THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 0090/2010-IMJ
(Originally Cause No. G 59/07)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF WATLER HOLDINGS LIMITED (In Official Liquidation)

CAUSE NO: FSD 0091/2010-IMJ
(Originally Cause No. G 193/09)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF FRANK SOUND ESTATE LIMITED (In Official Liquidation)

CAUSE NO: FSD 0092/2010-IMJ
(Originally Cause No. G 194/09)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF RED BAY ESTATES LTD (In Official Liquidation)

Appearances:	**Mr. Fenner Moeran Q.C. instructed by Mr. Guy Cowan of Campbells for the Joint Official Liquidators.** **Mr. A. De la Rosa and Ms. Magda Embury of HSM Chambers for Mr. Selkirk Watler III.** **Mr. Michael Alberga and Ms. Denise Owen of Travers Thorp Alberga for Ms. Shannon Panton and Ms. Lynette Watler**
Before:	**Hon. Justice Ingrid Mangatal**
Heard:	**28 January 2016**
Draft Judgment Circulated:	**22 April 2016**
Judgment Delivered:	**29 April 2016**

HEADNOTE

Company Law - Company incorporated with intention to be used as corporate vehicle for distribution of family estate property to sole shareholders, three siblings- Winding Up Petition Presented on Just and Equitable Basis –

Winding Up Order by the Court expressed to be made "By Consent"- Agreement in Principle that Company's Land to be distributed by Liquidators In Specie Pursuant to a Scheme of Distribution to be settled- Liquidators producing Schemes of Distribution agreed by two Shareholders, but objected to by one Shareholder- Change of mind by two of three Shareholders-No unanimity amongst Shareholders after years of Liquidation- Liquidators' Application for Further Directions, or Variation of Order so as to obtain sanction to sell Land, allowing for purchase of land by any Shareholder wishing to bid. – True nature of Winding-Up Order.

JUDGMENT

1. Mr. Gwynn Hopkins and Ms. Eleanor Fisher of Zolfo Cooper (Cayman) Limited are the Joint Official Liquidators ("the Liquidators") of Watler Holdings Limited (in Official Liquidation) ("the Company"). Mr. Hopkins was appointed Joint Official Liquidator of the Company and its subsidiaries by the Order of Henderson J made 29 March 2012. Ms. Fisher was appointed as Joint Official Liquidator of the Company and its subsidiaries by Order of Henderson J made 15 July 2014 to replace Mr. G. James Cleaver who had previously tendered his resignation as liquidator.

2. By Summons dated 22 December 2015, the Liquidators sought relief in respect of properties owned by the Company and Red Bay Estates Limited ("RBE") and Frank Sound Estate Limited ("FSE"). The relief sought has been modified in a draft order submitted during the course of the hearing, seeking the following:-

> *"1. The Liquidators be authorized without further order at any time to list for sale all (or any) of the parcels of the land owned by the Companies and thereafter:*
>
> *(a) with the written consent and at a price to be agreed in writing by the majority of Lynette Watler, Shannon Panton and Robert Selkirk Watler III (the **"Shareholders"**) of the Companies, to sell to any party (including, for the avoidance of doubt, to any of the Shareholders themselves) by private treaty;*
>
> *(b) in the event that the majority of the Shareholders do not provide their written consent as required above, within 30 days of a written request for that consent having been made by the JOLs, the JOLs shall be authorized to sell all (or any) of the parcels of the land*

owned by the Companies by public auction without further order of the Court;

(c) to pay out of any proceeds of sale, the Court fees which were previously ordered to be deferred;

(d) to make such cash distributions to any of the Shareholders (as may be necessary) to repay any liquidation funding which may have been provided to date or which may be provided in due course (and which, for the avoidance of doubt, the Liquidators shall be authorized to accept); and

(e) subject to sub-paragraph (c) and (d) above, to declare and pay to each of the Shareholders, on a pari passu basis, such interim and/or final dividends as the Liquidators, in their sole discretion, consider appropriate.

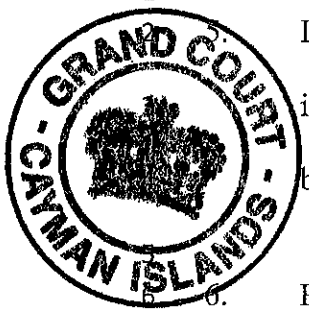
2. Paragraph 5 of the Order of 28 November 2008 be varied accordingly.

3. The Liquidators' costs of this application and, for the avoidance of doubt, the summons dated 11 February 2015, be paid from the assets of the Companies."

SOME FACTUAL BACKGROUND

3. This matter has a long and convoluted history. I am grateful to the parties for their efforts at summarizing, and I have for convenience, relied gratefully on the factual background provided in the Liquidators' Skeleton Argument. This is itself said to be produced in reliance upon a Chronology prepared on behalf of Shannon Panton and Lynette Watler for an earlier hearing, and which Chronology does not for the most part appear to be contentious.

4. This case concerns land that is held by RBE and FSE, which was in turn owned by Selkirk Watler (Senior). In 1982 Mr. Watler (Senior) executed a Will, and in 1989 he executed a Codicil to that Will naming his widow Irene Watler as executor. The beneficiaries under the Will were Mrs. Watler, and Mr. and Mrs. Watler's three children: Shannon Panton ("SP"), Lynette Watler ("LW") and Robert Selkirk Watler III ("RSW").



In 1989 Mr. Watler (senior) died. At the date of his death he held the entire share capital in RBE and FSE. These companies in turn owned the property discussed in more detail below at paragraph 12

6. Probate was granted to Mrs. Watler in 1990 but in June 1992 Jeffrey Parker was appointed in place of Mrs. Watler, and as a person independent of the beneficiaries.

7. On 19 February 1983 the three children of Mr. Watler (Senior) signed a Deed of Family Arrangement, which Deed issued the share capital in RBE and FSE to SP, LW and RSW.

