In The Supreme Court of Bermuda

Companies (Winding-Up) Jurisdiction 2005 No. 328 and 329

In the Matter of the Companies Act 1981

RE REFCO CAPITAL MARKETS, LTD

and

RE REFCO GLOBAL FINANCE LIMITED

Dated the 12 December 2006

Mr P Harshaw for the Joint Provisional Liquidators

Mrs R Mayor for RCM

Mr J Williams for RGF

Mr D Duncan for the Committee of Unsecured Creditors

Winding-up - Taxation of costs for fees of joint provisional liquidators - Companies assets under control of US court - Cooperation between Bermuda and US courts - Cross-border insolvency - Avoiding duplication of costs - Duties of liquidators

The following case was referred to in the judgment:

Re ICO Global Communications (Holdings) Ltd [1999] Bda LR 69

RULING of KAWALEY, J

Introductory

1. On October 19, 2005 Refco Capital Markets Ltd. and Refco Global Finance Ltd. ("the Companies') petitioned for their own winding-up, two days after filing for protection under Chapter 11 of the US Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York ("the US Proceedings"). On the Companies' ex parte applications, I appointed Mr. Mark Smith as Provisional Liquidator of the Companies on the same day the petitions were filed.

2. On October 26, 2005, the Chief Justice discharged the appointment of Mr. Mark Smith, who was no longer able to act, and appointed in his stead Messrs. Michael W. Morrison of KPMG Financial Services Ltd., Bermuda, and Richard Heis of KPMG LLP., London ("the JPLs"). Their main powers were to monitor the restructuring of the Companies which would remain under the control of their Boards of Directors and "*under the supervision of this Court and the United States Bankruptcy Court for the Southern District of New York in the United States of America ('the US Court').*" [1]

3. The October 26, 2005 Order appointing the JPLs anticipated that the JPLs would have their costs taxed by this Court as would occur in a traditional liquidation or provisional liquidation. A minor practical detail made this impracticable. All of the Companies' liquid assets were under the control of the US Court. So attempts were made to agree a Protocol to be adopted by the Bermudian Court and the US Court under which the JPLs' fees would be approved by this Court. The approval of the US Court for a Fee Protocol acceptable to the Companies and the JPLs was sought as early as December 15, 2005, but neither Court was able to approve the Protocol, apparently due to creditor objections. On May 5, 2006, the JPL appointment Order was revised to reflect the development that the Companies management had been replaced in the US Proceedings by a Chapter 11 Trustee appointed on or about April 12, 2006.

[1] Order of October 26, 2006, paragraph 2 (a).

4. The JPLs remained in office, performed various duties and incurred fees, under this Court's supervision, through 2006. Eventually, matters were brought to a head in November, 2006. On November 16, 2006, on an application for leave to apply for payment to the US Court, the JPLs submitted, very persuasively, that, absent a Fee Protocol, it was both unprecedented and wrong in principle for this Court to defer taxation of their costs to the US Court. The Companies and the Unsecured Creditors Committee, equally persuasively, contended that the US Court could not pay the JPLs without first following its own taxation process, and that it was therefore duplicative and wasteful of costs to have an additional taxation process in Bermuda. I encouraged the parties to attempt to resolve the jurisdictional dispute. On November 22, 2006, I directed that the JPLs could apply to the New York Court for a reserve to be maintained for their fees

5. On December 1, 2006, an informal understanding was reached, following an ad hoc telephone conference between myself and Judge Drain of the US Court, that the two Courts would use their best endeavours to work towards a shared approach whereby the US court assessed the quantum of the JPLs' fees provided that the Bermuda court defined the scope of their duties. The contents of this communication were shared with Counsel by me at a hearing on the same date[2]. This way forward was reduced by Counsel into the form of a draft Order, which I approved on December 7, 2006, and signed on today's date after a corresponding US Court Order had been approved.

6. At the December 7, 2006 hearing, which I adjourned for submissions to be made today on the scope of the JPLs' duties, I gave a strong indication that any Ruling that I gave would be limited to primarily summarizing the various actions which this Court had formally approved over the course of the provisional liquidation thus far. Mr. Harshaw, for the JPLs, helpfully provided me with a binder containing the various Confidential Reports received by (and the following day, the various Orders made by) the Court, to enable me to consider the present Ruling and significantly curtail the need for oral argument.

7. The approach taken in this case, which represents a departure from the usual practice in parallel insolvency proceedings in Bermuda and the United States according to which this Court taxes the costs of the provisional liquidators it has appointed, should not be used as a precedent for future cases. It is to be hoped that the cooperation which has occurred between the Bermuda and US Court towards the end of the present proceedings on the fees issue will in the future, in the exceptional cases where a Fee Protocol is not agreed at the outset, be brought into play at an early stage of the respective proceedings.

8. In order to properly define the scope of the JPLs duties, one must understand these duties in more than a purely mechanical way and to outline the conceptual framework within which the JPLs operate. Only then will a list of the specific categories of actions they have been authorized to perform be properly understood.

The Comity Order

9. On December 8, 2006, having reviewed a draft of the corresponding Order to be made by the US Court, I signed an Order ("the Comity Order") in the following terms:

> "UPON THE APPLICATION by the Joint Provisional Liquidators ("JPLs") of Refco Capital Markets Ltd. ("RCM") and Refco Global Finance Limited ("RGF")
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> AND UPON READING the Ninth, Tenth and Eleventh Affidavits of Michael Morrison, the First Affidavit of Marc S Kirschner and the Second Affidavit of Luc Despins, together with the exhibits thereto together with the draft order to be placed before the United States Bankruptcy Court for the Southern District of New York (the "US Court")
>
> AND UPON HEARING Counsel for the JPLs, RCM, RGF and the Official Committee of Unsecured Creditors of Refco Inc.
>
> AND THIS COURT HAVING spoken to the Judge of the US Court assigned to the Refco Group Chapter 11 filing in the US Court

[2] A Note of the telephone conference was subsequently placed on the file.

