depositors really want is to have 100% of their deposits paid back. This Court is not empowered to grant that understandable wish but you can be assured your views have been taken into account and the Court very much appreciates in particular the inevitable frustration which must arise from all the delays which you are experiencing.



Deputy Deemster Corlett

Approved 20/4/09.