8. The Company was incorporated on 16 February 1983, with its shares being divided evenly between SP, LW and RSW. At some point prior to 2007 SP, LW and RSW transferred their shares in RBE and FSE to the Company.

9. Although Mr. Parker's appointment was terminated by all three children in 1996 and they attempted to administer the estate of Mr. Watler (Senior) themselves, this did not succeed.

THE WINDING-UP OF THE COMPANY AND ITS SUBSIDIARIES

10. On 6 February 2007 SP presented a winding-up petition against the Company upon the just and equitable ground. The Company was asset rich, but cash-strapped. Despite some initial opposition from RSW, ultimately the parties entered into a "Consent Order" for the winding-up of the Company. This Order was made by Foster J on 28 November 2008 ("the November 2008 Order"). Mr. De La Rosa, who appears for RSW has advised that

SP was the Petitioner, LW was the 1st Respondent and both were represented by eminent Queen's Counsel Andrew Jones (now Jones J) instructed by Myers & Alberga. Turner & Roulstone, represented the 2nd Respondent.

11. The terms of the November 2008 order are crucial to a resolution of this case, and thus I set the substance out in full below:

"UPON hearing leading Counsel for the Petitioner and 1st Respondent and Counsel for the 2nd Respondent

……

IT IS ORDERED BY CONSENT that:

1. *Watler Holdings Ltd. ("the Company") be wound up in accordance with the Companies Law.*
2. *Mr. G. James Cleaver of Kroll (Cayman) Limited, PO Box 1102, Bermuda House (4th Floor), George Town, Grand Cayman, KY1-1102 be appointed as official liquidator of the Company.*

AND IT IS DIRECTED BY CONSENT that:

3. *The Official Liquidator is directed to appoint himself as the sole director of the Company's wholly-owned subsidiaries, namely Red Bay Estates Ltd and Frank Sound Estates Ltd ("the Subsidiaries").*
4. *The Official Liquidator is authorised to put the Subsidiaries into voluntary liquidation if he considers it necessary or appropriate to do so in order to distribute their land in specie to the Company.*
5. ***The Official Liquidator is directed to prepare a scheme of liquidation whereby the assets of the Company and its subsidiaries be distributed amongst its shareholders in specie in equal shares by value, for which purpose he is directed to instruct a licensed land surveyor to prepare a plan for the distribution of the land. Such scheme of liquidation shall be submitted to the shareholders within 90 days and, in the event that such scheme of liquidation is not unanimously agreed upon within 30 days thereafter, the official liquidator shall apply to the Court for further directions.***

6. *The Official Liquidator may exercise any of the powers contained in Section 109 (b),(d,)(e), (f),(g) and (h) of the Companies Law without the sanction of the Court.*

7. ....

8. ....

9. *The parties and the Official Liquidator shall have liberty to apply, on not less than 21 days notice, for further or other directions.*

.....

10. ....."

(My emphasis)

12. The property ("the Property") which is held by the Company and its subsidiaries consists of a number of plots of land. However, it would seem that the four plots at the heart of the dispute are Duck Pond 36A, 4,5,13 and 14, High Rock 68A81, George Town 20D171 & 20E213, and Red Bay 22D141REM12.

13. On 14 July 2009 Foster J made a pooling order on the application of the Official Liquidator, and after reading the Liquidator's First Report dated 31 May 2009. It is to be noted that this Order was made on an ex parte application. However, it is nevertheless noteworthy that the following terms of the Order were included. All of this was prior to an order that Foster J would later make on 6 March 2013 inter partes, when the Shareholders were represented. The terms of the July 2009 Order that are arguably relevant are as follows:

"1. ....the assets of the Companies being administered respectively by the Official Liquidator be treated as being and be pooled, for the purpose of the payment of costs, expenses, claims and distributions arising out of or relating to the Companies, and that the Official Liquidator be authorized to execute

all such documents and do all such acts and things as may be necessary to implement at the same time in all respects subject always to the further directions of the Court where appropriate.

2. *All funds, property and assets held by the Companies will be realized and pooled in one liquidation estate account (the "General Pool") which will be invested by the Official Liquidator as appropriate.*
3. .....
4. *The remuneration of the Official Liquidator and all costs and expenses in relation to the liquidation of the Group Companies be paid from the General Pool in accordance with the Companies (Amendment) Law, 2007.*
5. *In addition to the powers prescribed in Part II of the Third Schedule to the Companies (Amendment) Law, 2007 which are exercisable without sanction of this Court, the Official Liquidator is hereby sanctioned to exercise the powers set out in Part I of the Third Schedule to the Companies (Amendment) Law, 2007; and save as set out above, the terms of the appointment of the Official Liquidator shall remain unchanged....."*

14. However, notwithstanding the above, the Company's Liquidators do appear, as Mr. Moeran QC puts it in his written submissions, to have attempted, for more than six years, to create a scheme of liquidation whereby the Property could be distributed *in specie* to the Shareholders. This, learned Counsel opined, has proved incapable of receiving the unanimous support of the Shareholders.

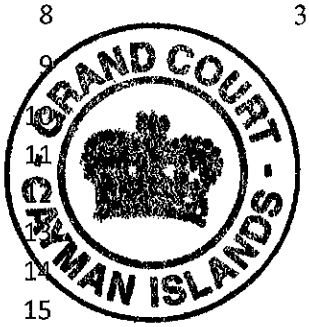
THE 2011 SCHEME

15. The first scheme was proposed on 28 April 2011 ("the 2011 Scheme"). SP and LW were in agreement with the 2011 Scheme, but RSW had objections to it. In essence, RSW took the view that the 2011 Scheme awarded him land significantly lower in value than the land to be allotted to SP and LW.