IT IS HEREBY ORDERED as follows:

1. this Court shall consider and rule (the "Bermuda Scope Ruling") on whether the categories of actions undertaken by the JPLs are in accordance with their mandate as specified in the Companies Act 1981 and in the Orders of this Court governing their appointment and shall consider whether the hourly rates charged are in line with previous similar cases in Bermuda;

2. subject to the US Court so ordering, the US Court shall consider and rule (the "US Expense Allowance Ruling") on the allowed amount of fees and expenses payable to the JPLs and their advisors in accordance with the relevant provisions of the US Bankruptcy Code . For the avoidance of doubt, and subject to the US Court so ordering, the Fee Committee, appointed by that certain Order Approving Motion for Order under 11 U.S.C. § 331 Appointing Fee Committee and Approving Fee Protocol (Docket No. 2193) entered by the US Court on July 21, 2006, shall review the payment requests of the JPLs and their advisors, consistent with the Fee Committee's role in respect of other compensation request and the Bermuda Scope Ruling;

There shall be liberty for the JPLs to apply in respect of the interpretation of this Order."

10. It was anticipated that the US Court will make an Order on the same date in the following terms:

"1. **Role of Bermuda Court.** Upon proper application, the Supreme Court of Bermuda shall consider and rule (the "Bermuda Scope Ruling") on whether the categories of actions taken by the Joint Provisional Liquidators are in accordance with their mandate as specified in the Bermuda Companies Act 1981 and in the Orders of the Supreme Court of Bermuda governing their appointment and shall consider whether the hourly rates charged are in line with previous similar cases in Bermuda. The Supreme Court of Bermuda entered the Bermuda Scope Ruling on December 8, 2006, and a copy thereof is also attached hereto.

2. **Role of United States Court.** Upon proper application, this Court shall consider and rule (the "US Expense Allowance Ruling") on the allowed amount of fees and expenses payable to the Joint Provisional Liquidators and their advisors in accordance with the relevant provisions of the Bankruptcy Code. For the avoidance of doubt, the Fee Committee, appointed by that certain Order Approving Motion for Order under 11 U.S.C. § 331 Appointing Fee Committee and Approving Fee Protocol (Docket No. 2193) entered by the Court on July 21, 2006, shall review the payment requests of the Joint Provisional Liquidators and their advisors, consistent with the Fee Committee's role in respect of other compensation requests and the Bermuda Scope Ruling."

Court to Court Communications and Judicial Cooperation-background to the Comity Order

11. This Court has adopted no guidelines on court-to court communications in cross-border insolvency matters. It may be that consideration will be given to adopting guidelines similar to those applicable between the United States and Canada, the American Law Institute's May 16, 2000 '***Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases'.*** The Ontario Commercial List has adopted these Guidelines. However, this Court has communicated through representatives with foreign courts on an ad hoc basis and/or through formal protocols for many years.

12. Bermuda's approach to judicial cooperation has evolved through common law practice rather than by legislative regulation. The leading local authority on co-operation between this Court and the United States Bankruptcy Court is the November 26, 1999 landmark

judgment of L. Austin Ward Chief Justice (as he then was[3]) in Supreme Court of Bermuda, 1999: 288, *Re ICO Global Communications (Holdings) Ltd*, where the Chief Justice observed[4]:

> "A look at the background to the application may be instructive. On 27th August, 1999 a Petition was filed by the company which was insolvent seeking the appointment of joint provisional liquidators. There was no prayer that the company be wound up immediately. On the same date the company filed for protection under Chapter 11 of the U.S. Federal Bankruptcy Code to allow it to consider a re-financing/re-organisation which, if successful, would result in the company continuing business.
>
> An Order was made that Messrs. Wallace and Butterfield be appointed joint provisional liquidators. I am satisfied that the Court is given a wide discretion and had jurisdiction under section 170 of the Companies Act 1981 and Rule 23 of the Companies (Winding-Up) rules 1982 to make such an Order. Under it the directors of the company I remained in office with continuing management powers subject to the supervision of the joint provisional and of the Bermuda Court.
>
> I do not accept that because the company is a Bermuda registered company therefore the Bermuda Court should claim primacy in the winding-up proceedings and deny the joint provisional liquidators the opportunity of implementing a U.S. Chapter 11 re-organisation. Nor do I accept that a Chapter 11 re-organisation will, of its very nature, destroy the rights of creditors and contributories under the regime being established. Such an approach would be to deny the realities of international liquidations where action must be taken in many jurisdictions simultaneously. In this case proceedings are being conducted in the USA and in the Cayman Islands as well as in Bermuda. The aim of the proceedings is to enable the company to re-finance in the sum of $1.2 billion or to re-organise so as to continue in operation. Under such circumstances the Court should co-operate with Courts in other jurisdictions which have the same aim in relation to the affairs of the company. It is not a question of surrendering jurisdiction as much as harmonisation of effort. Moreover, the joint provisional liquidators are officers of this Court. 'who submit confidential Reports informing the court of progress being made in the liquidation from time to time. I am satisfied that proceedings in many jurisdictions relating to the same subject matter may properly be conducted at the same time when there is a connecting factor. *Barclays Bank plc v Homan and others* [1993] BCLC 680."

