

**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 Winding-Up
Order in respect of KAUPTHING
SINGER & FRIEDLANDER (ISLE OF
MAN) LIMITED dated 27th May 2009

**SKELETON ARGUMENT OF KAUPTHING, SINGER & FRIEDLANDER (ISLE OF MAN)
LIMITED AS JOINT PETITIONER TO THE WINDING-UP PETITION
DATED 9TH OCTOBER 2008**

1. On 9th October 2008 Kaupthing, Singer & Friedlander (Isle of Man) Limited ("the Bank"), jointly with the Isle of Man Government Financial Supervision Commission ("the FSC"), filed a Winding-Up Petition with this Honourable Court ("the Court"). The Bank stated within the Winding-Up Petition that it was unable to pay its debts as they fell due. As a consequence, the Bank and the FSC jointly sought an Order that the Bank be wound up pursuant to Section 162(5) of the Companies Act 1931 ("the Act").
2. The Joint Winding-Up Petition was brought on for an ex parte hearing on 9th October 2008. At the ex parte hearing the Court, at the joint request of the Bank and the FSC, made an Order appointing Michael Simpson as Liquidator Provisionally of the Bank

pursuant to Section 178(1) of the Act; at the request of Michael Simpson, the Court subsequently appointed Peter Spratt as Joint Provisional Liquidator of the Bank on 20th November 2008.

3. At all material times Michael Simpson and Peter Spratt have had their powers as Liquidators Provisionally of the Bank confirmed by the Court. In particular:
 - (1) by Order dated 9th October 2008 Michael Simpson was empowered, inter alia, to manage the affairs of the Bank;
 - (2) by Order dated 29th January 2009 Michael Simpson and Peter Spratt were empowered "to liaise with, and provide assistance to, the Treasury and/or its agents including Alex Partners Limited in relation to the proposed Scheme of Arrangement being considered by the Treasury";
 - (3) by Order dated 19th February 2009 Michael Simpson and Peter Spratt were empowered "to consider, prepare and promote (including in consultation with creditors) the Scheme of Arrangement pursuant to Section 152 of the Companies Act 1931 between the company and its creditors or any class of them".
4. Subject only to the matters set out in paragraph 5 below, the Bank's affairs (including all aspects of the Scheme of Arrangement) have been managed and controlled by Michael Simpson and Peter Spratt acting in their capacity as Joint Provisional Liquidators of the Bank.
5. The only aspect of the affairs of the Bank which have remained under the control and management of the Bank's board of directors has been the conduct of the Winding-Up Petition – **In re Union Accident Insurance Co. Ltd.** [1972] 1 W.L.R. 640. In this regard, the Bank engaged its own Counsel to:-
 - (1) draft the original Winding-Up Petition and present it to the Court on 9th October 2008 and prosecute it thereafter;
 - (2) assist in the drafting and presentation of Affidavit evidence filed by the Bank in support of the Winding-Up Petition. Such evidence has been filed by Aidan Andrew Doherty, Managing Director of the Bank, by Affidavits sworn by him on 9th October and 24th October 2008;

