

CP 2008/94

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

IN THE MATTER of the Companies Acts 1931-1996
and
IN THE MATTER of the Bankruptcy Code 1892
and
IN THE MATTER of the Companies (Winding-Up)
Rules 1934
and
IN THE MATTER of the Financial Services Act 2008
and
IN THE MATTER of the Compensation of Depositors
Regulations 2008
and
IN THE MATTER of Kaupthing Singer & Friedlander
(Isle of Man) Limited (in Liquidation)
and
IN THE MATTER of the Petition of MICHAEL
SIMPSON and PETER NORMAN SPRATT as Joint
Liquidators of Kaupthing Singer & Friedlander
(Isle of Man) Limited (in Liquidation) *dated 4th August 2009*

**Judgment delivered by
His Honour the Deemster Kerruish
at Douglas the 5th day of August 2009**

Introduction

[1] By Petition, Michael Simpson, and Peter Norman Spratt (the Liquidators), the Joint Liquidators of Kaupthing Singer & Friedlander (Isle of Man) Limited (in Liquidation) ("KSFION"), seek a direction under section 185(3) Companies Act 1931 (the Act) in relation to "catch-up" payments to creditors who fail to lodge their proofs of debt by 12th August 2009 ("the Direction"), and an order pursuant to rule 94 of the Companies (Winding-Up) Rules 1934 ("the Rules") granting an extension of time within which to adjudicate upon proofs of debt ("the Order").

[2] The Petition was supported by an affidavit with exhibits of Alan Charles Kuhnell sworn on 4th August 2009.

Notice

[3] The Petition sought directions as to notice. There are approximately 11,000 creditors of KSFIOM, of whom 1,500 have submitted proofs direct to the Liquidators, *and* approximately 5,000 have claimed compensation under the Depositors Compensation Scheme (DCS), to which I refer in more detail later. There are approximately 4,500 other potential creditors.

[4] The Liquidators claim that there is uncertainty within the law and hence they have brought the Petition. If the court determines to direct notice to be given to all creditors, it would undoubtedly take months before the Petition could proceed to determination. The Liquidators indicated through their advocate, Mr. S.F. Caine, that in such circumstances they would defer payment of the first dividend. The Liquidators have been realising the assets of KSFIOM since 9th October 2008, and have collected a substantial sum which is now available to be used or partly used to satisfy a first dividend. The creditors have been unable to access their monies with KSFIOM since 9th October 2008. I decided that it was in the interests of creditors that I proceed to determine the Petition without delay. To require the Liquidators to give notice to each creditor, for the court to be satisfied that each creditor had received notice, or all reasonable effort had been made to bring the Petition to the attention of creditors relevant to whom service could not be proved, to then proceed to case manage the proceedings, and to finally determine the same could not unreasonably take months. To cause such delay might prejudice the timing of further dividends, and would certainly prejudice those who have to date submitted proofs. Also, the subject of the Petition was not fact sensitive but required the court to determine matters of law.

Brief background facts

[5] KSFIOM is a company incorporated in the Isle of Man which was wound up by Order of this court on 27th May 2009. By such Order, the Liquidators were appointed Joint deemed Official Receivers and Joint Provisional Liquidators of KSFIOM.

[6] At the first meeting of creditors held on 7th July 2009, it was determined that no application should be made to the court for the appointment of any other person as

liquidator of KSFIOM, pursuant to section 179(2) of the Act. At the first meeting of the contributories held on 23rd July 2009, it was determined that no application should be made to appoint some other person as liquidator of KSFIOM, pursuant to section 179(2).

[7] By Order of 23rd July 2009, a Committee of Inspection was appointed to act with the Liquidators, and it was confirmed that the Liquidators had become the Joint Liquidators pursuant to the provisions of section 179(4) of the Act on 7th July 2009.

[8] The Liquidators intend to make a first dividend payment to creditors, and issued the requisite notices pursuant to rule 96 of the Rules. Pursuant to rule 3, a form which is substantially the same as form 63 in the Appendix to the Rules was used to give notice of intended dividend to creditors who had not proved their debts, and form 103 was used for the requisite newspaper notices.