HENDERSON J'S ORDER - OCTOBER 2012 - THE CONSTRUCTION ORDER

16. As a consequence of there being no unanimous accord, the Liquidators then applied to the Court for directions. On 2 October 2012, Henderson J made the following order, among others:

> "...
>
> 2. *If it is agreed that JEC* [Property Consultants Ltd] *has no conflict of interest then the Liquidators be permitted to retain JEC as valuers.*
> 3. *If so advised, the parties are to file and serve skeleton arguments....on the following issue ("the Construction Issue"):*
>
> > *"Is it the intention of the Honourable Justice Foster's order ("Order") dated 28 November 2008 that the valuer should value the land and property owned by the Company on an 'as is' basis on the assumption that its use will be nothing other than residential, or is it the intention of the Order that the valuer will proceed to value this land and property on the basis of 'highest and best use'?"*



FOSTER J'S ORDER- MARCH 2013

17. After contested argument when the matter came before him, in March 2013, Foster J made amongst others, the following orders ("the 2013 Order"):

> *"1. The word "value" in paragraph 5 of the order made herein on 28th November 2008 means the market value of the land to be distributed* ***in specie*** *to the three shareholders.... And that such market value shall be ascertained in accordance with internationally recognized valuation standards, in particular the Royal Institution of Chartered Surveyors' Professional Standards (Incorporating the International Valuation Standards) of March 2012 in the glossary at page 7 and at Valuation Standard 3.2 at pages 30 and 31.*
>
> .....
>
> *3. The JOLs shall instruct Mr. David Greener of JEC....to carry out market valuations of all the real property concerned, and having regard to such valuations, the JOLs shall if necessary then prepare a revised plan for the*

distribution of the said real property among the shareholders ***in specie*** *in equal shares by market value. In preparing the said plan the JOLs may consider, adopt or adapt by reference to their said market valuations the scheme ("the Original Scheme") previously produced by the JOLs as exhibited at exhibit GH4 to the Affidavit of Gwynn Hopkins dated 10th November 2011.*

4. *The completed valuations, and, if produced, the revised plan of distribution referred to in paragraph 3 above shall be disclosed to each of the shareholders and unless within 21 days of such disclosure they unanimously agree to accept the plan (or, if no revised plan is deemed necessary by the JOLs, the Original Scheme) the JOLs shall apply to the court for directions as to whether or not the revised plan (or, if no revised plan is deemed necessary by the JOLs, the original scheme) shall be carried into effect. On the hearing of such application the valuer instructed by the JOLs shall attend for cross-examination on behalf of the respective shareholders..."*

THE 2014 SCHEME

18. Then came the 2014 Scheme. JEC provided valuations of the Property in August and October 2014. At paragraph 17 of his 9th Affidavit, Mr. Hopkins says of the 2014 valuations:

> *"In summary, JEC had determined that the proposed boundaries of the 2011 Scheme gave RSW a greater value than his equal share would entitle him to receive. Based upon this finding, the Liquidators determined it was appropriate to revise the 2011 Scheme. This was further discussed at a Shareholders' meeting, held on 27 February 2014...."*

19. Utilizing the 2014 valuations, the Liquidators produced a revised scheme ("the 2014 Scheme").

20. SP and LW also agreed to the 2014 Scheme, but RSW did not. RSW indicated that he objected to the JEC valuations. Unfortunately he did not then make his reasons for so

objecting clear. (He did not do so until later at the hearing before me in June 2015, and more so in subsequent documentation as I explain below).

21. Once again unable to obtain unanimous agreement, and indeed not fully appreciating what RSW's basis for objecting was, the Liquidators applied to the Court for directions. That application came before me on 11 June 2015.

22. RSW not having filed any evidence or written submissions came to Court and raised an objection which he later fleshed out in an affidavit which I on 11 June 2015, ordered to be filed. At the request of Counsel for the Liquidators and Counsel for SP and LW, amongst a number of other orders, I made an "unless order". I ordered that the 2014 Scheme would be approved unless RSW served evidence by 25 June 2015 which established to the Court's satisfaction that he did in fact have a reasonable prospect of succeeding on his arguments that the 2014 Scheme should not be approved. I note that up until the time of the hearing before me in June 2015, SP and LW had expressed themselves as wanting the assets of the Company to be distributed as intended by their late father, which is *in specie*- see for example paragraphs 2(ii) – (iii) of the Skeleton Submissions on behalf of SP and LW prepared for that hearing, where those points are recorded, as well as SP's wish to contribute further to the funding of the liquidation.

23. RSW served affidavit evidence on 25 June 2015, and having regard to the nature of it, in July 2015, I ordered the matter to be re-listed as part-heard. There was some unavailability of convenient dates for all Counsel for some time. However, as Counsel Mr. De La Rosa points out in his written Skeleton Arguments, in point of fact, the summons that actually

came to be filed on behalf of the Liquidators is not a summons in pursuance of the order to relist the earlier summons as part-heard.

24. One of the matters raised by RSW at the June 2015 hearing, and which he detailed in his affidavit somewhat, is that it is his position that the Valuations carried out by JEC did not properly comply with the 2013 Order of Foster J which required that market value be ascertained in accordance with Valuation Standard 3.2 of the Royal Institution of Chartered Surveyors' Professional Standards (Incorporating the International Valuation Standards), at pages 30-31. In particular, one of the bases for RSW's criticisms is that the JEC Reports ignore all or substantially all developmental potential. It should be noted that these pages where Valuation Standard 3.2 are set out are exhibited within the body of the Andrews Key Valuation Reports, referred to in paragraph 45 below.