13. Writing extra-judicially, I have observed that Justice Ward's decision "*provides powerful support for the proposition that through judge-made law, the Bermuda courts can provide flexible and sophisticated support for most cross-border insolvency conundrums which may arise.*" [5] Since *ICO*, a considerable track record of judicial co-operation between this Court and the US Court has been established in terms of parallel proceedings in cross-border restructurings. Court-to court communications have typically taken place through the JPLs and representatives of the US debtors in possession. Protocols have been adopted, and more often than not the JPLs have arranged to have (a) monies in Bermuda out of which their fees will be paid, and (b) taxation of their costs by this Court, which is primarily charged with their supervision.

14. When presented with the seemingly unprecedented dilemma of a liquidation one year old with (a) no significant monies in this jurisdiction out of which the JPLs could be paid and (b) a dispute over both the quantum of the JPLs' fees and the scope of their duties, it seemed to me that there was a need to avoid a potential jurisdictional conflict between the

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[3] Sir Austin Ward is now a Justice of Appeal on the Court of Appeal for Bermuda.
[4] At pages 2-3.
[5] Moss et al (eds.), '*Cross-Frontier Insolvency of Insurance Companies*' (Sweet& Maxwell: London, 2001) pp. 88-89.

Bermuda Court and the US Court which traditional indirect communications had failed to solve. There appeared to be no precedent for this Court, certainly without a Fee Protocol acceptable to all concerned, requiring officers of this Court to have their fees and expenses solely taxed by the US Court, let alone to have controversies as to the scope of their duties resolved by the foreign court. This conundrum presented novel challenges because of a coalescing of various factors.

15. Firstly, it could not be overlooked that the primary constituency in an insolvency situation is the general body of unsecured creditors. Secondly, it was an undeniable jurisdictional and practical reality, that the US Court's effective jurisdiction over the funds out of which the JPLs sought to be paid meant that there was no realistic prospect of avoiding some measure of taxation of the JPLs' fees in New York. Moreover, the JPLs were initially appointed and continue in office on the express basis that the Companies' business would be conducted "under the supervision of this Court and the US…Court"[6].

16. But thirdly, while established cross-border insolvency practice supports the notion of harmonising efforts to avoid duplication of costs, it seemed to me that permitting the US Court to both assess the reasonableness of the quantum of costs incurred and to determine what as a matter of Bermuda law they were required to do was simply a bridge too far. This would not be merely a harmonisation of efforts; it would be an unprecedented surrendering of the jurisdiction which this Court assumed when it first appointed the JPLs on the Companies' own applications.

17. Faced with this conundrum, and concerned to avoid permitting an already unseemly and costly fee dispute turn into an embarrassingly expensive and time-consuming *cause celebre*, I decided to call Judge Drain directly, without prior notification to the parties, with a view to achieving a speedy yet practical resolution with the least burden to the Companies' estates. The dispute over fees seems unseemly in two respects. Firstly, it is unseemly to see highly skilled professional men, as the JPLs undoubtedly are, having to justify being paid at all, when they were appointed to fulfil statutory duties and have clearly done a substantial body of work with the approval of this Court. And, secondly, it is unseemly to see the JPLs being compelled to add to the costs, which the Creditors say (for reasons that are presently far from clear) are excessive, through a protracted dispute on how their fees should be approved.

18. The following provisions of the Rules of the Supreme Court, incorporated into winding-up proceedings by rule 159 of the Companies (Winding-Up) Rules 1982, provide general support for this approach:

> "1A/1 The Overriding Objective
>
> (1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable —
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate —
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

[6] October 25, 2005 and May 5, 2006 Orders, paragraph 2(a).

> 1A/2 Application by the Court of the Overriding Objective
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> 2 The court must seek to give effect to the overriding objective when it —
>
> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.
>
> 1A/3 Duty of the Parties
>
> 3 The parties are required to help the court to further the overriding objective.
>
> 1A/4 Court's Duty to Manage Cases
>
> 4 (1) The court must further the overriding objective by actively managing cases."

19. The Introduction to the American Law Institute Guidelines, which I consider to be persuasive authority on the practice in this area of the law, also states:

> "One of the most essential elements of cooperation in cross-border cases is communication among the administrating authorities of the countries involved. Because of the importance of the courts in insolvency and reorganization proceedings, it is even more essential that the supervising courts be able to coordinate their activities to assure the maximum available benefit for the stakeholders of financially troubled enterprises. Communications by judges directly with judges or administrators in a foreign country, however, raise issues of credibility and proper procedures. The context alone is likely to create concern in litigants unless the process is transparent and clearly fair…"

20. The Guidelines contemplate (a) direct communications between courts by telephone or video link (Guideline 6(c)), (b) the courts retaining a discretion to direct whether or not counsel and/or the parties should participate in the communication, and /or whether a record should be kept of the communication (Guideline 7). The Bermuda court and the US Court implicitly decided to conduct a short informal telephone conference without the parties, and to communicate the purport of the understanding reached to the parties. There was a mutual understanding of the need for each Court to discharge its duty under local law, and it was expressly agreed that (a) the Bermuda Court would seek to avoid a duplication of taxation expenses having regard to the fact that the fund out of which the JPLs were to be paid was located in New York, and (b) the US Court would give comity to any findings by the Bermuda court on the scope of the JPLs' duties in applying its taxation process to the JPLs' fees.