[9] The notice sent to creditors who had not proved their debts pursuant to rule 96, stated that:-

“Kaupthing Singer & Friedlander (Isle of Man) Limited – In Liquidation
In the High Court of Justice of the Isle of Man No. CP 2008/94

A First Dividend is intended to be declared in the above matter, but you have not yet proved your debt.

If you do not prove your debt by 12 August 2009, being the last date for proving you will be EXCLUDED from this Dividend.

The appropriate form of Proof of Debt is attached and you must complete this and lodge it with me by the notice expiry date together with supporting documentation if you wish to be included in the Intended First Dividend.

It is intended to declare the First Dividend within two months from the date of this notice.”

The Direction

[10] Mr. Caine stated that an issue has arisen as to whether a creditor who fails to prove their debt by 12th August 2009, but lodges their proof of debt by a subsequent date, is entitled to a “catch-up” payment equivalent to the amount that they would have obtained under the first dividend and indeed any subsequent dividend.

[11] He claimed that the law is uncertain and therefore the Liquidators seek this court’s direction pursuant to section 185(3) of the Act. He stated that the issue is of considerable importance because of its potential impact upon the DCS. Regulation 10(1) of the Compensation of Depositors Regulations 2008, issued by the Treasury pursuant to section 25 of the Financial Services Act 2008, reads:-

“10(1) A depositor’s application for compensation shall be rejected:-

- (a) if submitted more than 6 months after the depositor became aware, or ought reasonably to have become aware, of the Default, unless the Scheme Manager determines that, by reason of exceptional circumstances, it ought to be allowed; or
- (b) if submitted more than 18 months after the date of the Default.”

For the purposes of the DCS, the date of the ‘Default’ of KSFIOM was 27th May 2009, pursuant to regulation 3(2)(a) of the DCS.

[12] Under regulation 16(2) of the DCS, an eligible depositor who receives compensation from the DCS is required to assign to the Scheme Manager all his existing rights to prove in the liquidation of the deposit-taker concerned. Thus, Mr. Caine argued the Scheme Manager may not be able to prove assigned debts for a period of at least 6 months, and possibly 18 months after the date of the winding-up order in relation to KSFIOM.

[13] The Liquidators indicated that 5,000 depositors will seek compensation through the DCS. It was further anticipated that the total number of creditors amounted to

some 11,000, 1,500 of which to date had submitted proofs of debt directly to the Liquidators.

[14] Mr. Caine continued that it would be unreasonable for the Liquidators to refrain from issuing dividends to creditors of KSFIOM who do not claim in the DCS until at least 6 months, and possibly 18 months after the date of the winding-up order, in order to ensure that the Scheme Manager is not excluded from the benefit of any dividend(s) made before all of the Scheme Manager's assigned debts are proved. He emphasised such argument by reference to the Liquidators having been realising KSFIOM's assets since 9th October 2008, and having accumulated some £200,000,000 plus available or partly to be used for dividend.

[15] For the sake of brevity, and because I agree with his material arguments and submissions, I do not recite Mr. Caine's further arguments and submissions, but proceed to my conclusions as to that part of the Petition by which the Liquidators seek the Direction.

[16] Rule 83(1) states that:-

“Subject to the provisions of the Act, and unless ordered by the Court, the Liquidator in any winding-up must from time to time fix a certain date, which shall be not less than 14 days from the date of the Notice, on or before which the creditors of the company are to prove their debts or claims, and to establish any title they may have to priority under Section 249 of the Act, or to be excluded from the benefit of any distribution made before such debts are proved, or, as the case may be, from objecting to such distribution.”

[17] Pursuant to rule 3(1), the notices, relevant to the first dividend, were in substantially the same form as form 63 in the Appendix to the Rules. The relevant part of the notices read:-

“If you do not prove your debt by 12th August 2009, being the last date for proving, you will be EXCLUDED from this Dividend.”

[18] I was referred and refer to sections 202 and 211(5) of the Act which provide:-

“202 Power to exclude creditors not proving in time

The court may fix a time or times within which creditors are to prove their debts or claims, or to be excluded from the benefit of any distribution made before those debts are proved.

...