25. At Valuation Standard 3.2, on page 30, under the caption "Market Value", it is stated:

> *"VS 3.2 Market Value*
> *Valuations based on market value should adopt the definition and the conceptual framework settled by the International Valuation Standards Council (IVSC):*
> *The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."*

26. Then, at page 31, Item 4 of the Commentary states:

> *"Notwithstanding the disregard of special value [see definition in paragraphs 44-47 of the IVS Framework] where the price offered by prospective buyers generally in the market would reflect an expectation of a change in the circumstances of the property in the future, this element of 'hope value' is reflected in market value. Examples of where the hope of additional value being*

created or obtained in the future may have an impact on the market value include:

- *The prospect of development when there is no current permission for that development; and*
- *The prospect of synergistic value (see definition in paragraph 48 of the IVS Framework) arising from merger with another property, or interests within the same property, or at a future date."*

27. It must be noted, however, that, at paragraph 27 (b) (ii) of his Ninth Affidavit, Mr. Hopkins states (this was before RSW obtained any Reports from Paul Key), that RSW in fact approved of, and recommended JEC as valuators. Mr. Hopkins depones:

> *"27.....*
>
> *b) To the extent that RSW is seeking to have his view, expressed without any supporting evidence, as to the values of the land parcels treated as a better or more appropriate benchmark than that of JEC, the Liquidators would comment as follows:*
>
> .....
>
> *ii) Indeed, JEC was one of the valuers (along with Paul Keys) which RSW specifically recommended to the Liquidators. In an email sent to me on 15 March 2011, he advised that "...valuers that I believe are reputable are JEC and Paul Keys, I find them reasonable and spot on."*

28. In effect, the Liquidators say that since the last hearing, and the filing of RSW's affidavit in June 2015, the picture has changed. In essence, Mr. Moeran Q.C. for the Liquidators, and Miss Owen for SP and LW, argue that what they are really seeking at this time is not so much a variation of the November 2008 Order as it is an augmenting of that Order, or rather, they are seeking further directions of the Court which they contend that paragraph 5 allows for.

29. Let me now turn to discuss what the Liquidators say happened to change the nature of the application, and to examine their arguments.

THE LIQUIDATORS' CASE

30. The Liquidators' Skeleton Argument provides a helpful summary of the evidence and the arguments. As stated before, it is not in issue that with the Company and its subsidiaries holding primarily land, the estate is asset rich, but cash poor.

31. There was a small amount of land held by FSE which was sold early on, but the sum raised from this sale was less even than the amount required to meet the admitted creditors' claims.

32. However, at that time all the Shareholders were in agreement that the Property was not to be sold. Accordingly, it is logical that the only feasible way to fund the liquidation without selling the Property is for the Shareholders to provide the funding.

33. As stated in paragraph 28 of the Liquidators' Skeleton Argument and borne out by the evidence, the idea was that the Shareholders could contribute funds, which would then be dealt with by way of corrective land grants if the contributions were unequal. If, however, there were unequal contributions then that would give rise to a need for adjustments to the distribution/s of the land, a process which itself brings some amount of complexity in a scheme of distribution.

34. There was an initial funding agreement between the Liquidators and the Shareholders in 2010 which called for the not insignificant sum from the Shareholders of US$600,000. Each Shareholder made equal contributions of US$200,000.

In early 2014, the Liquidators then required further funds. At that time they asked for US$60,000. RSW and SP both agreed to pay US$20,000. However, LW indicated that she was unable to provide those funds. The Liquidators then explored the possibility of RSW and SP paying US$30,000, but RSW was not inclined to have the matter dealt with in that way.

36. In May 2014, after the Liquidators had warned the Shareholders that they intended to sell land in order to raise funds, SP paid the entire US$60,000.

37. In November 2014, the Liquidators say that they needed further funding and at this time asked for US$165,000. LW again indicated that she could not provide her share of the funds. SP's position was that she had it under consideration. RSW indicated that he was taking legal advice.

38. Here is what the Liquidators' submissions indicate at paragraph 30 regarding the situation as it relates to liquidation costs:

> *"30. In fact, the Shareholders have* ***not*** *contributed the US$165,000 requested by the Liquidators in November 2014,* ***nor have they contributed anything else since May 2014.*** *In other words,* ***the Liquidators have been without funds for over eighteen months now.*** *They now have unpaid expenses and legal fees totaling (as at 31st December 2015) of US$118,107 and US$104,956 respectively... It is also worth noting that the Liquidators'*

> *costs have been entirely necessary and reasonable and have in large part been incurred:*
>
> *(i) First-in producing the 2011 Scheme, as agreed between the parties and ordered by the Court;*
>
> *(ii) Secondly-in the application for directions on the 2011 Scheme, which costs were ordered by the Court to be paid out of the liquidation;*
>
> *(iii) Thirdly-in instructing JEC to perform the valuation (as ordered by the Court), and preparing the 2014 Scheme (again, as ordered by the Court) and in the application for directions on the 2014 Scheme, which costs were again ordered by the Court to be paid out of the liquidation."*
>
> (Counsel's emphasis)

39. Consequently, the Liquidators say that on 28 July 2015, after they had received RSW's evidence in opposition to the 2014 Scheme, and after the Court had ordered the matter re-listed, they wrote to the Shareholders seeking additional funding.

40. The Liquidators say that the result of this was that:

(i) RSW agreed to contribute his share, and to consider possible further funding if other Shareholders could not provide funds; but

(ii) LW and SP indicated that they now no longer desired *in specie* distribution, but rather wanted the Property to be sold and the proceeds distributed.

41. On 13 August 2015, in light of LW and SP expressing a desire to have the land sold rather than to have *in specie* distribution, the Liquidators asked RSW for his response. There seems to have been some back and forth of communications between the Liquidators and their Counsel, and with RSW's Counsel. It does not appear as if anything concrete

emanated from RSW until 18 January 2016 (after the Liquidators had issued the present summons). At that time RSW offered an alternative proposal ("the Alternative Proposal").

42. Ms. Fisher in her Second Affidavit filed 20 January 2016 stated, at paragraph 22, that in light of the lack of response from RSW, the Liquidators determined that it would be in the interest of the liquidation estates to proceed as requested by LW and SP, and to seek an order from the Court that they be permitted to sell all of the Scheme land, and to make a cash distribution to the Shareholders. Ms. Fisher goes on to indicate that unfortunately, it proved problematic finding a date which was convenient for all of the parties' respective legal representatives. The hearing date ultimately convenient to the parties was the 28 January 2016 hearing date.