21. This seemed to me to be a reasonable accommodation of the commercial and jurisdictional realities and the resultant implications for the fundamental duties of each Court in this novel situation. It also seemed likely to preserve in the wider public interest the strong commercial and legal ties between the jurisdictions, and the strong spirit of cooperation which has evolved between our respective courts over the years.

The scope of duties of the JPLs: general principles

22. The scope of the JPLs' duties and what tasks they are required to perform is quintessentially a question of Bermuda law. Their powers are defined by this Court, and all of their duties are carried out under this Court's supervision. It is somewhat ironical that investors in Bermuda-based companies are keen to take advantage of the enhanced profit-making opportunities which this low-tax and light regulatory environment is believed to offer. Yet when insolvency intervenes, the same investors on occasion seem to wish that Bermuda companies could be restructured under Chapter 11 as if they were not incorporated here. Short of re-domiciling the Companies to the US, a somewhat improbable regulatory option, the reality of their Bermudian place of incorporation cannot be wished away.

23. Bermuda winding-up proceedings are required to obtain a stay of actions here, to mirror that in the parallel US Proceedings, and no restructuring or liquidation process can be truly effective without engaging the law of a company's place of incorporation. In supervising provisional liquidations such as the present ones which are twinned with Chapter 11 proceedings, this Court is mindful of the need to maximize the return to unsecured creditors through promoting harmonization and reducing duplication of effort. But this Court is also conscious that once provisional liquidators are in office, they owe fiduciary duties to creditors, and will be exposed to potential liability if the fail to exercise a high degree of care in their essentially monitoring duties.

24. When the JPLs were initially appointed by Order of Chief Justice Richard Ground on October 26, 2005, the following Order was made on the Companies' own application:

> "1 …..
>
> 2. The JPLs will have the following powers
>
> (a) to monitor the continuation of the business of the Company under the control of the Company's Board of Directors, and under the supervision of this Court and the US Bankruptcy Court for the Southern District of New York in the United States of America (the "U.S. Court");
>
> (b)to monitor and otherwise liaise with the existing Board of Directors of the Company in effecting a sale or reorganization/refinancing of the Company under the supervision of the U.S. Court and this Court in connection with the Chapter 11 proceedings that have been commenced by the Company for that purpose;
>
> (c) to monitor any continued payments by the Company as are provided for in orders made by the U.S. Court and to provide copies of such orders from time to time to this Court;
>
> a. to consult with and assist the Chapter 11 Debtor in Possession regarding the strategy of the Chapter 11 proceedings;
>
> b. to receive notice of hearings and to appear and be heard in the U.S. Court on the Chapter 11 case;
>
> c. to be consulted prior to and have the power to make applications to this Court as may be appropriate in connection with
>
> (i)the sale or other disposition of any business operation, subsidiary, division or other significant asset of the Company, and
>
> (ii)the filing by the Company of any plan of reorganisation in the Chapter 11 case;
>
> d. to provide written reports to this Court from time to time and as this Court may otherwise request on the progress of the aforesaid Chapter 11 case;
>
> e. to retain and employ barristers, attorneys or solicitors and/or such other agents or professional persons as the JPLs deem fit, in Bermuda, the United States, the United Kingdom and elsewhere as the JPLs deem appropriate for the purpose of advising and assisting in the execution of their powers;
>
> f. to render and pay invoices out of the assets of the Company for their own remuneration at usual and customary rates (including all costs, charges and expenses of the JPLs attorneys, and all other agents, managers, accountants or other person that the JPLs may employ);
>
> (k)[sic] if deemed appropriate, and with the sanction of this Court, to draft a scheme of arrangement under the provisions of s.99 of the Companies Act

1981 between the Company and its creditors and/or shareholders to give effect to and/or facilitate a sale or reorganisation/refinancing and to seek whatever directions are required in respect thereof from this Court and the US Court for proposing and implementing such a scheme;

g. with the sanction of this Court, to take whatever steps they deem appropriate in order to deal with claims made or to be made against the Company, including, without limitation, the power to require claims to be submitted to the JPLs and, upon appropriate direction from this Court, to fix a final date for the submission of claims for the purposes of participation in any proposed scheme of arrangement, subject to the Court's discretion to admit claims made after that date in special circumstances;

h. if deemed necessary and/or appropriate and following consultation with the Chapter 11 Trustee, and with the sanction of this Court, to seek the assistance of the High Court of England and Wales under the provisions of s.426 of the Insolvency Act 1986;

i. with the sanction of this Court, to seek to enter such protocol or other agreement as the JPLs deem appropriate for the coordination of the restructuring and/or reorganisation of the Company and other companies within the Refco group, such protocol to involve this Court and the U.S. Bankruptcy Court;

j. to open such bank accounts in Bermuda as they deem appropriate in their own name.

3. No disposition of the Company's property by or with the authority of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 166 of the Companies Act 1981.

4. Save as are specifically set out herein:

(a) the JPLs will have no general or additional powers or duties with respect to the property or records of the Petitioner; and

(b) The Board of Directors of the Petitioner shall continue to manage the Petitioner's affairs in all respects and exercise the powers conferred upon it by the Petitioners' memorandum of association and bye-laws, provided always that, should the JPLs consider at any time that the Board of Directors of the Petitioner is no longer acting in the best interests of the Petitioner and its creditors, the JPLs shall have the power to report the same to this Court and seek such directions from this court as the JPLs are advised is appropriate.

5. Save as are specifically set out in paragraph 2 herein, the JPLs will have no general or additional powers or duties with respect to the property or records of the Petitioner, provided always that should the JPLs consider at any time that the board of Directors are not acting in the best interests of the Company and its creditors, the JPLs shall have the power to report same to this Court and seek such directions from this Court as the JPLs are advised in the circumstances are appropriate.

