CAUSE NOS. FSD 0035 of 2015 (ASCJ)
FSD 0036 of 2015 (ASCJ)

IN THE MATTER OF MADISON NICHE ASSETS FUND LTD (IN LIQUIDATION) ("MNAF")

IN THE MATTER OF MADISON NICHE OPPORTUNITIES FUND LTD (IN LIQUIDATION) ("MNOF")

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
THE 25TH DAY OF APRIL 2016

APPEARANCES: **Mr. Fraser Hughes of Conyers Dill & Pearman for TMC Consulting**

Mr. Barnaby Gowrie of Walkers for the Joint Official Liquidators of ANAF and MNOF ("JOLs") (with him Mr. Matthew Wright one of the JOLs.

Cayman Islands investment fund company in liquidation under the aegis of the Grand Court – action instituted by former service provider against the Company before the Delaware Court seeking damages for breach of service agreement – application to the Grand Court for leave to allow Delaware action to continue pursuant to section 97(1) of the Cayman Islands Companies Law (2013 Revision) – applicable principles.

JUDGMENT

1. This application gives rise to an unusual instance of cross-border insolvency co-operation and so I have taken the time to provide these brief reasons for the orders made towards that end.

2. TMC Consulting Services LLC ("TMC") is a Delaware LLC which has an ongoing action in Delaware against MNAF and MNOF (together "the Companies") and the JOLs. In the Delaware action, cited as *TMC Consulting Services LLC v Matthew et al*, C.A. No. NISC-11-132 (EMD) (Del. Sup. Ct); TMC claims damages for breach/repudiation of a consulting agreement dated 15 October 2014 and entered into with the JOLs (the "Consulting Agreement"). The Consulting Agreement was entered into after the Companies were placed into voluntary liquidation on 1 July 2014, but before the JOLs' appointment was continued by way of supervision by this Court by order on 12 March 2015.

3. The Consulting Agreement is governed by the laws of Delaware and designates Delaware as the exclusive venue for the resolution of disputes relating to it.

4. Thus, while the Delaware action is regarded as properly instituted in Delaware, as an action taken against the Companies being wound up under Cayman Islands law, its continuance requires the leave of this Court under section 97(1) of the Companies Law (2013 Revision) ("the Law") which provides:

> *"When a winding-up order is made or a provisional liquidator is appointed, no suit action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with leave of the Court and subject to such terms as the Court may impose."*

5. This is TMC's application pursuant to section 97(1) for leave to continue the Delaware action against the Companies. Before turning to discuss its merits, I must set out a bit more of the background.

6. The JOLs had filed petitions in the United States Bankruptcy Court District of Delaware on 8 January 2016, seeking recognition of the Companies' Cayman Islands liquidation proceedings as "foreign main proceedings", pursuant to Chapter 15 of the United States Bankruptcy Code.

7. TMC initially objected to the JOLs' application to obtain Chapter 15 recognition. TMC's concern was that an ordinary and usual consequence of recognition is that an automatic stay is imposed upon any proceedings against the bankrupt (not unlike that imposed here by section 97(1)).

8. However, following an agreement between TMC and the JOLs whereby TMC withdrew its objection, the U.S. Bankruptcy Court for Delaware entered an agreed order recognizing the Cayman liquidation as foreign main proceedings with the express caveat that the TMC litigation would not be stayed. This is memorialized in paragraphs 4 – 10 of the Recognition Order made by the Delaware Bankruptcy Court on March 1, 2016[1], a copy of which is presented now in support of TMC's application.

9. Paragraph 4 of the Recognition Order expressly exempts the TMC actions in Delaware as proceedings that shall not be stayed. And paragraph 5 expressly grants TMC relief from the automatic stay imposed under the Bankruptcy Code.

10. Paragraph 7 of the Recognition Order goes further and requires the parties (ie: TMC and the JOLs) to work together to schedule the TMC action so as to accommodate the circumstances associated with litigation involving companies in official liquidation in the Cayman Islands. Paragraph 8 specifically enjoins the JOLs in this regard, not to object to any application made to this Court by TMC to lift *"any stay that may be*

[1] Per the Honourable Kevin J. Carey, United States Bankruptcy Judge.