43. The Liquidators take the position that, in light of the history of this matter, and the funding issues, and the apparently intractable positions of the parties, that there is literally no other practical alternative but to proceed to the sale of the Property and distribution of the proceeds. At paragraphs 26-32 of Ms. Fisher's Second Affidavit, the current position as seen through the eyes of the Liquidators is discussed. At paragraph 29, Ms. Fisher's evidence is as follows:

> *"A commercial sale of the Scheme Land would remove the prospect for further disputes on matters such as funding, implementation of boundary lines, and perceived land values and so should allow for a timelier conclusion to the liquidations that is fair to all the Shareholders. Given that a sale of the Scheme Land is now supported by a majority of the Shareholders, the Liquidators firmly believe that selling the Scheme Land is the most sensible, proportionate and appropriate way to proceed. Doing so may maximize returns to the Shareholders, minimize the liquidation costs and expenses that will need to be incurred going forward and allow the significant costs and expenses already incurred by the*

Liquidators to date to be settled. Ultimately, it would provide an equitable, fair and prompt resolution to a dispute that has now been on-going for over twenty years."

44. It is important to note, however, that a sale of the Scheme Land would allow any of the Shareholders to bid for any land that they may wish to purchase; they would not be forced to accept simply a cash distribution. Thus, RSW could bid for any or all of the Scheme Land which he has previously indicated he would like to have distributed to him as part of any scheme of distribution - see paragraph 32 of Ms. Fisher's Affidavit. The Liquidators' Summons allows for this possibility.

THE RSW ALTERNATIVE PROPOSAL

45. I certainly agree with Ms. Fisher's assessment in paragraph 23 of her Second Affidavit dated 20 January 2016 that the Alternative Proposal is voluminous and complex. Indeed, it came by way of an eighteen page letter from HSM Chambers with supporting documents, consisting mainly of the Andrews Key Valuations. The letter of proposal and the Valuation Reports together consist of over a hundred and fifty pages. Further, it is indeed regrettable that the Alternative Proposal came only ten days before the hearing date, given in particular and in addition that, based upon the date of the addendum to the valuation reports included in the Alternative Proposal, RSW does appear to have had the relevant documents from early September 2015.

46. According to the Liquidators' Skeleton Argument, the Alternative Proposal from RSW is essentially for an *in specie* distribution. It involves a funding proposal which the Liquidators argue is conditional and unworkable for a number of reasons.

THE LAW

47. The Liquidators refer to and rely upon the recent decision of Smellie CJ in ***Re DD Growth Premium 2X Fund (In Official Liquidation)*** [2015] 2 CILR 361 at paragraph 30, where the Chief Justice, reiterated that the principles applying to the sanction of Liquidators' powers are well-known, and are as follows:

> *"30...*
>
> *(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. ([1999] 1BCLC at 642). The decision of the liquidators to enter into the FAA and the Appleby CFA fall within the exercise of such powers.*
>
> *(b) In exercising its discretion as to sanction, the court must consider all the relevant evidence (see In re Universal & Surety Co. Ltd. (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)*
>
> *(d) The court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so(Re Edonnote Ltd (No. 2)) ...*
>
> *(e) The liquidator is usually in the best position to take an informed and objective view (see Re Greenhaven....*
>
> *(f) Unless the court is satisfied that, if the Fund is not permitted to enter the compromise in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all (see Re Greenhaven...."*

48. Reference was also made to ***In the Matter of Trident Microsystems (Far East) Ltd.*** [2012 (1) CILR 424], a decision of Cresswell J. Learned Counsel emphasized that the Liquidators' decisions must be viewed in light of all of the evidence, in particular, the financial consequences of the decision for stakeholders, the wishes of the creditors, (and

of course, of the contributories in a solvent scheme, such as this one), and how the interests of the stakeholders are best served.

49. The Liquidators refer to article 39.02 of the Company's Articles of Association, which states as follows:

> *"In the winding up of the Company the liquidator may, with the sanction of an ordinary resolution, determine that any winding-up distribution shall be made in whole or in part by the distribution of specific land, for which purpose it shall be valued at fair value."*

50. Learned Counsel for the Liquidators makes the point that SP and LW control two-thirds of the shares in the Company. It was submitted that they therefore have the right to block any attempt under the articles to permit an *in specie* distribution. Accordingly, the Court should be slow to force on SP and LW, (as a result of a request by RSW), a demand which RSW could not in the first place have enforced, as per Article 39.02.

51. Applying the law to the facts, the Liquidators say that their honest and reasonable opinion of the facts of this case is that the only practical solution is a sale and distribution of the proceeds of sale. That this opinion should be given considerable weight, and prima facie reflects the best interests of the Company.

52. Further, that as there is no realistic alternative, the choice is the course proposed by the Liquidators or no action at all.

53. In relation to the matter of costs, the Liquidators say that they are neutral on the question of the costs of SP and LW. However, with respect to their own costs, they ask that costs be

costs in the liquidation. They argue that they have acted reasonably and have at all material times acted in accordance with the Court's orders.

THE CASE OF SP AND LW

54. Both SP and LW support the sanction application made by the Liquidators and support the granting of orders to enable the Liquidators to sell the land and distribute the net proceeds. They agree that the gross proceeds of sale should be applied to settling the outstanding costs of the liquidation and recompensing those Shareholders who have advanced additional liquidation funding, and thereafter the net proceeds to be distributed fairly as between the Shareholders. Miss Owen indicated that she adopted and endorsed the submissions advanced on behalf of the Liquidators.

55. There was a suggestion by RSW (in particular, in the letter from HSM Chambers dated 18 January 2016, and in RSW's Third Affidavit, filed on the eve of the hearing, paragraphs 7-9) that LW had indicated to him that she did not in fact want, or did not any longer want, to sell the land. In light of the lateness of RSW's affidavit, I permitted Miss Owen to indicate what LW's position and response was to these latest assertions. Miss Owen indicated that LW's position remains as it was stated in her earlier affidavits, in particular, her affidavits of 19 and 21 January 2016. Her stance remains that she wants the land to be sold by the Liquidators, and the net proceeds of sale after expenses and adjustments divided fairly and evenly between the Shareholders. Miss Owen indicated that whilst LW has advised that she had a discussion with her brother in which she listened, she did not agree anything with him.