6. The Petitioner shall provide the JPLs with such information as the JPLs may reasonably require in order that the JPLs should be able to properly discharge their functions under this Order and as officers of this Court.

7. The JPLs shall be at liberty to submit to the Registrar of the Supreme Court of Bermuda bills of costs for taxation for all costs charges and expenses of those person or firms employed by them and that such taxation shall be on an attorney and own client basis with respect to attorneys and on an equivalent basis for all managers, accountants or other persons.

8. That the costs of this application be taxed and paid out of the assets of the Company as an expense of the provisional liquidation on an attorney and own client basis."

25. It is a matter of record that discomfiture with the Companies existing management became greater than expected, and so the role of the JPLs' became larger than initially anticipated. After the appointment of the Chapter 11 Trustee, Mark Kirschner, on April 13, 2006 by the US Court, the JPLs' powers were modified by this Court on their application on May 5, 2006. Justice Bell's Order provided as follows:

"2. The JPLs will have the following powers

(a) to monitor the continuation of the business of the Company under the control of the Chapter 11 Trustee, and under the supervision of this Court and the US Bankruptcy Court for the Southern District of New York in the United States of America (the "U.S. Court");

(b) to liaise with the Chapter 11 Trustee in effecting a plan or other resolution for the estate of the Company under the supervision of the U.S. Court and this Court in connection with the Chapter 11 proceedings that have been commenced by the Company for that purpose;

(c) to monitor any continued payments by the Company as are provided for in orders made by the U.S. Court and to provide copies of such orders from time to time to this Court;

k. to consult with and assist the Chapter 11 Trustee regarding the strategy of the Chapter 11 proceedings;

l. to receive notice of hearings and to appear and be heard in the U.S. Court on the Chapter 11 case;

m. to be consulted prior to and have the power to make applications to this Court as may be appropriate in connection with

(i)the sale or other disposition of any business operation, subsidiary, division or other significant asset of the Company, and

(ii)the filing by the Chapter 11 Trustee or the Company of any plan of reorganisation in the Chapter 11 case;

n. to provide written reports to this Court from time to time and as this Court may otherwise request on the progress of the aforesaid Chapter 11 case;

o. to retain and employ barristers, attorneys or solicitors and/or such other agents or professional persons as the JPLs deem fit, in Bermuda, the United States, the United Kingdom and elsewhere as the JPLs deem appropriate for the purpose of advising and assisting in the execution of their powers;

p. to render and pay invoices out of the assets of the Company for their own remuneration at usual and customary rates (including all costs, charges and expenses of the JPLs attorneys, and all other agents, managers, accountants or other person that the JPLs may employ);

q. if deemed appropriate, and following consultation with the Chapter 11 Trustee, and with the sanction of this Court, to draft a scheme of arrangement under the provisions of s.99 of the Companies Act 1981 between the Company and its creditors and/or shareholders to give effect to and/or facilitate a compromise and to seek whatever directions are required in respect thereof from this Court and the US Court for proposing and implementing such a scheme;

r. following consultation with the Chapter 11 Trustee, and with the sanction of this Court, to take whatever steps they deem appropriate in order to deal with claims made or to be made against the Company, including, without limitation, the power to require claims to be submitted to the JPLs and, upon appropriate

direction from this Court, to fix a final date for the submission of claims for the purposes of participation in any proposed scheme of arrangement, subject to the Court's discretion to admit claims made after that date in special circumstances;

s. if deemed necessary and/or appropriate and following consultation with the Chapter 11 Trustee, and with the sanction of this Court, to seek the assistance of the High Court of England and Wales under the provisions of s.426 of the Insolvency Act 1986;

t. with the sanction of this Court, to seek to enter such protocol or other agreement as the JPLs deem appropriate for the coordination of

(i) the restructuring, reorganisation or other resolution of the Company and other companies within the Refco group, and

(ii) the remuneration and cash reimbursement of the JPLs, such protocol or agreement to involve this Court, the Chapter 11 Trustee and the U.S. Court;

u. to open such bank accounts in Bermuda as they deem appropriate in their own name.

9. No disposition of the Company's property by or with the authority of the JPLs in carrying out their duties and functions and in the exercise of their powers under this Order shall be avoided by virtue of the provisions of section 166 of the Companies Act 1981.

10. Save as are specifically set out herein the JPLs will have no general or additional powers or duties with respect to the property or records of the Petitioner.

11. If at any time there are matters which give rise to concern on the part of the JPLs that any party is not acting in the best interests of the Company and its creditors, the JPLs shall have the power to report same to this Court and seek such directions from this Court as the JPLs are advised in the circumstances are appropriate.

12. The Company shall provide the JPLs with such information as the JPLs may reasonably require in order that the JPLs should be able to properly discharge their functions under this Order and as officers of this Court.

13. The JPLs shall be at liberty to submit to the Registrar of the Supreme Court of Bermuda bills of costs for taxation for all costs charges and expenses of those person or firms employed by them and that such taxation shall be on an attorney and own client basis with respect to attorneys and on an equivalent basis for all managers, accountants or other persons.

14. That the costs of this application be taxed and paid out of the assets of the Company as an expense of the provisional liquidation on an attorney and own client basis."