- (3) appear for and on behalf of the Bank at the hearings of the Winding-Up Petition on 24th October and 27th November 2008 and 19th January, 17th February, 9th April and 27th May 2009;
 - (4) advertise the initial hearing of the Winding-Up Petition and prepare and maintain a list of parties entering appearance on the Winding-Up Petition; and
 - (5) draft various Court Orders for the assistance of the Court and circulate notice of such Orders to parties to the Winding-Up Petition.
6. At the hearing on 24th October 2008 Counsel for the Treasury requested an adjournment of the Winding-Up Petition. In support of its application the Treasury referred to **Re Demaglass Holdings Limited** [2001] 2 BCLC, which stated that the foundation of the court's jurisdiction to deal with a winding-up petition was its discretion under Section 125(1) of the Insolvency Act 1986 to "*dismiss [the petition] or adjourn the hearing conditionally or unconditionally or make an interim Order or any other Order it thinks fit*". Section 125(1) of the Insolvency Act 1986 is materially identical to Section 165 of the Act. The Court in these proceedings, applying **Re Demaglass Holdings Limited**, accepted that when exercising its discretion under Section 165 of the Act, it was necessary to balance the interests of those creditors who were in favour of a Winding-Up Order and those creditors that were against, and referred to the seven points test set out in **Re Demaglass Holdings Limited**. The Bank, as one of the Petitioners named in the Winding-Up Petition, at all times before the Court accepted that the decision whether or not to proceed towards an immediate Winding-Up Order or whether to adjourn in favour of some alternative way forward lay with the creditors and the Court. The Bank adopted a neutral stance at each hearing of the Winding-Up Petition save for informing the Court that the factual matrix underlying the initial presentation of the Winding-Up Petition remained unaltered. At the hearing of the Winding-Up Petition on 27th May 2009, the Bank and the FSC asked the Court to make a Winding-Up Order. This application was unopposed and reflected the reality which was that by that date no alternative way forward was before the Court and no further adjournment of the Winding-Up Petition was requested.

7. The Bank submits that at all material times it acted entirely reasonably and properly in the conduct of the Winding-Up proceedings. In such circumstances, the Bank seeks the usual Order on a successful Winding-Up Petition that the costs of the Petitioner (in this case of the Bank) be paid from the assets of the company: **Re Humber Ironworks Co** [1866] L.R.2 Eq. 15 - as referred to at paragraph 15 of the Skeleton Argument of the Treasury as a pre-preferential debt.

8. At paragraphs 31 to 34 of the Skeleton Argument of the DAG, it is suggested that the correct course, in all the circumstances, is for the Court to order that the Bank's costs of the Winding-Up Petition be the subject of what is known in England as a Bathampton Order. As explained in paragraph 33 of the DAG Skeleton Argument, a Bathampton Order is an Order which postpones the company's recoverable costs to the payment of all creditors of the company.

9. It is submitted that the basis upon which the DAG advance its argument for the making of a Bathampton Order is unsustainable for the following reasons:-
 - (1) The DAG assert that the Bank, as Joint Petitioner under the Scheme of Arrangement, must share some responsibility for the increase in the costs of the Winding-Up Petition. This is not correct. Firstly, the Bank as Joint Petitioner to the Winding-Up Petition was under the control and management of its board of directors who played no role whatsoever in the conduct of the Scheme of Arrangement proceedings. Secondly, in so far as the costs of the Winding-Up Petition were increased as a result of repeated adjournments of such Petition, the Bank (quite properly in its view) at all times adopted a neutral position and left the decision whether or not to adjourn to the creditors and the Court.

 - (2) The DAG's Skeleton Argument relies heavily upon **Re Esal (Commodities) Limited** [1985] BCLC 450. The circumstances of **Esal**, and in particular the conduct of its directors and/or managers and agents could not be in starker contrast to the conduct of the directors of the Bank in this case. No criticism has been levelled, or indeed can be levelled, at the conduct of the directors of the Bank in connection with their decision to lodge and proceed with the Winding-Up Petition. Further, as already stated, they had no role whatsoever in the decision to promote the proposed Scheme of Arrangement.

- (3) The making of a Bathampton Order is no longer considered appropriate in England (see paragraph 25 of the Skeleton Argument of the Treasury).
 - (4) The effect of a Bathampton Order is in effect to punish the Bank's legal advisors who, in the circumstances of this case, would not be able to recover their costs from the Bank. Again, no proper reason has been advanced as to why the fees of the legal advisors retained by the directors on behalf of the Bank to conduct of the Winding-Up Petition should be withheld.
10. For the avoidance of doubt, the Bank, as managed and controlled by its board of directors (to be contrasted with the Bank under the control of the Joint Liquidators Provisionally) has not instructed legal counsel nor has it incurred legal fees of or incidental to the Scheme of Arrangement Petition.
 11. For the above reasons, the Bank's costs of and incidental to the Winding-Up Petition should be paid as an expense of the liquidation.

P B Clucas

11th June 2009