211 Delegation to liquidator of certain powers of court

Provision may be made by general rules for enabling or requiring all or any of the powers and duties conferred and imposed on the court by this Act in respect of the following matters:-

...

(5) the fixing of a time within which debts and claims must be proved;

to be exercised or performed by the liquidator as an officer of the court, and subject to the control of the court:

...”

[19] I agree with Mr. Caine that the power of a liquidator to fix a time by which creditors must prove, or by which they are to be excluded from benefit of any dividend, derives from the power conferred upon the court itself by section 202, as presently delegated to a liquidator by section 211(5) and the relevant part of the Rules, that is rule 83.

[20] The relevant parts of rule 83(1) and rules 96(1) and (2), are in the same terms as rule 106(1) and rules 119(1) and (2) of the Companies (Winding-Up) Rules 1949 of England and Wales (the English Rules). The notice issued by the Liquidators relevant to the first dividend was in substantially similar terms to the standard form 63 annexed to the English Rules. Section 202 of the Act is in the same terms as section 264 of the Companies Act 1948 (of Parliament), and section 211 is in materially the

same terms as section 272 of that Act. In the absence of Manx case law, this court is entitled to look for assistance to English case law.

[21] I refer to *Re House Property & Investment Co. Ltd* [1953] 2 All ER 1525 and those parts of the judgment of Roxburgh J at 1534 A – C, and D – F which read:-

“... It was not contended, and, I think, it probably could not be contended, that any rule of the character which I am about to read is ultra vires.

The Companies (Winding-Up) Rules, 1949 (S.I. 1949, No. 330), r. 106(1) is as follows:

“Subject to the provisions of the Act, and unless otherwise ordered by the court, the liquidator in any winding-up may from time to time fix a certain day ... on or before which the creditors of the company are to prove their debts or claims, and to establish any title they may have to priority under s. 319 of the Act, or to be excluded from the benefit of any distribution made before such debts are proved, or as the case may be from objecting to such distribution.”

It is to be noted that the words used are “or to be excluded”, and not “or be excluded”, and I think that may be the crisis. ... but what [Counsel] further submits, and what I think is conclusive on this point, is that r. 106(1) opens with the words: “Subject to the provisions of the Act, and unless otherwise ordered by the court ...” I take the view, and it is a considered view, that those opening words apply to the whole of r. 106(1). As I have pointed out, the words are not: “or be excluded”. They are: “or to be excluded”. That is to say, they refer to something that is to be in the notice in which the creditors are called on to prove. The liquidator has to give notice of a date on or before which the creditors are to prove or to be excluded, and I feel no doubt that the whole of that machinery is subject to the opening words: “Subject to the provisions of the Act, and unless otherwise ordered by the court”. I have no doubt that, in such a case as this, the court would invariably make such an order preventing the applicant from being excluded until an interesting point of law which he has raised had been

determined by the highest tribunal to which anybody desired to resort, and, therefore, my conclusion is that the rule neither helps nor hinders the applicant.”

[22] I find that the powers of a liquidator to fix a date on or before which the creditors of a company are to prove their debts or claims or to be excluded from the benefit of any distribution made before such debts are proved, are delegated by the court to a liquidator by virtue of section 211 and the Rules which are made under the Act, but such delegation does not oust the superior jurisdiction of the court, which notwithstanding that a liquidator has fixed a date or dates may issue a contrary direction as to the date or one or more of them. I consider that my conclusion is supported by the final words of section 211 ‘... subject to the control of the court,’ and the opening words of rule 83(1) ‘Subject to the provisions of the Act, and unless ordered by the court ...’ Further, pursuant to section 202, the court is entitled to fix a time for creditors to be excluded from benefit of any distribution made before the debt or claim due to the creditor is proven without necessarily having to fix the same time or change the time for submission of proofs of debt. Thus, when presented with a request for a direction under section 185(3) of the Act, the court may exercise its jurisdiction to issue a contrary direction to that of a liquidator relevant to the date when a creditor will be excluded from the benefit of any distribution made before he has proven his debt or claim, but need not issue a contrary direction relevant to the date selected by the liquidator for submission of proofs of debt or claim.