26. The Official Unsecured Creditors Committee ("the Creditors"), established when the Chapter 11 proceedings were commenced in October 2005, clearly had notice of both Orders defining the JPLs powers. Represented by experienced and specialist bankruptcy and insolvency counsel in New York and Bermuda (seemingly, in the latter case only since March, 2006), the Creditors, while objecting to a Fee Protocol and the level of the JPLs' fees, at no time applied to this Court to limit the scope of their duties and powers. Nor, it appears, was any such application made to the US Court.

27. Mr. Duncan, understandably, was unwilling to concede that his clients were estopped from challenging the various Orders which were only served on him at the most recent hearing. These Orders approved the various steps the JPLs have taken over the last several months. But in my view the Companies and the Creditors had constructive notice of the

fact that the JPLs, in accordance with standard liquidation practice, would be routinely seeking this Court's approval for the various actions they were taking.

28. Court approval is not just a matter of practice but also, as regards certain actions, a legal requirement, especially where there is no formal or informal committee of creditors appointed by or formally recognised by this Court. Most of the general powers of a Bermuda liquidator are set out in section 175 of the Companies Act 1981, although the JPLs' powers were limited by the Order appointing them in accordance with section 170(3) of the Act. Mr. Harshaw rightly reminded the Court that section 176(3) provides as follows:

> "(3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers."

29. In a provisional liquidation, even where the powers of a provisional liquidator derive primarily from an Order of the Court, the right of any creditor to challenge the exercise of those powers cannot be doubted. So the general scope of the JPLs' duties, first and foremost "*to monitor the continuation of the business of the Company*", as defined by this Court since October 26, 2005, has never been challenged and cannot now be challenged. If the Companies or the Creditors wished to seriously assert that there was no need for the JPLs to remain in office, they should have, as soon as they formed that view, applied to this Court to seek the discharge of the appointment. Of course, they could first have requested the JPLs to step aside, or, more pertinently, requested the Companies to discontinue the winding-up proceedings they had commenced in Bermuda. But there is no suggestion that anything like this occurred.

30. Accordingly, any actions taken between October 26, 2005 and May 5, 2006 by way of exercise of the powers set out in the October 26, 2005 Order of this Court was in accordance with their mandate under Bermuda law, including the Companies Act 1981. And any actions taken after May 5, 2006 by way of exercise of the powers set out in the May 5, 2006 Order of this Court was likewise in accordance with the said mandate. Those powers include (a) monitoring the Chapter 11 proceedings and the business operations of the Companies generally, (b) monitoring any payments, (c) consultations relating to the disposition of any significant assets, and (d) preparing written reports to this Court.

31. It remains to consider in more detail the specific actions on the JPLs' part which this Court has already approved.

The general approach of the Bermuda Court in approving actions taken by the JPLs

32. In accordance with the Order appointing them on October 25, 2005, the JPLs prepared various Confidential Reports to this Court. The aim such reporting, as established by the previous practice of this Court in similar cases, is to add flesh to the bare bones of paragraph 2 (a) of the appointment Order, which directs that the business of the Companies shall be continued in provisional liquidation "*under the supervision of this Court*". Although such applications are ordinarily ex parte, the invariable practice of JPLs is to carry out their functions in consultation with key stakeholders. The US debtors in possession and the unofficial unsecured creditors committee, through the more participatory Chapter 11 process, are typically well aware of what the JPLs are doing on their behalf. The Bermuda Court, absent a concrete reporting mechanism, would be the only entity left in the dark.

33. Accordingly, the JPLs were required by paragraph 2(g) of the Order appointing them, drafted in now standard terms, "*to provide written reports to this Court from time to time and as this Court may otherwise request on the progress of the aforesaid Chapter 11 cases.*" With a view to protecting themselves from potential liability for unauthorised acts, and perhaps with a view to ultimately justifying their fees, provisional liquidators are invariably scrupulous about reporting their actions fully to the Court so that the scope of their activities may be judicially sanctioned or approved. The record in the present case is no exception.

34. The role of the Court on approving the actions of the JPLs is not to act as a rubber stamp. This is particularly the case in parallel proceedings where no committee of creditors has been constituted under Bermuda law. In a traditional Bermuda liquidation of any complexity, the Court would place considerable reliance on the prior approval of the committee of creditors (known under Bermuda company law as the "committee of inspection") in deciding whether or not to approve significant actions on the liquidator's part. Where this Court, as in the present case, is the sole formal decision maker, a higher level of judicial scrutiny will be brought to bear before the actions of the liquidators are approved. However, it is also necessary to point out, that this Court places some reliance on the more participatory process in the dominant Chapter 11 proceedings, and the fact that an Official Unsecured Creditors Committee is constituted which can instruct Bermuda counsel to challenge the actions of thee JPLs in this Court, if not, to some extent at least, before the US Court.

35. But the primary and overriding consideration of this Court in approving actions taken by a provisional liquidator of an insolvent company is to ensure that the best interests of the general body of unsecured creditors is being served.

Actions between October 26, 2005 and the present

36. The First Confidential Report is dated November 17, 2005, only three weeks after the JPLs' appointment. The explicit purpose of "*to update the Court on recent developments and seek the Court's approval of our actions to date and our proposed actions.*" (paragraph 1.3)The Report defines their role as being "*to act in the best interest of creditors of the Bermuda Companies and oversee asset sales and restructuring of the Bermuda Companies and the Refco Group under the umbrella of the Chapter 11 filing*." (paragraph 2.2).