56. Both SP and LW emphasize the need to avoid further expense and delay for the estate and to avoid any further expense for the Shareholders. It was pointed out that in particular, LW is without assets and Counsel argued that she has been kept out of her inheritance, which is itself dissipating rapidly.

RSW'S ALTERNATIVE PROPOSAL

57. As regards the Alternative Proposal now being put forward by RSW, SP's position is that these proposals will not achieve finality and will incur further delays and additional costs. The Valuations produced by RSW they say would require their own consultation with experts, and they point to the whole domino effect that this would produce. They ask the Court to contrast this with the course for which sanction is sought by the Liquidators.

58. I think that paragraphs 14 and 15 of the Skeleton Argument provided on behalf of SP and LW present their case lucidly. Those paragraphs read as follows:

> *"The intention behind the creation of the original estate*
>
> *14. Whilst the intention behind the estate was to keep the land in the family, this has proven to be impossible despite extensive efforts on behalf of the [Liquidators] to accommodate the Shareholders' wishes. The wider intention behind the estate was clearly to provide a benefit to the Shareholders as the children of Mr. Watler Snr. and this now needs to be pursued.*
>
> *15. If the sanction application is not approved by the Court and the further delays and expenses set out above are realized, the estate will be significantly depleted and any benefit that may be realized by the Shareholders will be dramatically reduced and potentially extinguished entirely. This would be completely contradictory to the intention behind the original creation of the estate by the Shareholders' father, to benefit his*

family. Selkirk argues that his father wanted the land to be kept in the family. He also wanted his children to benefit from his estate, not for the value of the estate to be spent on professional fees and years of protracted litigation spanning nearly a decade."

59. Miss Owen also submitted that, in light of how matters have unfolded, it is proper for the Liquidators to be seeking further orders from the Court, pursuant to paragraph 5 of the November 2008 Order. She contended that in all of the circumstances, in addition to giving the Liquidators' views considerable weight, the Court should also, having regard to the fact that it has now been nearly a decade since the winding up started in February 2007, adopt an approach which brings into play considerations of proportionality.

60. At the last sanction application hearing on 11 June 2015, Counsel for SP and LW had requested an inter-partes costs order be granted in their favour against RSW. In the written submissions advanced at the hearing on 28 January 2016, Counsel indicated they would be seeking the costs of this hearing from RSW. However, in oral argument, Miss Owen indicated that she took the view that costs would best be dealt with after the decision of the Court had been reached.

RSW'S CASE

61. Mr. De La Rosa, lead Counsel for RSW, set the stage for the main thrust of his submissions in paragraph 3 of his Skeleton Argument. He started out by commenting that the express terms, or the form, of the summons seeks authority for the Liquidators to sell certain property. However, he posits that, in fact, what the Liquidators, "in concert with SP and LW" seek on this application is "a wholesale revision of the agreed and ordered basis on which the Companies are to be liquidated and their assets distributed".

The submission advanced is that in reality, the present situation in terms of liquidation funding has been brought about by the Liquidators' persistent failure to abide by the November 2008 Order. Further, amongst other things, that the relief claimed in the summons concerns matters in which the Liquidators have a personal interest in terms of recovery of fees. Counsel submitted that there is no jurisdiction, and in any event the Liquidators ought not to be permitted or enabled to, effectively extricate themselves from a situation that is principally of their own making.

63. The argument continues that, it is in an attempt to resolve these matters without a wholesale departure from the basis on which the Companies were ordered to be liquidated, that RSW through his Attorneys put forward the proposals set out in letter of 18 January 2016. This Alternative Proposal, RSW's Counsel views as having been rejected out of hand both by the Liquidators and by SP and LW.

64. Counsel submitted that the November 2008 Order expressly provided that the ultimate distribution of land between the Shareholders would be *in specie* on the basis of relative land values ascertained by a licensed surveyor and the scheme of distribution would be propounded by the Liquidators.

65. Having referred to paragraph 5 of the November 2008 Order as a Consent Order, at paragraph 13 of RSW's Skeleton Argument, Counsel points out that this was an order made by consent in proceedings in which all of the parties were legally advised and represented. It therefore, he submits, constituted a binding contract between the Shareholders and the Liquidator as well as binding directions to the then Official

Liquidator appointed pursuant to it, and necessarily to his successors. That contract, it was stressed, cannot be varied or set aside without agreement between the parties, save on the conventional grounds that it was procured by fraud or is subject to some other vitiating factor. It was also submitted that a separate action would be required. It was further averred that no such ground is disclosed by the evidence served on behalf of the Liquidators, or SP and LW. Counsel presented another way of analyzing the legal position. He submitted that the parties and their successors are estopped from seeking to re-litigate matters that are the subject of the agreement effectuated by the consent order.

66. Mr. De La Rosa submitted that both the 2011 and the 2014 Schemes represented a departure from the November 2008 Order, and that the 2014 Scheme was still allowed to be prepared without taking into account developmental potential, notwithstanding the 2013 Order of Foster J.

67. Counsel referred to the Affidavit of RSW filed in response to the Court's Order arising out of the June 2015 hearing. He remarks that at that point the Liquidators, SP and LW did not seek to meet the substance of RSW's valuation evidence which they already had, but reversed the situation which had obtained since the November 2008 Order. The actions of the Liquidators and SP and LW are characterized as "resiling" from the requirement of *in specie* distribution of the land in question, reckoned on the basis of market value as ascertained by a professional valuer.

68. Counsel submitted that there is a very strong inference, and the Court was asked to draw that conclusion for the purposes of dealing with the summons, that this *volte face* is the

result of the Liquidators, SP and LW recognizing that they cannot justify the 2014 Scheme propounded by the Liquidators, in light of RSW's valuation evidence.

69. Mr. De La Rosa submitted that Article 39.02 of the Company's Articles of Association, upon which the Liquidators rely, does not assist as it has nothing to do with the sale of land and the *in specie* distribution is already the subject of the Order.