[23] I shall issue a direction under section 185(1) of the Act. As to the precise wording of the same, I look to Mr. Caine for assistance.

[24] It may be considered that there is a strong argument that a creditor who lodges his proof of debt after 12th August 2009 would not be excluded in any event from the benefit of the first dividend, and would be entitled to a “catch-up” payment.

[25] Section 248 of the Act reads:-

“248 Application of bankruptcy rules in winding up of insolvent companies

In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up, and make such claims against the company as they respectively are entitled to by virtue of this section.”

[26] Section 317 of the Companies Act 1948 (of Parliament) is in very similar terms. The relevant English legislation in force at the time of the Companies Act 1948 was the Bankruptcy Act 1914. Section 65 of that Act is in virtually identical terms to section 46 of the Bankruptcy Code 1892, which reads:-

“Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in Court to the credit of the bankruptcy estate available for dividend, any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.”

[27] The issue that therefore arises is whether by virtue of section 248 of the Act, section 46 Bankruptcy Code is incorporated into the Manx law on the winding-up of an insolvent company. In England, it appears that section 317 of the Companies Act 1948 incorporated the “catch-up” right embodied in section 65 Bankruptcy Act 1914 into the English law relating to the winding-up of insolvent companies.

[28] I refer to that part of the judgment of Vinelott J *In re Berkeley Securities Limited* (1980) 1 WLR 1589 at 1610H – 1611C, which part reads:-

“... The claimant will not be entitled to disturb prior distributions to other creditors although, as regards any undistributed assets, he will be entitled to a

dividend out of the undistributed assets equal to dividends distributed to those whose proof has already been accepted. That has always been the rule in bankruptcy. Vaughan Williams L.J. said in *In re McMurdo* (1902) 2 Ch. 684, 699-700:

“ Now, according to my experience of bankruptcy practice, there never has been any doubt as to the right of a creditor, whether he is a secured creditor or whether he is an unsecured creditor, to come in and prove at any time during the administration, provided only that he does not by his proof interfere with the prior distribution of the estate amongst the creditors, and subject always, in cases in which he has to come in and ask for leave to prove, to any terms which the court may think it just to impose; and, of course, in every case in which there has been a time limited for coming in to prove, although the lapse of that time without proof does not prevent the creditor from proving afterwards, subject to the conditions which I have mentioned, in every such case he can only come in and prove with the leave of the court. If that is so, leave must be granted upon such terms as the court may think just.”

The rule is now embodied in section 65 of and paragraph 14 of Schedule 2 to the Act of 1914. In *In re McMurdo*, the bankruptcy rule was applied pursuant to section 10 of the Supreme Court of Judicature (1873) Amendment Act 1875 and to the administration of an insolvent estate. It must apply equally to the winding up of an insolvent company.”

[29] I conclude that section 46 Bankruptcy Code 1892 is incorporated into this jurisdiction’s law relevant to the winding up of insolvent companies. Further, bearing in mind that section 46 was enacted some considerable time ago, I consider that to avoid doubt such section should be construed purposively so as to carry out the intention of Tynwald and should thus be read by omitting the words ‘in court’. Such construction would carry out Tynwald’s obvious intention when passing such statutory provision bearing in mind modern day practices.

The Order

[30] With reference to the Order, Mr. Caine referred to rule 94, the relevant part of which reads:-

“Subject to the power of the Court to extend the time, the Liquidator in a winding-up by the Court, other than the Official Receiver, within 28 days after receiving a proof which has not previously been dealt with, shall, in writing, either admit or reject it wholly or in part, or require further evidence in support of it.”

[31] Mr. Caine then referred to Mr. Kuhnell’s affidavit in which he stated that it is anticipated that approximately 5,000 depositors in KSFIOM will claim compensation from the DCS, and assign all of their rights to prove in the liquidation of KSFIOM to the Scheme Manager. Mr. Caine stated that the Liquidators have agreed with the Scheme Manager that the Scheme Manager will lodge proofs of debt in batches. However, in view of the volume of proofs that will be lodged, the Liquidators seek an extension of time for dealing with proofs.

[32] Mr. Caine submitted that it is clear from rule 94 that the court has the power to grant the extension sought. I agree and will grant an order as sought.