37. The following actions are reported as having been taken: (a) access to information procedures including establishing an office site at Refco's New York Headquarters, meetings with financial advisors for the secured lenders, the Creditors and their advisors, the US Trustee and "numerous senior management and employees of the Refco Group" (paragraph 2.3), (b) monitoring activities of the Creditors and the Ad Hoc Committee in the US Proceedings, (c) monitoring three US legal issues (paragraphs 2.6-2.7); considering the implications for the Companies of the sale of certain assets to Man Financial Inc. (paragraphs 2.8-2.10), (d) operational monitoring, including seeking a full understanding of financial position of the Companies, whose business was carried out in a fragmented manner (paragraphs 2.11-2.14), and (e) considering what position to take on the hearing of the Companies' petitions scheduled for November 18, 2005. In addition, the First Report describes (f) administrative action which has been taken, including negotiating a Fee Protocol and preparing a summary of time costs and disbursements, which are attached to the Report (paragraph 103-10.5).

38. On November 25, 2005, Chief Justice Richard Ground ordered as follows:

> "1. the steps taken by the Joint Provisional Liquidators from their appointment on 26 October 2005 to this date are hereby sanctioned by this Court;
>
> 2. the Joint Provisional Liquidators are directed to continue to administer the provisional liquidations…substantially in accordance with the proposals set out in the …First Confidential Report…"

39. The Second Confidential Report is dated December 15, 2005. It followed the same format as previously, and updated the Court on what action had in the interim been taken. It runs to 28 pages (excluding appendices), and its contents make it obvious that the JPLs have undertaken a substantial amount of work.

40. This action included (a) taking the 8 steps particularized in paragraph 4.8, (b) monitoring the corporate governance situation as particularized in paragraphs 4.10-4.19 and dealing with Committees as described in paragraphs 4.18-4.19, (c) considering the US legal issues described in paragraph 5, including (i) the Ownership issue, (ii) the Chapter 11 v. Chapter 7 Stockbroker liquidation, and (iii) the Securities Management Issue, (d) analyzing and understanding RCM's trading activities (paragraph 6), (e) assessing the impact of the asset sale to Man Financial , the potential sale of ACM and other assets (paragraph 7), (f)

assessing the financial position of RCM, as explained in paragraph 8, (g) operational monitoring as detailed in paragraph 9, and (f) dealing with the administrative matters set out in paragraph 10. These issues include deciding on the position to be adopted at the next hearing of the petitions, discussions on the Fee Protocol, and preparing a further summary of fees and expenses, which was attached to the Second Report.

41. On January 8, 2006, Commercial Court Judge Justice Geoffrey Bell sanctioned the steps taken by the JPLs to date, and directed that they continue to administer the companies' provisional liquidations substantially in accordance with the proposals in the Second Confidential Report.

42. The Third Confidential Report is dated February 8, 2006. In the Introduction, the JPLs describe this case as "unusual" in that RCM is no longer trading and the "*Chapter 11 process comprises an attempt by the creditors to formulate a proposal which would be more beneficial to them than a liquidation procedure such as Chapter 7*". It reports on (a) the role of the JPLs, pointing out that their monitoring role had been made more difficult by limitations on the ability of the Boards to function as initially thought, as noted in earlier Reports. The Creditors objection to the proposed Fee Protocol and dissatisfaction at the cost of the JPLs' involvement was reported to this Court and a report to the Creditors on the benefits of the provisional liquidation was exhibited as Appendix 2. The disposition at the next hearing of the petitions was also analyzed and reported to the Court (paragraph 2); (b) the meeting between the JPLs and the Creditors in which the JPLs explained their role was described, in relation to (i) corporate governance issues, (ii) risk management issues and asset preservation, (iii) the JPLs powers, and (iv) the JPLs fees (paragraph 3), (c) the main outstanding work areas were listed in paragraph 4.3 and described in more detail in Appendix 1, (d) US law issues are reported on in paragraph 5 and a concise status report on various issues set out in paragraph 6, and (e) a summary of the JPLs' fees and expenses was exhibited to the Report.

43. By Order dated February 16, 2006, Justice Bell sanctioned the steps taken by the JPLs to that date, and directed the JPLs to continue to administer the Companies' provisional liquidations substantially in accordance with the proposals set out in the Third Confidential Report.

44. The Fourth Confidential Report is dated March 22, 2006. The Report (a) describes the proposed appointment of the Chapter 11 Trustee and the appointment of an Examiner in respect of all Refco debtors other than RCM (paragraph 2), (b) reports on the related Bermuda law issues, namely the need to revise the appointment Order in light of the Chapter 11 Trustee replacing the Board, and the continued need for Fee Protocol (paragraph 3), (c) describes the status of various operational issues which the JPLs have been and will continue to monitor (paragraph 4), and (d) exhibits an updated schedule of fees and expenses.

45. By Order dated March 23, 2006, Justice Bell sanctioned the steps taken to date, and directed the JPLs to continue to administer the Companies' provisional liquidations substantially in accordance with the proposals set out in the Fourth Confidential Report.

46. The Fifth Confidential Report is dated April 13, 2006, and is the shortest thus far. This Report very briefly describes (a) the actual appointment on April 10, 2006 of the Chapter 11 Trustee by the US Trustee, and the need to consider possible changes to their monitoring role, including modifying their powers (paragraphs 2, 3.4), and (b) the appointment in Bermuda by the Minister of Finance of an Inspector under the Companies Act, and the need to clarify the Inspector's role (paragraph 3).

47. On April 20, 2006, Justice Bell sanctioned the steps taken by the JPLs to date, and directed them to continue to administer the Companies' provisional liquidations substantially in accordance with the Fifth Confidential Report.