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applicable to the TMC Litigation under the Supervision Orders and relevant laws of the Cayman Islands..."; thus, with implicit recognition of the effect of section 97(1) of the Law.

The Case Law

11. Notwithstanding those terms of the Recognition Order and the agreement between TMC and the JOLs in this regard, TMC does require the leave of this Court to continue with the Delaware Litigation as is manifest from section 97(1) above.

12. The leading authority in this jurisdiction as to when the broad discretion of section 97(1) should be exercised is the judgment of this Court in *Ahmad Hamad Algosaibi and Brothers Company v SAAD Investments Company Limited and Forty Two Others* (the "*SAAD* Judgment").

13. In the *SAAD* Judgment, this Court cited with approval the dictum of Brightman L.J[2] from *In re Aro Co. Ltd*[3] in which he stated by reference to the English equivalent of section 97(1) that the court has "*a free hand to do what is right and fair according to the circumstances of each case.*"[4]

14. At paragraph 73, the SAAD Judgment goes on to state (citing the judgment of Jonathan Parker J. in *Re Bank of Credit and Commerce Int'l S.A.* (No. 4) [1994] 1 BCLC at 426); that in cases where there are competing claims to the assets, the essential question that a court must ask in determining whether to grant leave under the English equivalent of section 97 is *"[w]hat is the most "appropriate method for*

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[2] At paragraph 71
[3] [1989] Ch. 196
[4] At 209

determining the proposed claims – is it separate proceedings or is it the winding up process".

15. The implicit premise of the question is the recognition that while claims against the Company are ordinarily to be required to be resolved in the context of the winding up process[5], there may be circumstances where it is appropriate to allow proceedings to take place outside of that process. An example of such circumstances which arose in the *SAAD* Judgment, as it arises here, is where a claim must first be proven by action through the juridical process and give rise to a judgment debt before that debt itself could become the basis of a claim in the winding up process[6].

16. And so, reflecting upon the circumstances of this case where TMC's Delaware Litigation does not involve a direct competing claim to the assets of the liquidation estates but a contingent claim for damages to be enforced by a judgment debt for proof in the liquidation, the essential question can be restated in terms of whether it is more appropriate to allow the Delaware Litigation to run its course or whether TMC should be required to establish its claim exclusively in the winding up process.

17. That question, it seems to me, only has to be asked to be answered: TMC's claim cannot be resolved within the winding up process itself until it is established outside of that process and so the choice is as between separate litigation in Delaware and separate litigation in this jurisdiction.

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[5] This is settled principle and itself reflects the underlying premise of section 97(1). See the recent judgment of the Privy Council in *Stichting Shell Pensioenfonds v Krys and another* [2014] UKPC 41.

[6] The exceptional nature of such an action, falling outside the classes of those which should be restrained for being "vexatious", "unnecessary", or "contrary to equity and good conscience" was also recognized by the Privy Council in the *Stichting* case (above).

ARGUMENT

18. The question therefore becomes: which is the more appropriate forum for determining TMC's claim?

19. I accept that the overwhelming answer is to permit the TMC Litigation to proceed in Delaware for the following reasons:

    (a) the Companies and the JOLs have agreed to the Recognition Order permitting the TMC Litigation to continue in Delaware and this, to my mind, is a sufficient reason in and of itself to grant the relief requested;

    (b) in addition, the Consulting Agreement which is the subject matter of the dispute is governed by the laws of Delaware and the agreement designates Delaware as the exclusive venue for the resolution of disputes relating to it;

    (c) the TMC Litigation involves claims against various other Madison Niche entities other than the Companies. If TMC were not permitted to proceed with the TMC Litigation but was forced to litigate in the Grand Court, then near identical litigation would be taking place against those other entities in Delaware and so there would be different parties engaged in what is essentially the same dispute but in different jurisdictions at significant duplication and waste of costs; and,

    (d) determining the TMC Litigation in Delaware would be more convenient for the witnesses, and so permitting it to continue would ensure that there are no costs wasted by either the JOLs or TMC.

20. For all of the reasons set out above, I accepted that TMC's application should be granted for the lifting of the section 97(1) stay to allow the TMC Litigation to proceed to conclusion in Delaware.

Hon. Anthony Smellie
Chief Justice

May 30, 2016