70. As regards the reliance on authorities, notably ***Re Trident Microsystems***, Counsel submitted that the principles or criteria therein discussed were nothing to the point for the Liquidators' application, which is one that seeks to depart from an agreed and binding basis of distribution already governed by the November 2008 Order.

71. Mr. De La Rosa also took the view that the proper time to address the issue of costs will be after the Court has made its decision on the substantive aspect of the matter that was argued.

ANALYSIS AND RESOLUTION OF THE ISSUES

THE ALTERNATIVE PROPOSAL

72. At this stage, I wish to briefly examine some aspects of the Alternative Proposal. In my view the terms of the funding conditions are important and do appear to be conditional. They are set out in the letter of 18 January 2016 from Ms. Embury of HSM Chambers. At page 2 of the letter, the proposal reads as follows:

> *"**Proposal***
> ***Liquidation funding costs**: On the basis that Lynette also agrees with this proposal, Selkirk will contribute both Lynette's 1/3 share and his own 1/3 share of the costs of the liquidation funding, and if Lynette does not agree, he proposes to continue to*

contribute a 2/3 share, and in either case, on the basis that he is compensated by way of equal land value in Red Bay including for any additional funding he contributes beyond his 1/3 share and on the following conditions:

> *"1. The Proposal as set out in this letter is accepted 'in principle' by the Liquidators.*
> *2. The Liquidators do not use our client's funding contributions to fund their legal team to take action adverse to the intentions of this proposal or him personally as a shareholder. His position is that the Liquidators should remain neutral and not use his funding to pursue a course of action that is completely adverse to him.*
> *3. The remaining 1/3 funding owed to the Liquidators can be obtained by selling the remaining residue of land post-distribution to Selkirk and Lynette, or if Lynette does not wish to have her shares in land, then simply distribute Selkirk's share to him. If the Liquidators are unable to proceed on the basis that they will be short 1/3 of the liquidation costs, then my client will seek other sources for the remaining 1/3 owed in order to finalize the liquidation, but again on the basis he receives further allocation of land in Red Bay to cover these additional funding costs."*

73. I agree with learned Queen's Counsel Mr. Moeran that the funding proposal being put forward by RSW is unworkable for the following reasons set out in paragraph 36 of the Liquidators' Skeleton Argument:

(i) First and foremost, LW does not agree to the Alternative Proposal. She has indicated quite clearly that she no longer wants to have an *in specie* distribution. As this is a pre-condition to the funding proposal, then the other considerations may well not arise.

(ii) Secondly, it provides costs to the Liquidators but only if the Liquidators have already accepted the Alternative Proposal "*in principle*". But the Liquidators have indicated that they have no funds to assess whether the Alternative Proposal is appropriate, including the use of experts' advice or evidence on valuation. They therefore feel that they could not properly agree to this.

NATURE OF THE NOVEMBER 2008 ORDER

74. I think that it is crucial to recognize that there are some unique features to this case. The first is that this is not a straight-forward sanction application by Liquidators. That is because there is in existence the November 2008 Order, and this Order is itself expressed to be a "Consent Order". The case has also been complicated by the several twists and turns that the matter has taken, necessitating a number of court orders, including a court order (the 2013 Order), determining what an earlier order (the November 2008 Order), meant.

75. Mr. De La Rosa made some very persuasive arguments about the nature of a consent order and as to the limited bases upon which such an order may be varied or set aside. However, it is important to note that the November 2008 Order is not an ordinary consent order. It is one made in relation to Winding-Up Proceedings. Indeed, a winding-up order is a discretionary remedy. A winding-up order is "binding upon all the world". Therefore, notwithstanding that the Shareholders agreed to the making of a winding-up order, it is the Court, the Judge, that had to be satisfied that it was a proper case in which to make such an order based upon the facts pleaded in the Petition and supported in the evidence - see paragraph 11 of the decision of Jones J in the well-known decision ***In re Belmont Asset Based Lending Ltd (in Liquidation)*** [2010 (1) CILR 83]. Therefore, the winding-up order, although expressed to be a Consent Order, has the imprimatur of the Judge's merit based evaluation and is a manifestation of the Court's exercise of its adjudicatory powers.

In addition, although it is clear that the November 2008 Order did contemplate as a consensual position between the Shareholders of this solvent company, a distribution of land *in specie*, it expressly recognized that the Liquidators might need to apply to the Court for further directions. The situation expressly contemplated in the November 2008 Order was the circumstance of there being no unanimous agreement of the Shareholders within certain time periods, in which event it was ordered that the official liquidator *"shall apply for further directions"*- paragraph 5. Although Counsel for all the parties were of the view that nothing much turns on the wording of paragraph 9 of the November 2008 Order, the fact remains that Order No. 9 was that *"The parties and the Official Liquidator shall have liberty to apply, on not less than 21 days' notice, for further or other directions."* (My emphasis).

77. It should also be noted, that the 2013 Order was phrased in such a way that it required a revised plan of distribution, if produced, to be disclosed and for any such revised plan (or if no revised plan was produced, the 2011 Scheme) to be unanimously agreed within 21 days of such disclosure, failing which the Liquidators' were to apply to the court for directions as to whether or not the revised plan (or, if no revised plan was produced, the 2011 Scheme) should be carried into effect. However, none of the parties is now arguing or seeking that either the 2011 Scheme or the 2014 Scheme should be effected.

78. I return to the November 2008 Order. This Order therefore represents the exercise of the jurisdiction of the Company Court; it has an underlying substratum and has to be viewed through the prism of liquidation. It has indelibly stamped upon it the role of the Official

liquidator. It is well known what the functions of the Official Liquidators are. Indeed, sub-section 110(1)(a) of the *Companies Law (2013 Revision)* expressly states that it is the function of an official liquidator to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it. Further, sub-section 110(2) states that an Official Liquidator may with the sanction of the Court exercise any of the powers specified in Part I of Schedule 3, and with or without the Court's sanction, exercise any of the general powers specified in Part II of Schedule 3. There were similar provisions in place in earlier revisions of the Law, and at the time when the November 2008 Order was made.