48. The Sixth Confidential Report is dated April 28, 2006, and it exhibits the April 12, 2006 US Court order appointing the Chapter 11 Trustee, letters of resignation from the directors, and a draft Protocol with the Chapter 11 Trustee. This Report deals principally with (a) the JPLs ongoing negotiations with the Chapter 11 Trustee on the scope of their

role (paragraph 2), and the JPLs ongoing consideration of the action to be taken at the next hearing of the winding-up petitions (paragraph 3).

49. By Order dated May 5, 2006, Justice Bell sanctioned the steps taken by the JPLs to date, and directed them to continue the administration of the Companies' provisional liquidations substantially in accordance with the proposals set out in the Sixth Confidential Report.

50. The Seventh Confidential Report is dated August 16, 2006. It reports on (a) developments in the Chapter 11 case, and the hiving off from the Official Unsecured Creditors Committee of non-bondholders into an Additional Committee comprised of RCM account holders with claims against other Refco debtors, the Settlement Agreement and the impending Chapter 11 Plan based thereon (paragraph 2), (b) ongoing attempts to agree with the Chapter 11 Trustee a protocol a draft of which is attached (paragraph 3), and (c) a schedule of fees and expenses from October 26, 2005 to June 30, 2006. Voluntary reductions of travel time totalling $112, 399 are indicated, as well as the fact that most time in June was attributable to preparing Fee Packs 1 and 2 for the Chapter 11 Trustee (paragraph 4).

51. On August 31, 2006, Acting Chief Justice Norma Wade-Miller sanctioned the steps taken by the JPLs to date, and directed them to continue to administer the Companies' provisional liquidations substantially in accordance with the proposals in the Seventh Confidential Report.

52. The above summarizes the actions taken by the JPLs, reported to this Court and sanctioned both prospectively and retrospectively on seven occasions over a ten month period. This review indicates that the JPLs took scrupulous care to report fully to this Court on a wide range of activities, actions, issues and challenges, including the Creditors' concerns about the provisional liquidation costs. It is self-evident that the categories of actions described in the various Confidential Reports, and expressly sanctioned by this Court, fall within the scope of the JPLs' duties under Bermuda law.

53. For the avoidance of doubt, the Seventh Confidential Report gave prospective approval for the JPLs ongoing efforts in (a) monitoring the Chapter 11 process and the implementation of the Settlement Agreement, and (b) resolving the dispute over how their fees should be assessed and paid.

The rates charged by the JPLs

54. The Affidavit of Christopher Giddens sworn on December 6, 2006, deposes to the fact that the rates charged by the JPLs are consistent with those charged by them in similar matters. I accept this direct evidence, which is consistent with my recent experience with fees charged in other similar matters currently before this Court. Accordingly, I rule that their rates, as set out in the Affidavit of Christopher Giddens, are consistent with the rates charged in previous cases, including similar matters currently before this Court. In other similar cases, the provisional liquidators' fees have invariably been taxed by this Court, but often with the assistance of an independent fee assessors, who are usually chartered accountants from other firms who also serve as liquidators.

55. It seems appropriate to note that the professional firms in Bermuda and London to which the JPLs are attached have been involved in almost all of the parallel provisional liquidation/Chapter 11 proceedings over the last seven years, including the landmark *ICO* case. The level of specialized knowledge and expertise which the JPLs bring to their present appointments is beyond serious argument, and may fairly be reflected to some extent in their rates. These rates have, to a large extent, withstood the scrutiny of the key stakeholders of other estates.

Conclusion

56. The scope of the JPLs' duties has been given careful consideration by this Court and the categories of actions described in the First to Seventh Confidential Reports fall within the scope of their duties under Bermuda law, as defined by, inter alia, the Companies Act 1981 and the various Orders of this Court referred to above. The rates charged by them

are consistent with those charged in previous cases and approved by this Court, often in conjunction with an independent fee assessor.

57. Since the JPLs were appointed by this Court on October 25, 2005, on the Companies' application, their role as defined by this Court has been subject to no formal challenge. It seems to be the case that all key stakeholders in the proceedings before the US Court were aware of the JPLs' appointment, and the fact that they were appointed and supervised by the Bermuda Court.

58. It is hoped that the present Ruling will assist the US Court to carry out its fee assessment exercise, in accordance with the Comity Order made by this Court and the US Court on December 8, 2006. This approach is motivated by the common goal of avoiding the wastage of costs that a dual assessment process would entail, and would appear to reflect a division of judicial functions which is consistent with the jurisdictional realities of the present atypical case. In my view insular territorial sentiments should be secondary to the predominant objective of maximizing the return to unsecured creditors in cross-border insolvencies, particularly those involving jurisdictions whose courts share a similar legal culture and an established tradition of cooperation and mutual respect.

59. In the ordinary parallel proceedings case, of course, this Court would expect to be the final arbiter of the fees of officers it appoints, as has been accepted by all key stakeholders in similar previous cases. The Bermuda provisional liquidation regime is sufficiently flexible to accommodate the reasonable demands of creditors as to what form the fee assessment process takes.

60. In the absence of agreement, no doubt the Bermuda and US courts will in future cases cooperate more directly at the commencement of parallel proceedings. This should avoid a situation where substantial work is done by highly skilled and reputable Bermuda office holders, without a viable framework for the assessment and payment of their professional fees and expenses being firmly in place. Indeed, the present dilemma has invariably been avoided in the past, through a more consensual approach, in similar cases, so it was impossible to anticipate the deadlock which arose in the present case.

61. I will hear Counsel as to costs, if required. However, the appropriate Order appears to be for the JPLs to have the usual order as to their costs, but otherwise to make no order as to the costs of the present application.