79. The official liquidators are officers of the Court, and they are given certain statutory powers. In my view, the discussion by Derek French in his well-known work **Applications to Wind Up Companies**, 2nd Edition, at paragraph 1.1.3.2, *Statutory Scheme for Dealing with assets: the liquidator* page 8, is equally applicable to winding up and the role of official liquidators under the Cayman Islands Company Law regime over the time span of the present proceedings:

> *"What is the object of winding up? It is to distribute the assets of the company rateably among its creditors, and enforce contributions against its shareholders or contributories, and make them pay what they are liable to pay with a view to liquidating the affairs of the company.*
>
> *The title to the company's property remains in the company; the control and management and disposal of it is taken from the directors and placed in the liquidators, who simply are officers of the court-receivers and managers acting under the direction of the court for the purpose of closing up the company's business, realizing its assets and making a legal distribution of them among the creditors and shareholders.....Every statutory power conferred upon the*

liquidators is given with a view to the speedy, inexpensive and effectual accomplishment of this object."

(My emphasis).

80. A cursory glance at the statutory powers set out in Schedule 3 to the *Companies Law* confirms that this is indeed the object of the type of powers therein set out. It therefore seems to me that albeit the November 2008 Order may be regarded as some level of agreement as regards the Shareholders, it is notwithstanding, subject to the duties and powers of the Liquidators. In addition, it must be remembered that the July 2009 Order did provide to the Liquidators a 'blanket authority' to sell, in that the Liquidators were granted sanction to exercise the powers in *Part I of the Third Schedule to the Companies (Amendment) Law 2007.* This includes the power at paragraph 8 of that Part, "*to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell any of it in parcels*" and also includes the power at paragraph 2 "*to dispose of any property of the company to a person who is or was related to the company*". That ex parte order was never set aside.

81. In addition, as discussed earlier, the November 2008 Order contemplated that there might not be unanimous agreement amongst the Shareholders, and therefore that the Liquidator would then be bound to come back to the Court. I agree with Mr. Moeran Q.C that in that sense there is no concluded agreement represented in the Consent Order. In other words, even though the Shareholders had agreed to distribution *in specie*, in principle, if there was no unanimous agreement after the Liquidator presented a scheme of distribution, then

there would be no concluded agreement. In my judgment, the principles of estoppel are also not applicable to the present circumstances.

82. Another issue that I have examined is whether, even assuming that RSW and his Counsel are right about the meaning of the November 2008 Order, the meaning of market value, and how the valuations should be performed, should the Court insist on valuations being carried out or acted on in the current circumstances? The Court is at this time being presented with information that two out of the three Shareholders, SP and LW are not interested in having any land distributed to them on any Scheme or in accordance with any valuation whatsoever. In other words, is the Court not being faced with a situation where, whatever the state of play may be in relation to valuations and schemes of distribution, it is now plain that there is not going to be any occasion for a concluded agreement since there can be no unanimity? In other words, as a result of the passage of time, distribution *in specie* by unanimous agreement is now a "non-starter". In my judgment, it would be quite impractical for the Court now to insist on valuations being carried out or acted on in the current circumstances, and would defeat the interests of efficiency, time and cost saving.

APPLYING THE LAW TO THE FACTS

83. In summary, the decision whether to sanction the powers being sought by the Liquidators is a matter for the Court, having regard to the totality of the evidence. The law is plain that the opinion of the Liquidators should be given considerable weight. As a practical matter, the Shareholders do appear to lack the ability or willingness to fund the liquidation any further. This would therefore clearly itself necessitate a sale of some of the land. The

Liquidators have no other realistic or practical way of funding the liquidation. Even if another proposal were possible, to wait upon it and to analyze and examine it would lead to even further delays. The Court has to consider whether what is proposed in this application is in the best commercial interests of the Company, and this is reflected prima facie by the commercial judgment of the Liquidators. The Court should give the Liquidators' views considerable weight unless there are substantial reasons for not doing so. In my judgment, there are no such substantial reasons shown for not according to the Liquidators' views significant weight. JEC, I accept was a valuator, put forward by RSW himself as being competent. This matter cannot afford to be delayed any further than necessary. It has already dragged on for an interminable length of time. (Indeed, as Mr. De La Rosa indicated, there being no evidence that there is any ready buyer waiting in the wings to buy the Property, even the arrangement proposed by the Liquidators will necessitate some delay). It is plain that although the Shareholders wanted to fulfill the desire of Mr. Watler (Senior) that the land remain in the family, that has just not been capable of being effected. Indeed, although for many years, as stated by Ms. Fisher in paragraph 26 of her affidavit, the only point upon which the Shareholders were agreed was that the Scheme Land not be sold, now even that point of unanimity is no longer applicable. In addition, I bear in mind, that the Orders proposed by the Liquidators will not prevent RSW from bidding for the purchase of any of the Scheme Land that he would wish to retain.

84. In all of the circumstances, it is plain that there is no realistic alternative at this time. I agree that the Court must apply a sense of proportion and practicality in examining the

issues. The Court has to take a "bird's eye" view of the matter. The choice is to pursue the course proposed by the Liquidators, or to have the whole process stymied yet again, with no concrete plan of action, which really would amount to no action at all. Although it is now too late for this liquidation to be achieved and completed speedily, inexpensively or effectively, the course proposed by the Liquidators now seems to be the most commercially prudent course to be adopted so to as to cauterize any further loss, depletion, expense, cost and delay. It is time to mitigate and finally bring this long outstanding liquidation to completion upon a settled path.

85. In my judgment, it does not matter significantly whether the relief required is considered as a variation of the November 2008 Order, or as further directions under it. Both approaches can in my view be justified, though the description "further directions" is perhaps most apt. I therefore grant the relief sought by the Liquidators as set out in the modified draft Order provided, as referred to in paragraph 2 above.

It would not be cost effective in my view to have any further hearings with regards to costs. If any of the parties have any further matters they wish to raise in relation to costs, written submissions and copies of any authorities are to be provided within 14 days of delivery of this Judgment.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

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